Between State Sovereignty and a European Federation

ed. Jarosław Szymanek

CBPE
CENTRUM BADAŃ POLITYKI EUROPEJSKIEJ

Between State Sovereignty and a European Federation


CBPE
CENTRUM
BADAŃ
POLITYKI
EUROPEJSKIEJ

Between State Sovereignty and a European Federation

ed. Jarosław Szymanek

2023
Wydawnictwo Akademii Wymiaru Sprawiedliwości

Between State Sovereignity and a European Federation

REVIEWERS Tomasz Grzegorz Grosse, Jacek Sroka

SCIENTIFIC EDITOR Jarosław Szymanek
EDITORIAL OFFICE Mark Atkinson
TYPESETTING Wiaczesław Krysztal [Studio Format]
COVER DESIGN Marta Turska [Studio Format]
PHOTO Frances Gunn [unsplash]

ISBN 978-83-66454-99-6

BOUND AND PRINTED BY „Elpil", ul. Artyleryjska 11, 08-110 Siedlce

Table of Contents

Sebastian Kaleta, Jarosław Szymanek

Introduction: the future of the European Union: aspirations, opportunities, constraints, and problems

The nearly two decades of Poland's membership in the European Union make us look at the Union with detachment. They also warrant expressing strong opinions on the direction of the Old Continent's progressive integration. We should finally reject the hyper-optimistic but, in a sense, servile perspective from which we look at the Union. Until now, the Polish view of the Union has been that of a younger, backward partner, who saw in the Union only the biblical Promised Land, a true Eldorado of which Poland and Poles would become a natural part at the time of accession. According to this naive outlook, the European Union was pure, innocent, filled with selfless cooperation and friendship that long ago made the former European animosities and disagreements fade away. The Union remained an area of prosperity, peace, and solidarity for all of us. Only now, after some time as a member, are we beginning to look at the European Union more realistically. We are beginning to see that the European Union is a condominium of the most diverse interests, particularisms, instrumental treatment of EU institutions, definitely not with the aim to increase the common good, but instead to build a strong position of the largest countries. Membership in the European Union has taught us that what we used to call European unity is in fact a European imposition of the policies of the strongest to pursue very specific interests by no means for the well-being of all, but to build the power of a select few countries for whom the Union is a convenient tool for pursuing their interests. Therefore, we should finally get rid of gratitude for the fact that the West has graciously accepted us into its fold and that Poland

has become part of the West thanks to its accession to the EU and has supposedly returned to Europe, which will thus re-civilize it.

Konrad Adenauer, one of the Founding Fathers of modern unification trends in Europe, claimed that "the basis of European unity is the idea of Christian community, European culture and civilization." All this was, in a basic and necessary sense, an elementary part of our Polish cultural code. Poland never left Europe and never got rid of the European cultural code. With its traditions, faith, heritage of political thought as well as scientific and technological achievements, Poland has always been a part of the West. It was our baptism in 966 that brought us into the circle of Western civilization, which, after all, was not determined by geography but by thought, ideas, and values. If we abandon the deceptive paradigm of geography and look at Europe through its spirit, which for centuries created the so-called European heritage, it is clear that Poland has always been in Europe, that it is an integral part of Europe, and geographically, as George Friedman said, it is "the heart of Europe."

Being the heart of Europe, we cannot remain on the sidelines of the political, economic, and legal processes that set the rhythm of today's integration. We joined the EU not to be a passive observer of the events taking place, but to actively participate in them, to decide on our own future and the future of our children together with other European countries and peoples, on equal terms established by the elementary rules of international law. Poland is not and will never be a second-class country. Poland did not enter the EU to sit quietly and listen only to the concert of European powers, as former French President J. Chirac wanted! We are part of Europe, just as much and exactly on the same terms as France, Germany, Italy, Spain, or Greece. We are all creating the European Union according to the same principles! In the EU, there are no worse or better countries, ones that are allowed more, and those that, by definition, are not allowed anything! If we say that the idea of the European Union is beautiful and alluring, if it is attractive to someone – it is specifically for these reasons. It is because of the fact that formally there are no stronger or weaker countries, that everyone's vote counts, and that the final decision is an expression of the best-understood compromise.

The European Union only makes sense when this self-evident truth is realized by every country that makes up the community of 27 equal and sovereign member states.

It is Poland's right, but also its duty, to speak out on how we Poles perceive a common Europe, what we expect from it, and how we see the cooperation of all those who, in the name of the common good, agreed to form the European Union. This is a manifestation of our patriotism. Patriotism, which, in the words of General Charles de Gaulle, "puts love of one's country first, thus differing fundamentally from nationalism, which puts hatred of others first." It is our patriotism and our love for Poland that makes us speak out on what the European Union should look like, what kind of Union we want, and what kind of Union we need.

Such a statement is required by our national interest and our raison d'état. The latter was not shelved upon Poland's entry into the EU structures. Poland's membership in the EU has not resulted in an abandonment of our interests, expectations, and aspirations. Therefore, it is necessary to definitively reject this pattern of political action that some Polish elites have tried to implement, a shameful manifestation of which was the famous declaration of the former foreign minister, Radoslaw Sikorski, who in Berlin asked Germany to lead Europe and to set its course, saying outright that he was more afraid of German inaction than of excessive activism. A sovereign, democratic state equal to others in the international community can never surrender its interests, can never cede to others the responsibility for its development! The discussion about the future of the European Union cannot and will never be a monologue of Berlin or Paris! The European Union is a democratic discussion among all member states, it is a compromise between different ideas and concepts, and finally it is a compromise between different interests, which the Union does not eliminate after all, but which it allows to optimize. If the Union makes any sense at all, it is precisely because it is able to effectively channel disputes and differing interests, but not by brutally imposing the opinion of the strongest on others. The great advantage of the European Union for years has been the fact that it was the force of arguments that counted, not the argument of force.

The European Union is a complex structure. However, it is not about treaty complications or the organizational structures themselves, although those are not simple either. The complexity of the Union lies primarily in the fact that it is formed by a mosaic of states, nations, languages, religions, cultures, interests, as well as expectations and aspirations. All this means that the Union is a forum for presenting various rationales, a place for exerting pressure, posing demands, and sometimes using smaller or larger blackmail. However, such complexity is the added value of the Union, and all ideas that insist on implementing the Soviet method of equalization and eliminating all differences to supposedly simplify, speed up, and improve the decision-making procedures should be openly opposed. Due to our historical experience, we Poles know like no one else that such methods are a simple way to impose worldviews, policies, and ways of thinking, to annihilate the national interest, and to demolish everything that makes Europe a civilization project.

Taught by experience, both historical and recent, we know well that any attempts at rationalization, for example by moving away from unanimity or streamlining processes by designating a leading member state or group of member states, sooner or later lead to putting the subjectivity of other member states in question. Unfortunately, all of these attempts also contain an implicit intention to show the superiority or greater maturity of the old member states. They are proof of the well-known thesis of historians that Europe in the sense of the West ends at the Elbe or the Oder, and that the region of Central Europe, including Poland, is only a "younger Europe," which at the same time is an "inferior Europe." All these ideas, which are so prominent in the thinking of the European establishment today, should be clearly opposed. The words of John Paul II, that "Europe is two lungs, eastern and western," and that both are simply necessary for Europe to fully live and flourish, should be repeated.

The European Union is a unique structure, which from the beginning, i.e. when the integration processes began after World War II, has been based on the noble idea of cooperation between nation-states. The foundation of the Communities, and later the Union, was, on the one hand, the nation-states, and on the other hand, sectoral cooperation where, in accordance with the principles of subsidiarity and solidarity, it is more

effective to cooperate than to act alone. This was the cornerstone of any integration process, which envisioned the central role of the nation-state and the subsidiary role of collective, supra-national action. Only this way of operation allowed the contribution to the progress and prosperity of all in a feedback process. This thought guided, Robert Schuman, Konrad Adenauer, and Alcide de Gasperi.

In the European discourse, unification processes have been present for a long time. In antiquity, they were associated with the Roman Empire, and later with the pax Christiana. More recently, they took the ideologized forms of political phantasmagoria of the First so-called Thousand-Year Reich, Mitteleuropa, the Third Reich, and the Communist International. All these concepts, steeped in ideology and particularism, have set as their goal the annihilation of the nation-state, the eradication of the authentic sources of European civilization, and the construction of a new man, molded according to an ideological scheme that demolishes the existing traditional structures such as the state, the nation, the church, and the family. Unfortunately, this way of thinking is still alive in the European establishment. That is why today's discussion of Europe, instead of referring to authentic sources, i.e., the thoughts of Schuman and de Gasperi, more readily and frequently uses the Ventotone manifesto of Altiero Spinelli and Ernesto Rossi. This makes the Union that exists today asymmetrical, strongly one-sided, ideologized, tilted to the left, and infected by the pandemic of neo-Marxism! This is why, Margaret Thatcher, among others, claimed that the European Union was doomed to failure, because it was something crazy, a utopian project, and a monument to the hubris of leftist intellectuals.

Today, these words sound quite prophetic, as evidenced by – on the one hand – Brexit and – on the other – increasingly phantasmagoric ideas infected by leftist ideology that tramples on Europe's cultural heritage and tries by force to construct a "new man" without gender, national, state, or religious affiliation.

Today's Union, with its futurological scenarios, is much closer to the legacy of the Italian Communists than to the Christian Democrats who were the real builders of European architecture after 1945. Thus, the guiding thought ceased to be European nations and states – as Robert

Schuman, among others, wanted – or international cooperation, as de Gasperi pointed out, but the violent construction of one great European superstate that tramples on diversities, differences, and local uniqueness. The centralized, ideologized machine of the Union is eliminating diversity and everything that was the foundation of classical liberal thought with brute force. As a result, instead of diversity, we have the so-called EU standards, instead of a free market we have more and more detailed planning that is increasingly centralized and very reminiscent of communist-era planning. Instead of Christianity, we have new parareligions, such as environmentalism, genderism, and the rule of law, which has become the EU's totem that is selectively interpreted and arbitrarily revised. But, worst of all, this is done not to expand the space of the common good, but rather in order to force, using pressure, blackmail, and lies, their own sick vision of unity, even against democratic public opinion and elementary logic.

This is best demonstrated by the rule of law, which the European Union has turned from a noble idea into a brutal tool. It serves as a Trojan horse for imposing the superiority of EU law, the supremacy of EU ideology, and the primacy of the Brussels bureaucracy. All of this has the no longer hidden, but overt, goal of incapacitating the member states. This has made the rule of law the weapon of a slowly federalizing Europe, while trampling on fundamental treaty principles, including Article 4 of the TEU, which, after all, explicitly stipulates 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." The senseless fight with Poland, among others, only to use blackmail and threats to force changes in the constitutional system of our country, which after all is protected by the treaty, shows best how low the Union has fallen and what real goals it wants to achieve.

The Union-led leftist offensive, which imposes a single worldview, eliminates diversity, and promotes new parareligions, is the path to an abyss. The real future of the European Union, as Lech Kaczyński said, "is good cooperation of sovereign states, taking different positions on different issues, but able to agree for the common good." This is how the integration project was seen by its creators from the beginning. This

is also how it should be seen today. This is why the sick, psychedelic fantasies of a single European state, leveling dissent, eliminating nation-states, are a madman's dream, a dream that is unfortunately becoming a reality before our eyes. Just as Europe needs an eastern and western lung, it also needs diversity. Following John Paul II, it should be reiterated that "the history of Europe is a great river into which numerous tributaries and streams flow, and the diversity of the traditions and cultures that make it up is its great wealth," which must be cared for and which must not be annihilated in the name of sick ambitions.

Today's European Union has metamorphosed into a mythical Leviathan. This Leviathan is devouring the sovereignty of the member states. This is evidenced by the practical changes to the treaties that are taking place almost invisibly due to the actual actions and case law of the European courts, referred to as competence creep, and the increasingly developed decision-making outside of the state, which ignores the member states and seeks their substitutes in the form of local governments, non-governmental organizations, and other non-state and often private substitutes. All these processes are taking place without any amendments to the treaties, which are a screen that hides obscure procedures that are increasingly less transparent, less and less democratically legitimized, and increasingly intrusive into the domain reserved for the member states. The treaty principle of delegated powers, which governs the logic behind the EU's actions under the TEU, has been replaced by the extra-treaty principle of powers taken away or even snatched from the member states by the increasingly aggressive actions of EU bodies.

All this is done under a slogan that is repeated like a mantra, which for supporters of ever stronger and deeper integration has even become a decalogue. Jaques Delore's famous statement that the European Union is like riding a bicycle means that if we stop riding, we will fall, and the integration project will topple over. Anyone who has ridden a bicycle at least once knows that riding without holding the handlebar ends in a disaster. The same disaster is inevitable for all those visions and projects that unreflectively reproduce the slogan of greater integration, which is supposed to be an alleged recipe for all the difficulties in the Union's operation. This is the best proof of the weakness of European elites,

which, when faced with new challenges, new problems, and new needs, can only repeat that more integration is needed. This way of thinking does not solve any problem. It only leads us down a dead end street, at the end of which there is only the wall of a single European state for which there is no alternative.

There is still time not to smash the noses of European countries against that wall. There is still time to stop and talk seriously in the discussion about the future EU architecture. But in order for such a debate to make sense and bring results, we need to ask one basic question that no one has yet, at least openly, asked: What is the purpose of integrating the Union? What do we want to achieve by conducting the process of strengthening the relations between the countries of Europe? Of course, today no one openly poses this question, as some have their own answer, which may be uncomfortable for many. This is best seen in the discussions of the German-French tandem. The French, by engaging the European integration project, want to carry out General de Gaulle's testament to "make France great again." Germany, on the other hand, sees the Union as a means of strengthening its own position, a tool to become a superpower again after World War II. A superpower with spheres of influence; however, this time, these spheres of influence will be formally the EU's or the Community's, but in reality German. It seems that this is leading to fundamental tensions between the big countries and the other member states. The latter see the Union not so much as a platform for maximizing their own international role, but as a place for cooperation and for minimizing costs and maximizing profits. Meanwhile, the large countries, such as Germany, treat the Union instrumentally. They want to take advantage of the integration not to multiply the common good, but to maximize their economic and political gains. This was confirmed by the 2009 crisis that put Greece on the brink of bankruptcy and was solved by buying out the Greek economy for pennies and pumping billions of euros into German banks. In the same way, the Ukrainian crisis, which for parts of the EU is euphemistically called a crisis, while it is an open war where people die, shows that plans to build unity are just a smokescreen for the power play of the largest countries. This explains the terrible, thoroughly selfish attitude of Germany, which does not

even think about helping Ukraine, but cares only about its own interest, mainly economic and political. Thus, Germany's plan is to maintain proper relations with Russia and maintain its own dominance in the Russian gas trade. Ursula von der Leyen rightly said in her State of the Union address that on February 24, 2022, the EU learned a lesson; unfortunately life shows that although the EU had received a lesson, it did not learn from it! Therefore, unfortunately, as Ryszard Kapuścinski phrased it, "the European experience is undergoing (…) a moment of great crisis."

When discussing the future, we must bear in mind that Europe has genetically been a continent full of diversity. Europe has always been rich in cultures, languages, religions, customs, nations, and states. This elementary heritage is not, as the acolytes of one great European state want, an obstacle to our development, but a drive of all changes. This is because change is not created by simple, primitive uniformity made in the USSR, but precisely by pluralism. The same pluralism that today, in the name of European political correctness, is forgotten and seen as an anachronism, although since Pericles' famous speech it has been considered a treasure of European civilization. Europe needs diversity of states and nations. Europe needs a plurality of courts and views, because only this will stimulate its actions. Europe needs a Europe of Homelands, because only such a Europe captures the spirit of the Old Continent. Europe needs scenarios other than the familiar scenario that Europe can either be German or will not exist at all. One mythical hijacking of Europe is enough for us. Let us not let new ideologues or one nation hijack Europe again! We may not allow Europe to be taken away from us, all Europeans, in the name of building an imaginary fantasy of Federal Europe.

The need for an substantive, authentic discussion about the future of the European Union is all the more necessary given the fact that the 21st century has seen the European Union shaken by crises that have radically transformed it and set it on a dangerous path of its transformation into a dangerously centralized structure.

The European Union, and before it the Communities, were for a very long time organizations with very simple, linear, and most importantly optimistic development prospects. The member states, no matter how

many there were, could always count on the fact that with each passing year, the level of prosperity and security of the citizens of an integrating Europe would increase. This is why the initial values that were at the origin of the integration processes, such as Christianity and human dignity, have lost their appeal. Thriving cooperation in economic areas meant that, at one point, the Communities were much more driven by thoughts of the prosperity and well-being of their citizens than by a belief in a commonly shared axiology. Thus, what was initially intended to build a sense of unity and generated a belief in the need for cooperation gave way to interests that were strictly economic. The intrinsic value of the ties between countries that were closer decade after decade became the GDP, whose rising rates proved the thesis of the necessity of integration to be true, while providing the driving force behind further integration processes. The communities, consolidated successively through new political agreements and legal treaties, were to become the implementation of the biblical promised land where people live in abundance, social peace, and political tranquility. Naturally, this gave rise to pressure for even closer cooperation, according to the idea that the more integrated the economies of the member states are, the easier, the faster, and the cheaper it will be to achieve prosperity or even a better quality of life, and that hot water in the tap will be the quintessence of the unification of Europe as a continent of permanent prosperity.

This hyper-optimistic outlook collapsed at some point, and today's European Union is being consumed by serious identity crises that affect the condition of the entire Union and the discussion about it. The first crisis was the crisis associated with the definitive rejection of the Treaty Establishing a Constitution for Europe. The crisis, which concerned, first, determining the content of the Constitution for Europe and, second, its acceptance by all member states, was of fundamental importance. This is because for the first time tensions have emerged in the Union over the axiology on which the process of integration of the Old Continent was to be based, as well as the political shape that the integration was ultimately to take. As far as the axiological issues are concerned, the drafting of the Constitution for Europe has shown, perhaps for the first time, a very serious rift between Europe's right-wing

conservative and left-wing elites. The former, having already reached a formal consensus on the content of the Constitution, began to demand a renegotiation of the document, rightly arguing that it was largely contrary to the entire logic and history of post-1945 European integration. They insisted, among other things, on the role of Christian values as an important motive that constituted Europe in the civilizational and cultural sense, proving that, in such a fundamental document as the Constitution for Europe, Christianity and religion cannot be ignored as the foundation of the processes that create Europe and Europeanness. In contrast, elites with a decidedly leftist provenance concluded that opening the topic of European values was nothing more than putting a stick in the spokes of the bicycle of integration, which no reasonable person should stop, because integration is an end in itself and is more important than values, which in the process of integration play at best an ornamental role. The leftist elites used blackmail, pointing out that the opening of renewed negotiations regarding European values, would in fact open the entire document to renegotiation, following the principle that "until everything is decided, nothing is decided." As a result, however, the dispute over axiology had a much broader dimension. It was, in fact, a dispute over the ideological provenance of the treaty, which was to redefine the principles of integration. It was a dispute over whether the fathers of the European constitution were closer to Robert Schuman, Alcide de Gasperi, and Konrad Adenauer, or to Altiero Spinelli, Ernesto Rossini, and other authors of the Communist Ventotene Manifesto, which drafted a vision of one great European state. The dispute over values was thus essentially a dispute over the future interpretation of the Constitution for Europe, which referred to the history, purpose, and function of the process of unification of the continent.

The next iteration of the dispute over the Constitution for Europe was the dispute over the process by which all member states would approve the document. As an act of primary law, the Treaty Establishing a Constitution for Europe had to be ratified by individual member states in accordance with their national laws. Some chose the so-called parliamentary path (consent expressed by the parliament), while others opted to organize a nationwide referendum. The parliamentary path, where it was used,

did not come as a surprise. The parliaments of Germany, Italy, Belgium, Finland, Malta, and Romania voted overwhelmingly in favor of ratifying the Treaty Establishing a Constitution for Europe. Referendums in Spain and Luxembourg also confirmed the desire to adopt the Constitution. However, an impasse emerged when a majority of French citizens voted against the Constitution for Europe in a referendum held on May 29, 2005. In another referendum, held in the Netherlands on June 1, 2005, a majority of voters also rejected the idea of establishing a Constitution for Europe. Moreover, polls conducted in successive member states where referendums were planned proved the growing skepticism of Europeans toward the project submitted for their approval. The most critical sentiment was in Denmark and Ireland, with an ever-growing group of those undecided. This situation, firstly, rendered pointless the process of further ratification of the Constitution for Europe, which required the consent of all member states to become effective, and, secondly, showed a serious gap between the opinions of the political elites and the citizens. While the elites were quite enthusiastic about the growing integration, the citizens were increasingly reserved, pointing out that nation-states still remained the driving force of the integration and that the ideas of centralizing the Union were definitely premature.

The failure to establish a Constitution for Europe created the first very deep tensions about the European Union. It clearly showed the gap between the opinions of European elites and the regular European citizens who perceived both the pace and the expected goal of the integration quite differently. At the same time, the failure to adopt the Constitution for Europe has left a sizable portion of the liberal-left elite feeling orphaned and its goal, against the public opinion, became to push through the vision of Europe reflected in the Treaty Establishing a Constitution for Europe. This is confirmed by the Lisbon Treaty adopted later, which, in the view of its opponents, was a watered-down version of the Constitution for Europe, which, to make matters worse, is interpreted as if it were actually the Constitution for Europe. In the opinions of many people, this produced the first systemic crisis of modern Europe, which is torn between the views of the elite and those of the "ordinary citizens," as well as between the vision of a Europe of homelands and

a federal Europe (because, after all, these two conflicting visions were in sharp contrast with each other during the work of the European Convention, which eventually created the Constitution for Europe). This rift continues to stigmatize the discussion about the European Union, while defining its fundamental points of contention.

The second crisis that struck Europe by shaking its foundations and heavily nuancing the discourse about its future was the financial crisis of 2008 and 2009. The turmoil in the financial markets that resulted in the largest-ever eurozone crisis challenged the view, held since the beginning of the existence of the Communities, that there is only one scenario ahead for a unifying Europe in the form of ever-increasing prosperity. The financial meltdown, which in the case of Greece almost resulted in bankruptcy of the state and the need to commit huge EU funds, showed that the scenario of permanent prosperity is fundamentally false and that the development of the European Union does not have to mean at all a gradual increase in productivity, GDP, and a general increase in consumption, as a visible sign of economic success. The consequences of the crisis, especially in countries such as Greece, Spain, and Italy, were exponentially rising unemployment rates and a national debt that exceeded several times the established EU ceilings that mark the security limit. As a result, the EU's economies are no longer seen as *perpetua mobile* of prosperity, as mechanisms that bring continued growth in production, employment, wages, social benefits paid, and consumption. This came as a shock to many Europeans and caused a breakdown of faith in the Union, which was previously seen as a wealth-producing machine. After 2009, it turned out that economic cycles and the crises inherent in them are a feature of the EU economy as well, and that it is unreasonable to expect things to be different. What is more, the interdependence in the exchange of goods, services, and money leads to a domino effect to an even greater extent, causing a crisis emerging in one EU country to quickly affect others. This is why questions began to be asked at that time whether the tightening of relations should not be halted, because the common market does have its unquestionable advantages, but it also has some disadvantages, which is particularly evident during crises, when a breakdown in one country quickly entails negative consequences

in others. Therefore, the financial crisis of 2008 and 2009 shook the sense of self-confidence, showed that despite all modernity and interdependence, certain constant and well-known economic processes take place, and the European Union is by no means immune to all possible economic turbulence, including a financial one. At the same time, the crisis which, after all, started in the USA with the bankruptcy of the Lehman Brothers Holdings Bank, has made it clear that the world is indeed a global village and that the European Union is susceptible to global economic processes, which, especially if they are on a large scale, have a strong impact on Europe as well. The paradox is that the financial crisis started two contradictory trends with regard to the European Union. European elites began to promote centralization processes with even greater zeal, assuming that only closer cooperation and a tightening economy would effectively counter similar crises in the future. In contrast, the European people began to look at the economic ties quite differently, seeing also their negatives and the fact that they do not necessarily serve the Union as such, but rather individual states, which is at odds with the idealistic image of European community and solidarity. This was evidenced by the bailout plan for Greece, which was in effect a plan to bail out primarily German and French banks that had seen Greece as a great place for doing business since the 1980s. The EU's plan to bail out the Greek economy, imposed by Germany – Athens' largest trading partner and lender – was an unprecedented action against a member state. It involved granting further loans to Greece, buying up the local economy by those most interested, and subjecting the entire economy to meticulous supervision, with detailed reporting required for the next 12 years (from 2010 until 2022). During that time, Greece received a total of three aid packages worth a total of €289 billion. However, the average Greek citizen did not see any of this money, as it was earmarked for the country's repayment of its obligations to private and public creditors. However, the Greek bailout did not necessarily save the Greek people. According to data from the Greek statistical office (ELSTAT), as much as 28.3 percent of Greeks now live below the poverty line, which marks a dismal record in the European Union. The average salary in Greece today is barely 700 euros a month, while back in 2006 it exceeded 1,300 euros.

The value of the average pension in the country is similar, with as many as 2.5 million retirees out of a total population of 10.3 million due to past social privileges. By the way, the aging of the population is undoubtedly the biggest burden on the country, especially since the outbreak of the financial crisis in 2009. More than 400,000 young Greeks have gone abroad in search of better living conditions. As a result, after twelve years of fighting the crisis, Greece is in much worse shape than it was a decade and a half ago, which for many is a glaring demonstration of the ineptitude of the European Union, which has failed to manage to restore the "certainty of prosperity" for its citizens, which for years was the Union's greatest strength and a magnet for the people.

The third crisis that shook the foundations of the European Union was the immigration crisis (refugee crisis) of 2015. According to Eurostat statistics, in 2015, European Union member states received more than 1.2 million asylum applications, which was more than twice the number received in 2014. As many as two-thirds of all asylum applications were filed in four member states: Germany, Sweden, Austria, and Hungary. The immigrants came to Europe mainly from the Middle East and North Africa, largely as an aftermath of the earlier Arab Spring and the destabilization of political systems there, and in some cases even the outbreak of regular war (Syria). The stream of migrants entering the European Union followed two routes, i.e. the Balkan route (via Greece and Hungary) and the Mediterranean route (via Italy). At the request of Greece and Italy, which faced the risk of a humanitarian crisis caused by the influx of refugees, German Chancellor Angela Merkel made the famous *Herzlich willkommen* announcement, adding that anyone who needed help must be granted asylum in Europe. This only intensified the influx of immigrants, who went to Austria and Germany via Hungary, as well as to France and the United Kingdom via Italy. In the following months, EU institutions began negotiations with the member states on the so-called refugee relocation and the need for solidarity in receiving the immigrants. Compared to the war in Ukraine that started in 2022 and the associated influx of several times more refugees from Ukraine, who ended up in Poland and other countries, the crisis of 2015 was just the beginning of the perturbations in the EU and started a key problem

for the entire European Union, i.e. the problem of security (broadly defined). At first it was only a question of border security (the tightness of the EU's external borders), but over time it also became a question of security of persons (checking for undesirable persons in the mass of refugees entering Europe), humanitarian security, and, last but not least, physical security (after February 24, 2022). In any case, after 2015, the European Union's sense of security has been badly shaken. Until now, on the other hand, the European integration has given everyone a sense of stability, certainty, and predictability, and security has been constant. The refugee crisis demonstrated that this certainty of European integration also no longer works in extreme situations and that just as the financial crisis undermined the predictability of the economic health of the member states, the immigration crisis undermined the predictability of broadly understood security, which for years had been one of the fundamental advantages of the integration process within the European Union.

Finally, the fourth crisis was the so-called rule of law dispute, which allowed the EU institutions to use tools that are not provided for in treaties to enforce obedience. In principle, the EU treaties themselves prevented the EU from violating elementary principles, but they did so by including the violation procedures in a complex legal regime. As a result, from the point of view of Brussels' interests, these procedures were inefficient, mainly because they required unanimity – the same unanimity that allowed individual member states to be protected from pressure and blackmail from other, more powerful players in the European Union. However, from the point of view of the interests of the EU establishment, these procedures were worthless. Consequently, ideas have emerged that, without regard to the treaties, provide alternative mechanisms that use the "carrot and stick" method to allow the EU institutions to impose their point of view regarding the understanding of principles and values, which, after all, by definition, are evaluative and therefore ambiguous. The so-called crisis over the alleged lack of rule of law was in fact a crisis caused by a different way of thinking by some of the member states, which were hit the hardest by the strongest ones with the totem of the rule of law. In this way, the "money for the rule

of law" mechanism was created, which, together with the reconstruction funding system after the COVID-19 pandemic and the so-called milestones contained therein, allowed the European Union to ruthlessly force constitutional changes on individual member states, blatantly violating the treaty principle of respect for the constitutional identity of the member states. As a result, against the background of the dispute over the rule of law, mechanisms were implemented to unify regulations, even in defiance of the so-called "British Protocol" (to which Poland is a party), taking action *ultra vires*, in the area of the judiciary, which, after all, remains the domain of the member states by treaty, not even being in the field of shared competence. According to the theory of occupied field, the dispute over the rule of law, allowed the European Union to occupy a field that until now has been excluded from EU authority. Thus, in practice, integration processes were taken further and hidden under the neat slogan of the rule of law, which today is interpreted as the arbitrary rule of law of the European Union.

All the crises that the EU has confronted in the 21st century have fundamentally changed the way we think about the Union, the way the Union works, and, finally, the way we discuss the Union. On the one hand, critical voices have intensified that pointed out the dysfunctionality of the European Union and the possibly excessive integration; but, on the other hand, the trends have intensified toward greater integration, as the supposed best recipe for dealing with these, and any other crises the European Union may face. What all these crises have in common, in spite of their radically different grammar, is that they showed certain weaknesses in the Union and proved that the Union is not at all immune to shocks and processes that can be sudden, unforeseen, and surprising, and can affect so many different areas (the political system, economy, and security). At the same time, they proved beyond any doubt that the modern European Union is ruthlessly pursuing a single goal of a stronger, more centralized Union, eliminating or at least minimizing the role of the member states, which are neither sovereign nor equal. The processes of change within the European Union neither are based on treaties nor have a democratic legitimacy. The European Union today is a technocratic machine with very dubious democratic legitimacy,

non-transparent mechanisms that increasingly serve few players and not everyone, as was naively assumed decades ago. All this makes the future of the European Union highly uncertain. Under the pressure of different, often contradictory trends, it can go in very different directions. Today, the direction of intrusive federalization is the most prominent, but it does not necessarily have to be successful. It is just as likely that the Union will remain a multi-speed Union, which means there will be small infective groups that, depending on their willingness and ability, will go further in their integration or stay at a looser level. The scenario of further exits is also imaginable, as not everyone must be comfortable with the vision of ever more far-reaching cooperation, where the sense of the Union is contained in the primitive slogan of "more integration." Finally, a scenario of the European Union's breakup can be imagined, if only because it will not withstand the pressure of further integration and building "one big European state." This will cause Europe to have to reinvent its agenda in a globalized and thus smaller world. Therefore, the future of the European Union is still uncertain. It has very different, sometimes conflicting and even contradictory aspirations and capabilities. But it also has limitations and problems that are likely to pile up and change the discussion about the Union and its future.

Jaime Nogueira Pinto

At the core of the discussion about Europe: European values

The idea of the founding fathers of Europe, or more precisely, of the European Union originated in the breakdown caused by the two European "civil wars" of the 20th century, i.e. the Great War and World War II. With them ended the world of Eurocentrism and what we used to call European public law. For this reason, in the post-war period, during the political and economic reconstruction, the French, Germans and Italians, traumatized by what they had lived through and experienced, wanted to join forces so that a similar tragedy would never occur again.

The vast majority of the "founding fathers" of the European communities – Robert Schuman, Jean Monnet, Konrad Adenauer, Alcide de Gasperi – were devout and practicing Catholics who wanted to bring peace to the old continent through trade relations and prosperity. The Franco-German axis also had a decisive importance in unifying Western Europe under the values of economic and political freedom, freedom of speech, religion and ideology. This was also because the Iron Curtain, drawn up by Soviet forces marching on Berlin, fell after World War II over the middle-eastern part of the continent, and the countries and nations behind the Elbe river were subjugated to Moscow and the communist parties and dictators.

Currently, for a variety of reasons, many Europeans – like the founding fathers of Europe and the nations and leaders of the Eastern European countries that regained their independence after the collapse of the Soviet Union and liberation in 1989–1991 – are skeptical, and very much so, towards the postmodern trend of so-called "new human rights", which

are stubbornly depicted by certain European Union institutions and political leaders as "European values".

Who is promoting these new values and "rights" that are so removed from proper, authentic rights? To what degree are they involved? Who authorized the Union's establishment, which as a rule should only perform management-related and administrative functions, to introduce new "fundamental rights" into European law, which often contradict science and other truly fundamental rights, common sense and the beliefs of the majority of Europeans? Who appointed them to promote good and proper political and ideological practices and to make the payment of funds, subsidies or, by way of the stick approach, the imposition of sanctions conditional on compliance with them? We should consider what these mythical "European values" are, most often located in the sphere of influence of groups and lobbies and various kinds of "activists" who promote these "values" and "rights" and sometimes even impose them? It is worth structuring this discussion, especially since it is heavily distorted today, and separating these pseudo-values from all that which forms the authentic foundation of Europe as a civilizational project.

Myths and values of pre-Christian Europe

As we all know, the very name of Europe comes from Greek mythology, as does what we call European values.

Europa was the daughter of Queen Telephassa and King Agenor of Phoenicia. A beautiful princess with a "body of snow", she was the object of passion and desire of Zeus himself, who, like other Olympian gods, resorted to trickery to seduce her. Consequently, he took the form of a white bull with golden horns, and when the young and innocent Europa stroked him, he finally persuaded her to mount him and abducted her to Crete, flying over a sea of monsters and dangers.

The union between the supreme gods and the young princess resulted in the birth of three children, Minos, Rhadamanthus and Sarpedon. Zeus soon grew bored with Europa and left in search of other adventures, while Europa married the king of Crete, Asterion, who, in his forbearance

and even being honored to be associated with the bride of the master of Olympus, adopted the couple's sons. One of them, Minos, became his successor. Minos' wife Pasiphaë, under Aphrodite's influence, followed the family tradition and also fell in love with a white bull, but this time sent by Poseidon. The fruit of this forbidden passion was the Minotaur, "half man, half bull", whom Theseus of Athens would eventually kill in the Labyrinth and thus relieve Attica of a heavy tribute that required a sacrifice of 14 young people, including seven boys and seven young girls, to the bull man every nine years.

Centuries later, the Roman poet Horace (65 BC-8 BC) recounted in his *Odes the* saga of beautiful Europe, who was "seduced by a bull" and abandoned to the dangers and monsters lurking in the depths of the sea. In the waves, winds and dangers of the sea, Horace found an earthly mirror of the turbulent passions which united both gods and men, whose living embodiment was Europa, "the invincible wife of Jupiter" (the Roman equivalent of Zeus). At the end of verse XXVII, he calls her to stop crying and express gratitude for her good fortune, since it was her for whom "a continent on Earth was chosen".

A reading of Homeric poems, Greek theater, Virgil's *Aeneid and* Tacitus' *Histories* and *Annals* brings closer the dimension of European values from pre-Christian times. These are values and ideals associated with the freedom of heroes, conditioned by the ethics of the group, the community, respect for the city, the tribe, the family – and finally for the gods as symbols, intermediaries or messengers of will or a higher power.

These values are exemplified by Ulysses, a man of many professions and talents. With regard to freedom, Calypso offers him immortality and "perfection", which he refuses because he wants to return to Penelope and Ithaca, to his wife, his family, his land, his kingdom. Odysseus is cunning, but also brave. He has common sense, but there is no fear in him. He is magnanimous, but mercilessly punishes all of Penelope's suitors. In short, he is a man in whose nature good and evil coexist and fight with each other. He is one of the archetypes of the values shaping Europe.

These values comprise, among others, the freedom of heroes and gods, their origin and intermediation in the relations of men, women, gods and goddesses between Earth and Heaven. Also important are beauty and

physical strength, realism, acceptance of imperfections, skill in sailing and overcoming dangers and possible traps. Loyalty, i.e. extraordinary fidelity symbolized by Penelope in the endless junctures of the plot, is another of the great classical values. Loyalty encompasses freedom and creativity, sacrifice in defense of homeland and family. These are the canon of values that have shaped Europe since the times of antiquity and have made it more than just a patch of land between the seas.

Meanwhile, it is Hector, and not the reckless Paris, who, along with Achilles, is the main character of the *Iliad*. The daring hero courageously confronts Achilles who was offended by Agamemnon and devastated by the death of Patroclus. This tragedy is not that detached from the values which we referred to above. According to von Wilamowitz-Möllendorff, a German philologist at the turn of the 20th century, the "Attic tragedy" constitutes an emanation of a "heroic legend" organized around two key elements, i.e. choice and suffering. This journey through suffering, which precedes the Christian mystery of the martyrdom of Christ God and opposes Epicurean trends and Platonic ideas, describes, poses questions about and clarifies the tragic dilemma and suffering which a given choice can bring.

The epic heroism of "the choice of Achilles", the struggle that will lead him to a noble and certain death, hides the question of human nature and of the mystery of human suffering in the face of the powerful and merciless world in which the heroes live.

Hybris can drive a man, a hero, a demigod to defy other men and the world at large, but also to oppose the gods and fate, to the very limits of reason. This is what Hector did when, against the advice of Polydamas, he decided to face the enraged Achilles alone. The life of Priam's son ended in tragedy, and his corpse was dragged behind the victor's horse-drawn chariot in front of his widow, Andromache, who saw everything from behind the walls of Troy and suffered the severe pain of her beloved's humiliation and defeat.

The theatrical works of Greek tragedy, from Sophocles' *Antigone* to Euripides' Theban cycle, tell stories of dilemmas and diabolical choices which Homer presents in a more epic, more cheerful way. Meanwhile, theater depicts the suffering that Nietzsche condemned in Euripides

as a pre-Christian sign of the "beginning of Tragedy", suffering that is nevertheless an integral part of Europe's values – it involves risk-taking, the price for adhering to rules, even when the cause seems lost.

In the stories that happen a little later in Rome and the Roman Empire, too, we can see prudence, a sense of balance and justice. In the *Aeneid*, for example, the influence of Homeric poems is evident, but the order is reversed: the six poems of the First Part are inspired by the Odyssey and tell of Aeneas' journey across the Mediterranean, his escape from Troy, his meeting with the queen of Carthage, Dido, and the hopeless passion and suicide of the queen, inconsolable and abandoned by the Trojan hero. The second part, in turn, refers to the Iliad and tells of the Trojans' battles in Lazio. In Book IV, Virgil, through the mouth of Anchises, father of Aeneas, addresses Emperor Augustus, the Prince of Peace, who brought an end to civil wars in Rome: *Tu regere imperio populos, Romane, memento (Hae tibi erunt artes), pacique imponere morem, Parcere subjectis et debellare superbos* ("*You, O Roman, govern the nations with your power – remember this! These will be your arts – to impose the ways of peace, To show mercy to the conquered and to subdue the proud*"). As we can see, antiquity created a repertoire of fundamental values that are coherent and common to Europe. Courage, valor, beauty, truth, goodness, loyalty, fidelity, responsibility for choices made, willingness to make sacrifice. All of these form European values being a crucial component of Europeanness, seen as a human condition in the surrounding world.

Journeys through the values: from the *Respublica Christiana* to the European Community

Geographical terms such as "a part of the world" or "a continent", which are derived from either mythological or poetic narratives, remained and persisted throughout the Middle Ages. However, in the medieval period, the meaning of what we call Europe today started to be based, first and foremost, around the spiritual realm, with clear prevalence of religious and ethical values. In this way, Europe became *Respublica Christiana*,

being an area of Christianity, a patch of civilization obedient to the Pope as the earthly Vicar of Christ.

Some advice on good governance, such as those which Virgil put in the mouth of Anchises, were adopted by Christianity, which from the time of Constantine began its spread. The early period of Christianity was dominated by Paul's teaching from the Epistle to the Romans, which watches over the concept of the supreme power of God as the origin of all authority granted to kings and princes of this world, and which calls on Christians to respect and obey the established authorities. However, if political authority is necessary, also necessary is resistance to wicked laws and orders – even at the cost of martyrdom, if needed. Therefore, the state as an entity is accepted, as is the belief that its existence is required, that it is legitimate, but in a spirit of critical thinking and fervent loyalty to the highest values that are beyond the state.

This duality of European Christian values will continue to function in spiritual and territorial unity, only to be torn apart later, in the 16th century, by the Reformation and its proponents.

Since the Peace of Westphalia which put an end to the religious wars in which Europe had been immersed for a long time, these values will slowly take on an increasingly secular character, as a European community of "civilized nations" with rules established for times of peace and war, principles of the mutual recognition of nations as legitimate partners in the community of powers, with principles which will serve as the basis for written and customary laws. All of this as a whole will form what Carl Schmitt would later call the *Jus Publicum Europaeum*, i.e. the law whose its greatest contribution was to regulate the issue of war, challenging the notion of a "just war", a war "for a cause", while believing that the legitimacy of the main protagonist translates into rightness and that it is the interstate system which chooses parties to a war, i.e. sovereign states recognized by other countries, which act on behalf of their national and geopolitical interests. A realistic assessment of the causes and conditions of war, imposing certain rules limiting the radical hostility of the belligerent parties, was an important achievement of the European civilization and over time became one of the European values.

It was the division of Christianity, together with the Lutheran Reformation and the English schism in the early 16th century that lead to the appearance of the metageographic concept of Europe. The idea of "European civilization" was reinforced at the intersection of the Baroque and the Enlightenment, during the "crisis of European consciousness", as it was called in 1935 by Paul Hazard. The "crisis of consciousness" emerges in confrontation with other civilizations, which in the opinion of the mentors of the nascent European intelligentsia were purer, not yet corrupted by power and money, composed of "others" who were morally superior to "Europeans". One well-known example of such admiration for distant cultures are the writings of Voltaire, *Description géographique, historique, chronologique, politique et physique de l'empire de la Chine et de la Tartarie Chinoise,* for whom Europe was full of wickedness, corruption and decadence, while distant countries were in their own way innocent, untainted by European civilization.

"Chinese" sources referenced by Voltaire – who himself never left Europe – were, as a matter of fact, accounts of Jesuit missionary priests who since the 16th century had been visiting the Celestial Empire, intending to convert the Chinese. Emperor Yongzheng banned Christianity in China and expelled the missionaries in 1724, but this by no means dimmed the admiration of the philosopher of Reason and Liberty, who, in the dialogues between Chinese and Christians, always ridiculed the Christians as that side of the Church which he considered *infâme* and which he wanted to *écraser.*

Montesquieu, another liberal, though more conservative, also used correspondence from far away, coming this time from two extinguished Persians, Usbek and Riki, who were visiting Paris with their compatriots from Isfahan, to criticize the institution of the French monarchy. As a precaution, the first edition was published in Amsterdam, and Montesquieu himself appeared in it not as an author, but as the publisher. This move was justified by Montesquieu's critical attitude toward Europe, since Montesquieu, like Voltaire, searched for the sources of beauty away from Europe which was regarded as axiologically and civilizationally corrupt continent.

In this way, philosophers and thinkers of the European rationalism, living under the non-liberal French monarchy, reveled in writing utopias, using "non-place" or "another place" as a means to criticize Europe and its political systems, while praising, implicitly, other civilizations as models of tolerance of principles and customs. This trend would go on to find many imitators in the near and distant future, and Europe would face increasingly harsh criticism.

This view about other civilizations, other nations and other customs encompassed within the term of "noble savage" which was coined by Jean-Jacques Rousseau was another paradigm and, simultaneously, an inspiring topic for anthropological optimism and the utopias derived from it, also influencing Marx's "scientific socialism" which was slowly emerging at that time.

Equally important in reinforcing the ethical and political notion of Europe, commencing from the Peace of Westphalia, was the recognition of the statehood of sovereign European nations and powers and their codes of relations, together with the emerging art of diplomacy and even the science of international relations. This led to the establishment of a galaxy of civilized contacts, based – on the one hand – on calculation and interest, and law, custom and elegant etiquette on the other.

Vergennes, the foreign secretary to Louis XVI from 1774 to 1787, spoke of the "balance of Europe", while diplomats at the British Foreign Office emphasized the importance of "Balance of Power". This term appears in David Hume's *Essays, Moral, Political and Literary*. Vergennes not only deliberated in the geopolitical context and about the balance and imbalance of power in Europe, but also rebelled against, *inter alia*, the First Partition of Poland by the Russians, Austrians and Prussians, and directly called it an immoral and vile act, from the perspective of what it was that shaped Europe as a civilizational and cultural space. In his opinion, the partition did not respect elementary principles and restrictions of ethics and law or politics and morals, nor even the principles of common sense, all of which formed a part of the European code of ethics that rulers who participated in the partition of Poland ignored and rejected.

At the end of the Napoleonic wars, the "European community" was born with the Congress of Vienna. And thus, diplomacy and war shaped the hard core of "European practices, customs and laws", which created a new order and the idea of civilizational values common to Europeans.

This common civilization was still based on the international hegemony that European powers enjoyed in the world – such as Britain or Spain with their overseas territories, or Russia, which was expanding to the East, using railroads and the military.

Values in crisis: wars, slavery and new conflicts

"The European community" found itself in crisis because of the Anglo-German rivalry which led to the Great War (1914–1918), communist revolutions, fascist reaction in Italy and National Socialist movements in Germany. These totalitarian and authoritarian ideologies on the opposing sides of the political axis shattered the community of European values. In this regard, World War II was merely a continuation of the first, and marked the end of the Eurocentric world, the collapse of all that Europe had produced over the centuries in the spiritual dimension.

With the end of the war in 1945, in an era of polarized US-Soviet confrontation, a consciousness emerged in Europe – it was shaped and awakened by the horrors of the conflict. The Founding Fathers of Europe believed in Christian principles, intended to enshrine them in societies and institutions, and thus maintain peace through trade relations. Such values as economic, political and religious freedom were an extremely important factor in the unification of Western Europe in opposition to "Eastern Europe" or to the repression of countries and nations subjugated by Moscow and subject to Soviet communism. The democratic Western Europe, which created today's European Union, appeared not only as a space of common values and interests but also – and this is often forgotten – as an opposition to enslaved Eastern Europe which was a synthesis of European anti-values.

After two wars, Robert Schuman (1886–1963), a devout and enlightened Catholic, upheld the need for Europe to return to faith. In his

opinion, faith should be the building block of Europe as something more than a mere union of states. In Schuman's view, "all European countries are pervaded by Christian civilization. It is the soul of Europe, which must be restored".

Schuman and the other founding fathers of the European Communities could not have predicted that the European Commission would show resistance to all existing Christian traditions, and they certainly could not have imagined any more that the Commissioner for Equality Helena Dalli would come up with a proposal to replace "Christmas" in EU documents with the term "holiday season". How would they react to the news that Emmanuel Macron, re-elected as president of France on 24 April 2022, announced in a speech to European parliamentarians in Strasbourg that he would do his utmost to ensure that the "right to abortion" would become a part of the EU Charter of Fundamental Rights, because abortion supposedly constituted one of the rights that a modern, progressive Europe should guarantee to everyone in the so-called democratic package.

It is a striking characteristic of our times that Macron insisted on making abortion a "fundamental right" at the beginning of the French presidency in the European Union, in the first half of 2022, and that he did so the day after Roberta Metsola, a Christian conservative pro-life politician and militant of the Maltese Nationalist Party, was elected by an overwhelming majority as the President of the European Parliament and, that in doing so, Macron referenced the abolition of the death penalty 20 years earlier, almost as if the death of unborn and innocent children should be the culmination of all the achievements of humanity.

Furthermore, the elections in France (and Macron's re-election thanks to a massive "anti-fascist" coalition against Marine Le Pen) reflect a political and ideological shift taking place in Europe. We can see a clear change where the confrontation over the "causes of fracture" and the conflict between states and governments that insist on national sovereignty (sovereigntists or nationalists) and those who defend the primacy of Made-in-Brussels laws and institutions over those of Member States (federalists or globalists) are becoming more and more radicalized. On this crucial, from an institutional perspective, division, there

is also superimposed a second, very clear axiological division where true, deeply-rooted European values are pushed to the margins, and are replaced by aggressively promoted anti-values, whose hallmark is abortion, disguised as a new human right.

For Sir Roger Scruton, one of the greatest riches of European political culture is the existence of different and independent nations, but with a common Christian and humanist heritage. This is what forms that mythical unity in diversity, where different states and nations share a common denominator in the form of faith and the universal values that flow from it. Christianity, when seen from this perspective, unites diversity, but does not standardize it. A few months before his death, Scruton stressed emphatically that the differences between the nations of Europe did not threaten its unity at all, that they were precisely what kept Europe alive for centuries and made Europe unique. Rejecting the idea of global assimilation, he added that it was exactly these "*rich cultural differences, formed by often traumatic histories, that made friendships between nations possible and precious*." Thus, for him, Europe's greatest glory was "*the ethnic diversity, patriotic identity and peaceful competition of nations*".

Roger Scruton, who was mercilessly attacked for his "conservative nationalism" by progressive academics and journalists and ignored by the mainstream, always demonstrated that he was at odds with the traditional liberalism of the individual, but also with the philosophers of modernism and neo-Marxist postmodernism, such as Sartre and Foucault.

Deliberating on the conflict between "sovereignists" and federalists or nationalists and globalists, the British philosopher was among the first to denounce the "epidermal Manichaeism of the intellectual left" and its rhetorical juggling in the face of a rising tide of European nations' rejection of supranational integration and migrations of foreign cultures, such as Islam. If the elections are "good", why are the results thereof "bad" or nationalist and populist?

What I find most interesting in the new confrontation, however, is that the intellectual Left has again assumed the high ground, not being prepared to concede the democratic legitimacy of the movements that it dismisses as 'populist', and is determined to frustrate any attempt

by those movements to establish themselves in government. The same annihilating rage that was directed against conservatives like myself in the 1970s and 1980s is being directed now against the supposed populists[1].

The growing tension between sovereignists and federalists, and in the background – between proponents of true values and those who have become enamored with new values, is one of the consequences of the loss of confidence in the European Union, which seems to have led to a conflict that the "United Europe" is unable to control. This conflict is evident in all the changes taking place on the continent.

Roger Scruton tracked the emerging new paradigm of confrontation in Europe, which in the United Kingdom led to Brexit. With the end of the Cold War and the liberation of the Warsaw Pact countries, many of the classic divisions between left and right disappeared, and the first two decades of the 21st century saw the emergence of new value conflicts which juxtaposed national identity and multiculturalism, the protectionism of state economics and national production, and the globalism of the "one world" and "global supermarket", managed by wise, omniscient and invisible hands.

New laws – old and new utopias

In the cornucopia of benefits of the current Europeanist and globalist utopia, smuggling in "new European and global values and rights", some saw a mix of libertarian sybaritism and authoritarian statism. In the new times, we can find also certain features, especially of a dystopian nature, prophesized in the works of European intellectuals: from the classic 18th century utopias – Montesquieu, Voltaire, Rousseau – to the dystopias of the 20th century – e.g. Yevgeny Zamiatin's *My*, Aldous Huxley's *Brave New World*, George Orwell's *1984* or Ray Bradbury's *Fahrenheit 451*.

What underlies the debates about the best or "less bad" of worlds are choice and conflict of values. What is interesting, almost all dystopias

[1] Roger Scruton, "Can Europe learn from communism?" Keynote speech at the 4th Summit of Speakers of Central and Eastern European Parliament, 2019.

take place in a single unified world, in a supranational space where the model of power is centralized and supervision never stops. In the case of Orwell's *Big Brother,* or in the cities and glass buildings of Zamiatin's One State, citizens are being constantly watched and are obedient to hyper-vigilant organs and instruments of central authority, under threat of arrest and annihilation.

It is the power of a supranational state, usually usurped by itself, or, as Tocqueville warns, the power of "democratic despotism", of lofty virtues and intentions in the name of modernizing experimentalism, convinced of its common sense and rationality. Tocqueville's state was "absolute, meticulous, regular, provident, and mild. It would resemble paternal authority if only its purpose were the same, namely, to prepare men for manhood. But on the contrary, it seeks only to keep them in childhood irrevocably. It likes citizens to rejoice, provided they think only of rejoicing". It is a state that, in the name of the greater good and happiness of man, presents itself in the light of transnational aspirations, as an enemy of borders, nations, states, which proposes new values, similar to today's "new European values".

Gradually moving away from the Christian humanism of its founding fathers, the European Union is ever more eager to invoke "new human rights", values, customs and traditions that ignore, reject or "erase" nearly three thousand years of European history.

The October 2010 document from the General Secretariat of the Council of the European Union: *Promoting the enjoyment of all human rights by lesbian, gay, bisexual and transgender people*, made available in all structures of the European Union in order to "reinforce the EU's human rights policy", provides the European Council with an opportunity to endorse the general assumptions of the so-called "gender policy", as if the radical separation of biological sex from unstable self-assessment and free manipulation were in line with the tenets of science and the desire of the majority, rather than the dictates of a minority ideology.

In order to achieve this goal, the EU should encourage Member States, by promoting educational activities against discrimination of LGBT people, and identify situations where the Union's political and financial support, or lack thereof, could act as an incentive to adopt appropriate policies.

However, there are nations and citizens of Europe who do not seem willing to accept the assumptions of these documents and the language used in them. Language is not innocent, even less so in the Gramscian era in which we live. It is on the front line of all battles: Hungary and Poland (conditionally supported by Austria, Slovakia and Bulgaria) have been fighting to remove the phrase "gender equality", replacing it with "equality of men and women". Budapest and Warsaw claim that the term "gender" does not appear in Europe's founding treaties. Polish President Andrzej Duda went so far as to say that "LGBT ideology" is more destructive to the community than Soviet communism, as it oozes slowly through all available channels under the guise of a democratic, free ideal.

The problem with angelic utopias – and the oldest, fullest and most real of them was Marxism-Leninism – is that, as Marx said, their creators or revolutionaries, philosophers of action who wanted to change the nature of things, stopped at nothing when fervently pursuing projects in order to build the best of all worlds: prohibiting, persecuting, arresting, executing, hanging, massacring throughout the 20th century, from Russia to Cambodia, from China to Ethiopia, tens of millions of men and women whom they saw as obstacles or even outright enemies. To legitimize themselves and reject God, reality and powerlessness, they turned their dream into Ultimate Truth, their methods into Supreme Justice, and a society marked with blood into an Earthly Paradise.

However, everything changed, and what was the absolute good of society in the communist utopia, a society without masters and slaves, without rich and poor transformed in the modern utopia into the absolute good of an individual, an individual without physical limitations, created in the image and likeness of his own will – Harari's *Homo Deus*, master of life and death. Portuguese poet Fernando Pessoa, when writing under the heteronym Bernard Soares, anticipated the current unrest when he suggested that we move from "morality" to "aesthetics" and from "society" to "the individual".

In an era filled with these pipe dreams, fraught with numerous "paradises on earth", the times of "aesthetics and individual", but equally totalitarian, few will remember, contrary to history and contrary to

what we are beginning to experience, that this kind of utopian thinking almost always degenerates into dystopia.

The expropriation of land is now the expropriation of the body, which can no longer belong to the Creator, which can no longer submit to the tyranny of biological sex or be associated with anything sacred or even natural, so that it can be recreated, mutilated, euthanized or, if science and the bank account allow, immortalized.

However, just as in societies that practiced "true socialism", what might have appeared to be individual freedom, the elevation of those who desired dignity and respect, the establishment of greater liberty, hides many difficult trials and quickly takes a different turn. Under the slogan "no one is forcing anyone", we are all forcibly called upon to support new utopian projects, to work for a new "aesthetic and individual" utopia, to praise its methods and to raise its banners under the threat of being labeled a pathological individual, confined to a ghetto of "phobes" who have quickly replaced the former "enemies of the people".

The escalating attacks of the European Commission on Poland and Hungary culminated in the suspension of recovery funds following the COVID-19 pandemic, on charges that the respective governments challenged the "fundamental values of the European Union", that they discriminate on the grounds of sexual orientation and fail to respect the rule of law and the separation of powers. The governments of both countries referred the case to the European Court of Justice, but the Court ruled, as expected, in favor of the Commission. Ironically, this polemic appeared at a time when in the United States, after a leak that revealed the Supreme Court's position on abortion, President Joe Biden and Congressional leader Pelosi declared that they would do their utmost, at the executive and legislative levels, to annul the effects of the Supreme Court ruling they did not accept and that they saw as backward, anti-democratic or even anti-freedom.

Vigorous resistance from the East

The countries of Central and Eastern Europe, which during the Cold War were under the communist rule of the Soviet Union, in a state of colonial-style ideological subjugation and with limited sovereignty, did not experience in their societies the individualistic, hedonistic tendencies or the libertarian movement that reached Western Europe, also thanks to the religious and conservative resistance to the regime's secular Marxism. These societies have also become more oriented toward identifying ideological aggressions and more determined to emphasize their identities.

Four of these countries, the Visegrád Four – Poland, Hungary, the Czech Republic and Slovakia – are closer to the national-popular axis. The nation is for them the supreme and primary political and identity element, since it was nationalism that saved and inspired them in Soviet captivity. This nationalism also has its historical manifestation in the personification and condensation of political values of independence and unity in the form of heroes and fundamental myths.

For Hungarians, it will be St. Stephen or Mattias Corvinus; for Poles, it will be the memory of the Polish-Lithuanian union in the 17th century and of the resistance and fight for independence in the 19th century, which was a period when the partitioners, trampling on European values, erased Poland from the map of Europe; for Czechs, it will be the nostalgia for the Czech Kingdom and its resurrections in the 19th century; meanwhile, Slovaks recall the times of the Great Moravian kings. For all of them, it will also be resistance against Soviet communism.

Analyzing 2005–2010 election texts from these countries, i.e. just after acceding to the European Union in 2004, what is visible is a strong patriotic and nationalist rhetoric, in stark contrast to the pro-European enthusiasm which is, for instance, evident in Portugal and Spain after they joined the European Economic Community in 1986.

Another aspect that shapes the values, programs and manifestos of the Visegrád countries is the preservation of standards of Christian origin, the reference to Christianity as the historical and cultural basis of their nations. A sense of mission is evident in this worship, and the very existence of the nation as well as its independence, action and destiny

are intertwined and form a transcendent vision of History. This should not come as a surprise especially in the case of Poland, where attempts to annihilate or diminish the importance and role of Poland have always been correlated with the fight against the Church and against perceiving religion as a factor which contributed to the emergence of the Polish nation.

There are also political powers in the conservative nationalist parties, such as Hungary's Fidesz and Poland's Law and Justice, that have gained prominence during the years following accession to the EU, powers which defend the identity of the state and its culture against the threats posed by the Euro-American order, those being materialism, consumerism and globalization; the order that finds objective and subjective allies in universities and the media. In the area of economy, from this defensive concern for identity, the legal ramifications of accession notwithstanding, follows a defense of the "national economy", in particular restrictions on the acquisition of land by foreigners or a far-reaching skepticism for the common currency as something that diminishes states and leads to the expansion of the EU center. There are also reservations to the immigration of non-Europeans, which is seen as a possible threat to the identity and uniqueness of nations, which in turn is associated with the perception of the European Union as a structure inextricably linked with values that are anchored in Christianity.

There have always been Eurosceptics in the European Union and those parties that saw a united Europe as an *à la carte Europe*, with the advantages of an economic community – with a common market and free movement of people and goods between member countries – but without the burden of political, military and cultural integration.

However, there has been an evolution of sorts, at least in semantics, in the attitude of some Eurosceptic parties to Europe: from a complete rejection or exit from the European Union, to a different notion of Europe, not a united, quasi-federal Europe, but a "Europe of Nations".

There are also differences among the Visegrád countries in the post-accession period: Hungarians and Czechs take a more nationalistic approach than Poles and Slovaks to European funds, which they see as "instruments of colonization". Nevertheless, all of these "nationalist"

features provoke opposition and retaliation from European Union authorities, taking the form of, for instance, the Parliament in Strasbourg issuing (non-binding) regulations and aggressive sanctions on family and education issues.

Despite the sacrifices borne by the Polish government, the pressure from the European Union and Eurocrats against Warsaw has not eased. The unilateral imposition of financial penalties is a clear expression of political domination. Retaliation from Brussels also takes the form of withdrawing any support for Polish cities that have declared themselves "LGBT-free zones". This shows what instruments are used for subjugating the rebellious and for imposing their own catalogue of values, which is less and less associated with real values.

In the West, people's reaction against globalism has been very clear. This has caused deep apathy among European liberal elites who are now on the defensive, and this is despite the damage that Putin (who has adopted conservative nationalist solutions in religious and family policy) is doing to the people through his nationalist invasion of Ukraine.

In the international mass media, especially in influential titles tasked with covering up the opposition, the reaction of the liberal globalist elites who are now in power in Washington has intensified, despite strong opposition in Congress and the courts, which thanks to their alliance with the extreme left have maintained power in France. This power is multiplied in the face of increasing support for nationalist movements and parties. There is even a campaign that challenges – without questioning universal suffrage – the ability of "those less educated" or the "tribal" people to make "proper decisions". There is also a growing wave of anti-populist and anti-democratic literature which exposes anxiety and discomfort in the face of opposition to the oligarchy of power and influence in the West. These elites are determined to retain power at all costs. They find it difficult to admit defeat and respond to the challenges of geopolitics and the hidden crisis in the world exacerbated by COVID-19 and the war in Eastern Europe.

These elites have remained in power since the end of World War II and have begun to prove that they are, indirectly but clearly, real "demophobes", which means they are more and more afraid of majority

decision-making and its consequences. And this they are doing, paradoxically, in the name of "European values", after, however, they have radically altered the meaning of their grammar.

Conclusion: Europe – far from greatness

In the 18th century, some enlightened Europeans such as Montesquieu, Voltaire and Rousseau criticized the European civilization and its values, contrasting them with those of the Persians, Chinese and "noble savages" of the American Indians. Later, Freud referred to this derogatory outlook on self and admiration for the alien and remote as "the malaise of civilization". Adopting this outlook made everything or almost everything invisible or irrelevant – for example, the fact that Christians were persecuted and massacred in Persia, or that 18th century China was a country of imperial despotism which did not resemble paradise, or that Rousseau's "noble savages" were cannibals.

The post-Marxists of May 68, following de Sade, and then the French deconstructionists colonized the American campus. The campus, which has been repeated *ad nauseam* in puritanical and fanatical versions, inheriting the fury of all blind faiths, has currently taken the anti-Christian and "anti-civilization" form. The result is a reformed neo-Marxism which today has replaced the ideals of justice, equality and work, with an ultra-liberal, hedonistic and decadent utopia that serves and exploits global hyper-capitalism, and which, in the face of the ignorance and inertia of many Europeans, establishes in the documents of the European Union pseudo-rights that are becoming more and more removed from the pagan, Christian, universal and national values that made Europe great.

BASIC LITERATURE

Barbosa L.T., *Images de la Chine dans l'oeuvre de Voltaire*, Valladolid 2009.
Eszter Z., *Poland and Hungary battle to eradicate 'gender' in EU policies"*, "*EUobserver"*, 16 December 2020.
Dooley M., *Roger Scruton the Philosopher on Dover Beach*, London, 2009
Guirand F., Schmidt J., *Mythes et Mythologie – Histoire et Dictionnaire*, Paris 1996.
Husák J., Schütz O., Vít M., *National Identity of the Political Parties in the Visegrad Region*, "*L'Europe en formation"*, 2012, no. 364.
Plagnol-Diéval M.-E., *Pour un lecteur éclairé: les leçons persanes de Montesquieu*, "Rue Descartes" 2015, no 84.
Soutou G.H., *L'Identité de l'Europe du point de vue de l'historien*, "Outre-Terre – Revue européenne de géopolitique" 2004, no 7.
Tocqueville A. De, *De la démocratie en Amérique,* Paris, 1986.

Anne-Marie Le Pourhiet

Tensions between the democratic system of the nation-state and centralization processes at the European Union Level

Tensions are inherent in all vertical systems of power organization, especially the federal ones. The creation of the United States of America itself was born out of a bitter Confederate crisis, and the Philadelphia Constitution was barely ratified. In 1791, the Anti-Federalists obtained the addition of the 10th Amendment, which explicitly states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." At issue is the famous principle of conferral, which appears in Articles 4 and 5 of the Treaty on European Union (TEU).

The recent U.S. Supreme Court decision on abortion has once again drawn our attention to this lingering tension by de-federalizing abortion laws and returning jurisdiction to individual states. At the same time, President Macron is proposing that the European Parliament include the right to abortion in the Charter of Fundamental Rights, i.e. he is working in the opposite direction – to have this right federalized.

In Europe, however, these tensions have taken a disturbing turn due to the increasing confiscation of the democratic sovereignty of member states by technocratic institutions, which are also multiplying invasive mechanisms of coercion and repression with strong ideological overtones. This authoritarian and brutal system, which is not very diplomatic, naturally provokes the expected opposition and ignites conflicts.

One of the most striking observations made with the eye of an objective jurist is the constant manipulation of terminology and the way in which major philosophical, political and legal concepts are distorted and instrumentalized. This is particularly true of the concepts of sovereignty,

democracy and the rule of law, which are stripped of their universal historical meaning and given a meaning different from the one they traditionally had. We should add that this terminological shift is not neutral; its ultimate goal is to overcome people's resistance with the newspeak once described by George Orwell.

Therefore, let me first remind you of what exactly democracy means in our nation-states (I), and then I will show how the progressive centralization of the European Union seeks and results in the restriction and even dismantling of said nation-states by confiscating the ability of their citizens to self-determine (II).

I. Democratic nation-state

As Giovanni Sartori notes in his famous book, "Theory of Democracy": *It is imperative that the word democracy be used in a sense that relates to its historical and semantic meaning, in a way that is not misleading.* Since Article 1 of the 1958 French Constitution, like its Spanish, Italian, Polish and German counterparts, states that France is a "democratic" republic, and Article 4 adds that political parties and groups "must respect the principles of national sovereignty and democracy," a certain and unambiguous legal definition of the term is necessary.

Essentially, the semantic and historical meaning of democracy is not in dispute: *demos-kratos* means the power of all as opposed to the power of one (monocracy) or a few (aristocracy). Let us recall the well-known formula of Thucydides: *This system is called a democracy for the administration is in the hands of the many and not of the few.* Democracy refers to the source of power, it is an organic concept, aiming at collective sovereignty, the ability of all to decide for themselves by majority vote and freely.

The only point of discussion has always been how to exercise this collective sovereignty. Does democracy mean the direct expression of the will of the people, or can it be achieved by electing representatives to express said will? Representation and democracy, initially seen

as opposed to each other, were eventually reconciled in the concept of representative democracy, complementing direct democracy.

The German Constitutional Court has discussed this definition extensively, especially in its June 30, 2009 ruling on the Lisbon Treaty, since Article 79 of the Basic Law prohibits revisions that violate the principles set forth in Article 20, and thus precisely the democratic character of the Federal Republic. It should be remembered that according to this article: "All state authority is derived from the people. It shall be exercised by the people through elections and other votes".

The Court recalls that the right of citizens to freely determine public power, both in terms of the individuals exercising it and its content, through elections and voting, is an elementary part of the principle of democracy and confirms that the right to participate freely and equally in public power, rooted in human dignity, is one of the principles of German constitutional law that cannot be changed. It also states that it is through the election of its deputies that the German people directly express their political will and regularly exercise power through a majority elected in a representative assembly, from which the federal government is formed and is itself accountable to it. The election of deputies is thus a source of state power periodically renewed by the people.

Besides, this is exactly what the French Declaration of the Rights of Man and of the Citizen, cited in the French Constitution of 1958, has been preaching for more than two centuries, since the main revolutionary idea is the self-determination of a free individual in an equally autonomous nation, whose freedom is called sovereignty.

> The principle of any Sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it (…) The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making (…) All citizens have the right to ascertain, by themselves, or through their representatives, the need for a public tax (…).

This statement is found in the preamble of the first French constitution of September 3, 1791, and the Polish constitution of the same year also states that "all authority in human society takes its origin in the will of the people".

The first guiding principle set forth in the Constitutional statute of June 3, 1958 authorizing General de Gaulle's government to draft a new constitution is: "The only source of authority is universal suffrage. Legislative and executive authority is derived from popular elections or elected bodies." This is exactly what the Karlsruhe court said.

Based on this principle, the 1958 French Constitution thus states that "France shall be an (…) democratic (…) Republic" whose principle is "government of the people, by the people and for the people." It reaffirms the 1789 Declaration, reiterating:

> National sovereignty shall vest in the people, who shall exercise it through their representatives *and* by means of referendum. No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof. Suffrage (…) shall always be universal.

Identical wording can be found in paragraph 2 of Article 4 of the current Polish Constitution: "The Nation shall exercise such power directly or through their representatives."

When European texts, and in particular Article 2 of the Treaty on European Union, state that "The Union is founded on the values of (…) democracy, (…)," they cannot therefore mean anything other than what European "constitutional traditions" have affirmed since the 18th century, following Thucydides.

However, it was clear from the beginning that the use of the word democracy in European institutions and jurisprudence did not correspond to traditional constitutional criteria.

Using the concept of "democratic society," mentioned several times in the European Convention on Human Rights, the Strasbourg Court never refers to collective sovereignty or majority consent, but only mentions the vague idea of a "democratic society governed by the rule of law."

In this way, the meaning of democracy is revised, as the Court does not hesitate to state in the body of its judgment that "democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. In this view, the majority choice becomes an expression of "domination" that must be rejected.

The nation and the people are also absent from the European human rights lexicon, and the Court states in passing and very reluctantly that "democracy presupposes giving a role to the people". While the letter of the Convention apparently places democracy and the rule of law on an equal footing, the Court subverts this horizontality, repeatedly emphasizing the requirement of a "true democracy guided by the rule of law." Meanwhile, as mentioned above, the German Constitutional Court believes that the right of citizens to freely decide on public power through elections and voting is related to human dignity and makes it a fundamental subjective right.

However, it must be acknowledged that the purpose of the entire European construction is to fetter the states and limit their sovereignty, and therefore includes a denial of the will of the people as expressed in the states. Challenging the primacy of state sovereignty is the basis of the European system of regional integration. The pioneers of the European cause believed that nations were responsible for war, not the imperialism of one nation, and therefore deduced that the Westphalian model based on state sovereignty should be challenged. It aims to bind the state into a web of international obligations that could legally oppose it. French Minister Pierre-Henri Teitgen stated bluntly in his report on the draft European Convention: *This is about limiting the sovereignty of the state on the side of the law, and on that side all limitations are allowed.*

All of this terminology, which subordinates democracy to "law," i.e., technocratic and undemocratic jurisdictional law created by European institutions and jurisdictions, is clearly evident in the very title of the Venice Commission, whose full name is the European Commission for Democracy through Law, while logic would dictate that it is "law through democracy".

It should come as no surprise that the institutions of the European Union itself are as far removed from democracy, the people or the nation as the institutions of the Council of Europe.

Article 2 of the TEU on "values" sets horizontally, without any articulation, hierarchy or connection: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

And while the rule of law has become ubiquitous, even invasive, in the European vocabulary, democratic sovereignty and the political people, the demos, are conspicuously absent there. In her 2020 State of the Union speech, Von der Leyen praises the so-called "open society of values and diversity," but does not mention the word democracy.

In fact, democratic value is an obstacle to European federalization, which is taking place through the creeping confiscation of popular sovereignty. Europe was conceived in defiance of the nations, by incorporating them into a structure to be gradually and politically tightened by the "small steps" method recommended by Jean Monnet, in an "ever closer" union, that is, a union that is increasingly centralized and unified.

II. Creeping confiscation of national democracy

The European Union is theoretically an ordinary "grouping of sovereign states," as the Karlsruhe Constitutional Court stated in its June 30, 2009 ruling on the Lisbon Treaty. It is repeated over and over again that the Union does not have "powers within its competence," and that it is the Member States, in the treaties they ratify, that delegate "sovereignty rights" to the Union, and it can in no way claim an autonomous extension of its powers.

This is also mentioned in Article 5 of the TEU, which organizes the distribution of powers according to relatively clear rules, in particular the principle of conferral, according to which the Union shall exercise only those competences which the Member States have conferred on it in the Treaties ("The European Union only has the competences (powers) conferred on it by the treaties"). This principle is then complemented

by the principles of subsidiarity and proportionality. *A priori*, Article 5 is reassuring, especially since it complements paragraph 2 in Article 4, which reminds us of the absolute most important point: *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*.

It may be noted, however, that this proviso is never cited or spontaneously mentioned in the legal acts of the Union, which refers to it only in passing when it is obliged to respond to Member States that invoke it to defend themselves in proceedings against them.

In fact, from the outset, the ambiguous and overly vague wording of successive treaties and their interpretation by the institutions and the Court of Justice, which since the Maastricht Treaty have become heavily tainted by ideology, have led to an invasive and authoritarian system with a strong repressive connotation that stands in direct conflict with democracies and national identities.

The confiscatory jurisprudence of the Court of Justice started very quickly: with the famous *Costa v. ENEL* judgments of 1964 and *Internationale Handelsgesellschaft* of 1970, which invented the principle of unconditional precedence of European law over national law, including constitutional law. These rulings were confirmed in particularly brutal form by the 1978 Simmenthal ruling. However, the principle of primacy is not enshrined in any treaty, it is the Court itself that decrees it. In addition, the aforementioned Court does not stop there and continues to fabricate principles of autonomy, effectiveness and uniform application of EU law, which it calls "fundamental principles," although they do not appear anywhere in the treaties. It was for violating these four principles that the Commission initiated infringement proceedings against Germany following the Karlsruhe Court's May 5, 2020 ruling on unconditional monetary transactions.

After the rejection of the Treaty establishing a Constitution for Europe in a French referendum in 2005, the drafters removed overtly federal elements from the text, such as legal terms or those referring to the legislature, the symbols of the Union, and above all the primacy that was originally found in Articles 1–6 of the Constitutional Treaty. However,

this primacy is hidden elsewhere: in the declaration attached to the Lisbon Treaty (No. 17), which allows the Commission and the Court to invoke it even more frequently.

In any case, the entire wording of the Lisbon Treaty lends itself to misinterpretation and systematic abuse of power by European institutions. States very unwisely, voluntarily or blindly, ratified this very poorly constructed and written text, full of contradictions, vague and long-winded terms, and even incomprehensible provisions.

If we take a closer look at Article 4, we see, for example, that the respect for national identities and the Constitution enshrined in paragraph 2 is immediately tempered by the obligation of states to take "any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union," as well as to refrain "from any measure which could jeopardise the attainment of the Union's objectives." These goals are described indefinitely in Article 3 of the Treaty, and include peace, values, prosperity, progress, sustainable development of the planet, etc. The objective for the Union is the happiness of the entire world. Similarly, the principle of proportionality is that the Union "shall not exceed what is necessary to achieve the objectives of the Treaties." The principle of subsidiarity also requires that in areas that do not fall under its exclusive competence, the Union should only act if the objectives of the proposed action can be "better" achieved at the European level, but the Union will always consider that its intervention "better" achieves the unlimited objectives of Article 3, which therefore functions as a veritable vacuum cleaner of powers.

Moreover, while the principle of conferral prohibits the Union from exercising powers not granted to it in the treaties, it must be acknowledged that the second Treaty on the Functioning of the Union describes the Union's powers and policies in such a general and vague manner, distinguishing between exclusive, shared and supporting powers, that there is practically nothing that cannot be excluded from its control.

And with the addition of Article 2 "values" and the European Charter of Fundamental Rights, which further restrict the powers left to states, it is clear that the system is becoming a vice, a veritable legal yoke imposed on European nations.

The last "invention" that makes it possible to cover all other compulsions is, of course, the rule of law (rule of law), as stated in Article 2 of the TEU.

The rule of law is a term coined by 19th-century German jurists that simply means a hierarchical normative system designed to provide legal certainty and avoid administrative arbitrariness by requiring officials and judges to make decisions based on general and impersonal laws that are equal for all. Thus, the public decision-maker makes decisions based on laws known to all, rather than according to his personal inclinations. Nothing else. The rule of law refers only to the hierarchical normative system, is a neutral, apolitical, formal and immaterial concept, independent of any "values" other than the rationality of public action. The rule of law can be monocratic or oligarchic, liberal, socialist or authoritarian. The hierarchy of norms is not a "value," and one wonders what the concept of the rule of law in Article 2 of the TEU is doing right next to human and minority rights – it is, after all, absurd.

Democracy implies the rule of law because it makes universal suffrage the source of law, and the constitution adopted by the people dutifully stands at the top of the pyramid of norms. The Constitution is above the laws passed by representatives, which in turn place themselves above the acts of the executive branch and its administration. But if democracy is the rule of law in principle, it cannot be said to work the other way: the rule of law is not necessarily a democracy, nor a liberal system. Nazi ideology used the concept of National Socialist *Rechtsstaat*.

However, European institutions have managed to reverse the hierarchy of norms prevailing in nation-states and give substantive content to the rule of law, confusing it with "values" in their own interpretation, i.e. in the progressive, multicultural Anglo-Saxon style dictated by non-governmental organizations (NGOs).

Since the establishment of the principle of supremacy of European law, including over national constitutions, any conflict between a national rule and a European norm is considered a violation of the hierarchy of norms and thus the rule of law. In fact, this notion is becoming a buzzword by which any national resistance to the ideology conveyed by European norms is labeled a "violation of the rule of law." Thus,

the use of this "value" will make it possible to annihilate paragraph 2 of Article 4 of the Treaty, which requires the Union to respect national identities and the basic functions of the state.

All the principles that govern the division of powers and protect the autonomy of member states thus give way to a distorted and invasive interpretation of the concept.

In conclusion, nation-states can only defend themselves against this anti-democratic normative invasion and its repressive arsenal in two ways. On the one hand, constitutional shields and a hierarchy of national norms that places the Constitution above European law must be firmly maintained: The Karlsruhe Court points the way to what the rule of law is and must remain, i.e. the primacy of states' constitutional identities over European law. On the other hand, it would undoubtedly be appropriate to take advantage of the procedure in paragraph 2 of Article 48 that allows for the revision of the treaties to "limit the competence" of the Union, and use it to eliminate all provisions that open the way to *ultra vires* jurisprudence and practices. But that's another matter, while any changes that would further increase these powers or reduce areas of unanimous decision-making should be rejected first.

What did Austrian jurist Hans Kelsen, who is widely regarded as the "father" of the hierarchy of norms and thus the idea of the rule of law in Europe, say? Well, he advised lawmakers to avoid using "phraseology involving the enshrinement of vague values and principles, such as freedom, equality, justice or equity," which could prompt a constitutional court to repeal a law as unjust and improper. He warned in advance that such a power of the court should be "considered simply unbearable". And this is what the wording of Article 2 of the TEU leads to: a government of judges that is unacceptable.

BASIC LITERATURE

Decaux E., *Les États-parties et leurs engagements*, [in:] *Convention européenne des droits de l'homme, ed.*, Louis-Edmond Pettiti, Emmanuel, Emmanuel Decaux, Pierre-Henri Imbert, Paris, 1995.

Dehousse R., *Naissance d'un constitutionnalisme transnational*, "Pouvoirs", 2001, no 96.

Mény Y., *Démocratie : l'héritage politique grec – Mythes – Pouvoir – Institutions*, Paris 2021.

Sartori G., *Théorie de la démocratie*, Paris, 1973.

Troper M., *Le concept d'État de droit*, in: *La théorie du droit, le droit, l'État*, Paris 2001.

Ghislain Benhessa

Upholding the primacy of the European Union with rule of law

Rule of law – everywhere and always

The January 6 United States Capitol attack carried out in 2021 by supporters of Donald Trump in an attempt to prevent the confirmation of the presidential election result prompted Joe Biden to say that it was "An assault on the rule of law … An assault on the sacred values of the United States." On November 29, 2022, when two rioters, members of the Oath Keepers, a far-right organisation were found guilty of seditious conspiracy by a federal court in Washington, representatives Bennie Thompson and Liz Cheney claimed that "The rule of law prevails!" Let us, however, cross the Atlantic Ocean and go to Europe, where the issue of the rule of law remains at the heart of numerous discussions, debates and analyses. The growing police brutality seen in numerous European countries? This, according to former Council of Europe Commissioner for Human Rights Nils Muižnieks, "poses a serious threat to the rule of law". The recurring lockdowns and curfews, which were enacted during the COVID-19 crisis? This only proves that the state of emergency is "becoming permanent" and that "the rule of law is one of the major losers of this crisis". Extending the mandatory health pass, which is what France sought to enact in order to encourage vaccination? This would "pave the way for the worst dystopian world, where facial recognition cameras will be checking our health data," as well as perpetuating the state of emergency, in the aftermath of which "the rule of law will be weakened and discredited even more than before". The concept of the rule of law is constantly invoked, often to sound the alarm about

the supposed authoritarianism of governments, and in some cases to praise the immateriality of rules and the unyielding nature of institutions.

While all of these hypotheses reflect the ubiquitous nature of that term in public discourse, they do not say anything – or hardly say anything at all – about the actual meaning of these words. The rule of law, usually talked about with certain gravitas, is just as inevitable as it is impenetrable. Many people see it as some sort of a talisman, an amulet to protect us from times of turmoil. This is evidenced by the inspired words of French Minister of Justice Eric Dupont-Moretti, uttered in the National Assembly chamber on June 2, 2021: "The rule of law is like happiness. We understand what it stands for when we lose it". For others, the sanctity of the rule of law is tantamount to a fantasy of an ideal, which has nothing to do with reality, kow-towing to a supposedly infallible and therefore untouchable legal construct. In the aftermath of the bloody terrorist attacks in 2015 in France, the former French president Nicolas Sarkozy criticised the inertia of the rule of law, blaming it for the tragedy that unfolded, dubbing it "Tablets of Stone carved on Mount Sinai". In doing so, he referred to the threat of inability to shift the balance between security and freedom, even in the situation when the country faces an Islamist threat.

Europe – the epicentre of discord

The concept of the rule of law plays a major role in European institutions. On March 8, 2023, MEP Sophie in't Veld, chair of the mission of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament, spoke during a press conference in Athens: "Although Greece has a solid institutional and legal framework, vibrant civil society and independent media, the delegation notes that there are very serious threats to the rule of law and fundamental rights". The politician cited the fact that a small number of oligarchs own most media in the country, violations of freedom of information by journalists and the influence of the executive branch on the functioning of the judiciary as reasons for this diagnosis.

In a broader context, for a number of years now, there have been ranking lists of countries classified according to criteria related to respect for the rule of law. An example of this trend can be seen in the European Commission's annual report on the rule of law situation in the European Union, which praises some countries, while pointing the finger at those that perform poorly. For example, on September 30, 2020, the Commission criticised Hungary for its "consistent lack of determined action to start criminal investigations and prosecute corruption cases" and the government's "indirect political influence over the media". Poland was admonished for "increased risk of adopting laws which endanger the respect of fundamental rights, the rule of law or democracy", while Romania found itself in hot water for "widespread use of government emergency ordinances" and failure to ensure separation of powers and "legal certainty". In addition to the above, in July 2021, the Commission decided – in the name of the rule of law – to initiate infringement proceedings against Hungary for its law banning the "promotion" of homosexuality to minors, and against Poland for the "LGBT ideology-free zones" and the "Charters of Family Rights" adopted by approximately a hundred municipalities. The conflict between the European institutions in Brussels and the Visegrád Group countries – Poland, Hungary, Czechia and Slovakia – has been going on for the past decade, with Malta, Romania and Slovenia also being criticised from time to time. We see two Europes clashing over issues of migration, sovereignty and cultural identity, and the rule of law is one of the battlegrounds, with the courts – both European and national – standing on the front lines.

Duel for the rule of law

The aforementioned conflict over principles is the starting point for numerous debates concerning the future of Europe. In one corner, we have the European Union, which – as Alexandre del Valle put it – is a kind of an UGO, an *unidentified geopolitical object,* which imposes its laws over the legal systems of its member states. Up until the end of the 2000s, the control maintained by the EU was based on the principle

of the primacy of Community law, but this has changed since. These days, the authority of the European Union is founded – as the Court of Justice of the European Union (CJEU) put it – on the basis of the "common values on which the European Union is founded", chief among them being the rule of law. The position of the European Commission and the CJEU on this issue is clear: any refusal to apply EU law is a transgression against the rule of law. In the other corner, we have numerous critics of this fledgling imperialism, who are active not only in the world of politics, but also in legal circles. In addition to the notable declarations by Viktor Orbán, who – seeing the actions of the European Parliament against Hungary as "blackmail" – stated that he was the "last defender of a Europe based on the nation, family, and Christianity, and the fight against migration" some courts of Member States, and not just peripheral ones, are also resisting. Take, for example, the Romanian Constitutional Court, which, in its June 8, 2021 decision stated that the Romanian national constitution "retains its hierarchically superior position … does not give EU law priority over the Romanian Constitution". According to the judges in Bucharest, the idea is simple – the rule of law means a hierarchy of laws, a pyramid crowned by the constitution, a key legal act in any sovereign nation.

This is the interpretation of the rule of law that the European Union fears – thus, it does its utmost to ignore it to frame the concept in a manner that it finds suitable – since it allows the EU to enforce its values derived from this vision of the rule of law and briefly described in Article 2 of the Treaty on European Union. In the past, the principle of primacy of Community law provided the basis for treating it as superior to national legal systems. Today, the rule of law is being used by the EU as a backdoor to assert a sovereign status.

I. Primacy of Community Law vs Sovereignty

The genesis of sovereignicide

Since the 1960s, the Court of Justice of the European Communities (renamed CJEU in 2009) gradually became the controlling entity for the laws enacted by Brussels. Without delving further into the historical details of this institution, a few points should be noted. In 1963, the Court stated that "The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals". A year later, the Court stated that "The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail". From that moment on, Community law takes precedence over all national laws, regardless of their significance and place in hierarchy. The Court of Justice went on to say that national courts are under a duty to repeal any provision of national legislation conflicting with the Community law, even if adopted subsequently and that "it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means" Since the national courts are obliged to uphold the primacy of the European Union legislation, such courts indirectly become advocates and enforcers of this principle. In 1991, the Court stated that "full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible". The Luxembourg judges thus opened the way for citizens to take action against their respective states for failing to comply with the Community law.

The moral of the story is clear. The cited judgements followed one another, forming a constellation of rules that would be used as a legal leash, gradually tightened around the necks of the member states.

The Community law gradually reduced their options to the point where it overturned national legal orders step by step, to paraphrase the methodology pursued by Jean Monnet and Robert Schuman. National courts were to surrender under the guise of "inter-court dialogue," as Bruno Genevois put it. Starting with the French Constitutional Council, which entrusted ordinary judges with the task of reviewing the compatibility of laws with European and international law, thus validating the supremacy of Community law as envisioned by the CJEU, through the Court of Cassation, which launched a conventionality review aimed at repealing French laws that were in opposition to European standards, all the way to the Council of State, which also joined the process sometime later. The functionalism of the technostructure in Brussels, designed in such a manner by its founding fathers and then activated by the action of its courts, has broken through the protective membrane of the member states. In the end, it turned out that the sanctity of the constitution, which was theoretically the top law in the hierarchy, had little meaning in the face of the encroachment of the *acquis Communautaire*, the body of legal rights and obligations binding the member states. In the quiet courtrooms, the judges committed what Anne-Marie le Pourhiet called an actual sovereignicide. It was an assault on the sovereignty of nations.

Revolt of German judges

In essence, it is of little significance whether it was a deliberate legal and political "crime." The reality of the matter is that a new hierarchy of laws was imposed, leaving behind the good old principle of the supremacy of the constitution, thus ensuring the permanence of the paradigm of the inherent primacy of European law over national law. That is why the German Constitutional Court's ruling in the midst of the health crisis was a real bolt from the blue. It was almost as if at the time when Europe was dreaming of coming together in the times of turmoil, German judges outright tried to stir up discord and called for rebellion.

On May 5, 2020, the German Constitutional Court invalidated the debt buyback program launched during the 2015 Eurozone crisis

by the European Central Bank (ECB) under Mario Draghi. The court criticised the CJEU for approving a massive cash injection aimed at the financial markets that threatened German pensioners' savings. With seven voices in agreement and just one opposing opinion – virtually unanimously – the Karlsruhe judges found that the ECB had violated the principle of proportionality, exceeded the scope of its intervention, and that the CJEU's judgement itself was "objectively arbitrary." Describing the judgement issued by the CJEU, the German Constitutional Court did not mince words and mentioned, among other things, "vanishing comprehensibility," "methodological inadequacy" and "incomprehensible and therefore arbitrary interpretation of the treaties." These words echoed across all of Europe and evoked a sense of horror. While foreign court rulings rarely lead to debates in the press, this time around everybody decided to weigh in. According to *Le Monde*, German judges run the risk of "fuelling nationalist movements that are already working to divide Europe at the worst possible moment, which might spell tragic consequences". In academic circles, a group of scholars protested against the stance of the German court, which was seen as "dangerous due to the rejection of the uniformity in application of the EU law" and as demonstrating "an utter lack of a sense of the adequacy of jurisprudential policy … in the area of European integration". The Karlsruhe judges are portrayed as irresponsible at best, while at worst they are depicted as conspirators whose goal is to subvert the masterfully-executed European structure.

And yet – and this is the lesson to be learned from this incident – the German judges simply affirmed the supremacy of the national constitution over the European treaties. What is more, they were merely following the line of argumentation already presented in 2009 during the evaluation of the Lisbon Treaty, when the same institution stated that states "rule over treaties" and that "only nations … can dispose of their constitutional authority and their sovereignty". If the European Union accelerates its transformation into a federal state, further reducing the autonomy of member states, the German government will be forced to consult with the people in the form of a referendum. The moral of the story is as follows: The Constitutional Court simply applied

the rule of law to the letter, reminding us that the Constitution remains the supreme legal act. It forms the keystone of the pyramid of legal standards and regulations and the final word belongs to the sovereign nation. German judges may have betrayed European functionalism, but they nevertheless stuck to a strict reading of the rule of law in its original definition.

II. Rule of law, the final ratchet

Offence and a moral

The German revolt left such an impression due to the fact that the dissent stemmed from the state that usually leads the way in building a united Europe, in addition to the fact that the dissenting voice came from the German Constitutional Court, which is famous for its meticulousness. In reality, however, the German objection summed up the dispute concerning hierarchy, a dispute between the primacy of Community law, shaped by the Court of Justice in Luxembourg on the one hand, and on the other, the supremacy of the Constitution, which was reminded by the Karlsruhe judges. In reality, the key battlefield of the official battle over the rule of law is taking place in Eastern Europe – in the conflict between the European institutions and the Visegrád Group member states. It is no coincidence that the rise of the rule of law coincides with the popularisation of the so-called illiberal regimes. Almost as if the European Union saw these new enemies and fashioned itself a new shield made of metal in the colours of the "values" of the rule of law.

Admittedly, already back in 2010, the CJEU stated that "integrity of the person and to individual liberties (are) issues which relate to the fundamental values of the Union". However, it was not until 2014 that a major shift began in this area. In Opinion 2/13 concerning accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the CJEU stated that the European legal structure

> is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded … That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

Since then, the rule of law and the associated values were officially added to the CJEU's toolbox. It is no longer just a concept written in legal texts, but an "inescapable assumption", a "necessity" for the existence of "mutual trust" between member states; above all, however, the respect for the rule of law means "respect for the EU law that implements it." The CJEU's reasoning is clear – a refusal to uphold the supremacy of EU law is tantamount to ignoring the rule of law. This is what is the most subtle about this power grab – the rule of law allows the European Union to make its laws supreme once and for all.

It was on this ground that the dispute between European institutions and Central European states intensified and grew more urgent. Brussels has a powerful tool at its disposal to combat illiberal democracies – Article 7 of the Treaty on European Union. It was invented by Jean-Claude Piris, a former member of the French Council of State and now Director General of the Legal Service of the Council of the European Union, dubbed the "man of the five treaties", after being involved in the drafting of the texts of the Maastricht, Amsterdam, Nice, and Lisbon Treaties, as well as the European Constitution of 2005, which was ultimately abandoned. The aforementioned Article 7 provides for two mechanisms in case a state does not respect the values listed in Article 2 of the Treaty on European Union. One concerns a preventive element in the event of "a clear risk of a serious breach", which requires a vote of majority of four fifths of the members of the European Council, as well as the approval of the European Parliament. The other concerns sanctioning the offending member state in case of "a serious and persistent breach" – this requires a unanimous decision of the entire European Council. On December 20, 2017, the Commission invoked

Article 7 for the first time in its history and called upon the Council to impose sanctions on Poland in connection with the reforms carried out by the government of the conservative Law and Justice party, which allegedly threatened the independence of Poland's Constitutional Court. On September 12, 2018, the European Parliament urged the Council to impose sanctions on Hungary in connection with the threat that the government's reforms could pose to the country's constitutional and electoral system, the independence of the judiciary, freedom of expression, minority rights and the fundamental freedoms of migrants, asylum seekers and refugees.

Leaving aside the substance of these issues, the key issue at hand is the exponentially growing power the European Union is exercising in the name of the rule of law. First of all, this gives rise to the emergence of a true government of courts. In addition to the procedural issues and the question of impartiality inherent in the functioning of a good judiciary, the CJEU does not hesitate to stigmatise national laws concerning the control of foreign aid disbursed to associations under the guise of defending the free movement of capital. In a broader context, the scrutiny of the CJEU makes sense in light of the "club sandwich" – Article 2 of the Treaty on European Union, which vaguely links the rule of law with "democracy," "human rights," "tolerance," "protection of minorities," or "solidarity and equality between women and men." There is nothing worse than a stylistic clause, in which the precision of terms bends under a set of complex precepts that are just as vague as they are virtuous. Above all, however, the fact that the Union marches under the banner of the rule of law is nothing more than the ultimate underhanded manoeuvre in a process that has been going on for decades, serving as a ratchet effect par excellence, to use a concept from the EU legal lexicon. Until now, Europe has claimed the supremacy of Community law in the name of integration, a functional project initiated by its founding fathers; however, these days it is displaying its omnipotence in the name of moral values, thus rejecting all substantive criticism and delegitimising any dissenting voices. Only by fully adhering to its principles and rules can a country actually have the rule of law. Hence the statement that Jean-Claude Juncker used in his 2017 State of the Union address:

"Respecting the rule of law and abiding by court decisions are not an option but obligation". On the other hand, if you dare to uphold your national constitution, you will be chastised as a country hostile to the rule of law, which is deficient in the areas covered by universal values such as human dignity, the protection of fundamental freedoms or the defence of minorities. The rule of law is a moral wolf trap in the European Union, which turns political opponents into lawless enemies.

Democracy and sovereignty in the dustbin

In other words, this new primacy rooted in morality allows the European Union to fill its ontological gaps. After all, "Europe's defining characteristic is, one might say, its lack of an identity of its own"; what is more, Europe has "relegated its religious and humanistic heritage to a state of historical past" to the extent that it denies its "Christian roots," which were removed from the preamble of the European Constitution in 2004 – in its stead, it has found a replacement identity in the form of the rule of law. Starting with the establishment of the European Economic Community in 1957, which gave rise to the single market, all the way to concluding the Maastricht Treaty in 1992, which made the European Union what it is today, Europe was founded on open markets and the free movement of workers, capital and goods. It was intended to be an extensive free trade zone; however, this strictly economic basis was not sufficient to justify the primacy of its laws and the expansion of its legal structure. Europe had to find itself a banner, a reason to justify its dominance, which is where the rule of law emerged as a solution. By positioning the European Union – backed by its Court of Justice – as a paragon of human dignity, freedom, human rights or the right to non-discrimination, the notion of rule of law merely camouflages its imperialist aspirations. Thus, even if the European Union does not have the competencies – as the traditional definition of sovereignty has it – which remain in the hands of its individual member states, the flexibility and pliability of the concept of the rule of law endows it with numerous avenues to exercise its power. If the "rule of law is a prerequisite for

an effective Union founded on law" and by definition means respect for the entire body of EU law, then even the slightest deviation from the "liberal-libertarian creed" of the rule of law is like a blow to the very heart of the Union. Thus, Europe positions itself as de facto sovereign, with the rule of law being its sacred parchment and the Court of Justice being the sword of punishment.

However, this self-made sovereignty is hardly the only blind spot. In the text of Article 2 of the Treaty on European Union, the rule of law is indeed linked with democracy, alongside a whole host of other values. However, as Jean-Eric Schoettl, former Secretary General of the French Constitutional Council, concludes, "the subordination of law to treaties, to acts of secondary law and to the decisions of national and supranational courts leads to a democratic impasse … it is an attempt to create democracy by means of laws, rather than to create laws by means of democracy". The European hierarchy of norms banished any idea of national sovereignty – it is a set of rules approved by the courts, without any consideration for their universal legitimacy, which is a major structural gap. There is no place for the people in this constellation of norms concocted in the spirit of conformity. Legitimacy does not matter – all that matters is legality. By promoting the law "without the people and against the state" the concept of the rule of law understood in that manner condemns nations to the dustbin of history. So much so that it is trying to convince the people that the Saint-Simonian principle apparent in all supranational institutions – that democracy can exist without the *demos* – that is, that the formulation of laws takes precedence over their popular adoption through a vote – is right. The rule of law as seen by Brussels is not an ally of democracy – but it will spell its legal death.

BASIC LITERATURE

Bernhard A., Bilan géopolitique avec Alexandre del Valle, "Le Regard Libre", July 2022.

Engels D., *Le Déclin. La crise de l'Union européenne et la chute de la République romaine – quelques analogies historiques*. Editions du Toucan, 2012.

Guichoux A., *L'état d'exception est un puissant analgésique, tant pour la démocratie des urnes que pour la politique de la rue*, "Le Monde", March 1, 2021

Ippolito F., Quel contrôle du respect de l'Etat de droit ? *It takes two to tango!, "Revue trimestrielle de droit européen"*, 2019.

Koenig G., *Comment l'extension du pass sanitaire mine l'Etat de droit*, "L'Obs", July 16, 2021.

Obadia C., *L'Europe, l'Europe, l'Europe ? C'est d'abord une civilisation*, "Le Figaro", July 8, 2016.

Mangenot M., *Chronique de l'administration européenne*, "Revue française d'administration publique", 2019/3, no. 171.

Platon S., *Les fonctions du standard de l'Etat de droit de l'Union européenne*, "Revue trimestrielle de droit européen", October 2019.

Pourhiet le A.-M., *La limitation du pouvoir politique : la garantie des droits subjectifs face à la démocratie politique*, "Revue française de droit constitutionnel", No. 102, February 2015.

Schoettl J.-E., *La notion européenne d'Etat de droit et les souverainetés nationales*, Fondation Res Publica, February 2022.

Tavoillot P.-H., *Démocratie par le droit ou démocratie par les voix : il va falloir choisir*, "Le Figaro", September 19, 2022.

Tassel E., *L'état d'urgence sanitaire est plus liberticide que l'état d'urgence classique*, "L'Express", May 2, 2020.

Jarosław Szymanek

Downplaying of the role of Member States: competence creep and state bypassing in decision making in the European Union

The European Union, as any other organisation, has been evolving. It is a natural need of necessary adjustment of a given organisation to current challenges which are never constant. However, in the case of the European Union, this evolution has been intensifying for some time and, moreover, it has been more frequently observed in practice, while treaties have remained relatively stable (the last interference in the primary law was, in fact, in 2009, in the Treaty of Lisbon). In effect, it is not an overstatement to say that the European Union, despite its strong, since treaty-based, framework for operations, is, in a way, an underspecified, *in status nascendi*, structure. The procedural essence of the Union consists in the pending process of 'becoming', which means that in terms of epistemology the Union has not yet been described fully, and the definition and explanation of Union decision-making processes fall behind the process of changes happening in the EU. The latter always precede legal regulations, which – as experience suggests – register changes that have occurred in the practice of Union institutions' operations with a significant delay. In fact, a lot of Union functioning mechanisms are first established in practice and then 'inserted' in treaty regulations, taking on the form of binding *de lege lata* solutions. Therefore, it can be safely said that while analysing the phenomenon of the European Union, each researcher faces a kind of 'epistemological chasing of the Union', the actual operating mechanisms of which precede formal grounds of operations.

It generates searching for new terms, new concepts that would best reflect the sense of changes and primarily, would balance the functioning of the Union with what is set in a book and what is seen in action.

Therefore, measures undertaken by Union institutions, which show the dissonance between what the Union can do and what the EU actually does, have been professionally defined as 'competence creep' and 'state bypassing'. Both concepts are, obviously, not reflected in the treaties, yet, they paradoxically precisely describe the functioning of Union institutions by showing the disproportion between formal and actual sides of their operations.

Let us start with the phenomenon of competence creep diagnosed as the first one. It has been observed for a long time and its essence consists in the possibility, despite all, to constitute the law or other effective measures in the areas, in which the Union has not been granted competence. In other words, competence creep is a phenomenon that boils down to setting the rules for the Union game binding both the Union and the Member States (in the form of law or political decisions), appearing through the backdoor in this way. It is underlined that thus named phenomenon has a dual course. On the one hand, it concerns positive measures oriented on the Union and its institution. Whereas, on the other hand, it concerns negative measures addressed at Member States. While the former boil down to the gradual development of Union competences and *ultra vires* measures, i.e. outside competences granted to the Union, relatively at the verge of these competences, negative measures are focused on narrowing the possibilities of undertaking measures by Member States. Therefore, the positive method consists in maximising competences of the Union and its authorities, whereas the negative method consists in minimising the role of Member States.

Thus, in the case of competence creep, the aim is to slowly shrink the area, which, from a formal point of view, remains an exclusive competence of Member States, or – at the very least – is included in the set of shared competences. In both cases, a phenomenon of 'an occupied field' occurs, which the Union institutions, if they succeed in taking it, do not give up, even if it is not reserved for the Union under any treaties.

It is worth indicating that we have dealt with the phenomenon of competence creep in the Union, and previously in Communities, since forever. On the one hand, this is a natural element of the internal institutionalisation of any organisation, *telos* of which sets reinforcement

and consolidation of its own structures and possibilities of operating, and, on the other hand, this is a process especially characteristic (intensified) for the integration process in Europe. The latter has been gathering a very unequivocal direction i.e. from a Member State to supranational structures, which are gradually reinforced both with a formal method (by adopting new treaty regulations), and a factual method consisting in the properly profiled practice (that is, in practice, the recognition of a field of interest to the Union institutions, which is later on occupied and then petrified by a relevant amendment of the treaty, which, in this case, usually only 'ratifies' previous practical measures). In order to legitimise *ex post* this type of Union measures, the conception of the so-called complementary competence has been adopted. We deal with it when harmonisation of national provisions is not possible and, at the same time, it is assumed that Union measures do not 'supersede' national competences. Therefore, paradoxically, it is assumed that the Union operates in a certain area; however, this operation does not, at least *de iure*, narrow or, in any other way, limit measures undertaken by Member States. The Union does, in fact, operate only complementarily, and the competence still, officially, remains with the Member State. By legitimising complementary competence, it is underlined that in such a case the Union's measure at most repeats competences of the Member States, which remain solely within their authority. Thus, the Union does not take anything, does not curtail anything, yet, at most, supplements the measures of a Member State in order to achieve the synergy effect, which gives a better, holistic, result.

By referring to the concept of complementary competence, competence constellation was created and accepted in the Treaty of Lisbon, with the aim of securing Member States against eroding them from their vested competences. Nonetheless, in practice, this 'competence constellation' has not solved the issue of competence creep, *ergo* it has not secured Member States against the Union's interference in areas, which have not been explicitly entrusted to it. Furthermore, some argue that the construction of complementary competence only validates the phenomenon of competence creep which, as it seems, is inscribed in the integration logics, the essence of which are, in fact, deeply integrated competences

at the European level. Therefore, sometimes, it is added that the source of the competence creep is not limited to the abuse of functional powers of the European Union, even if it is actually, in its scale, a serious issue. The actual cause thereof is, in fact, the political teleology of the Union and praxeology of its functioning. The latter is set by the basic principle, namely, effective governance, which means that, realistically, no single area or single issue can be hermetically sealed from European integration. At the strictly normative level, it means that competence of Member States, in one way or the other, must be finally aggregated by a supranational structure, since only this will bring an effect of efficient operation in the political area. It seems that this belief is to substantiate and justify the phenomenon of competence creep by arguing that it is inscribed in the logics of the European integration process, the course of which – apart from formal and transparent mechanisms – has to be supplemented with factual mechanisms, which are not fully visible and obvious. Therefore, it is suggested that the 'back door' integration is not, however, a dysfunction of the Union, yet, a necessary element of success of the integration objective.

While analysing the phenomenon of competence creep, it is indicated that it has several sources. The first one being adopting legislation by the EU which has an indirect impact on another area. In consequence, the European Union adopts a specific regulation, *prima facie* concerning the unquestioned area, i.e. remaining at the authority of the Union legislation, yet, in a way 'on the occasion', the adopted regulation also includes, to a smaller or larger extent, regulatory areas that remain outside of the Union competence. The second one being judicial decisions that in many cases extend the scope of the Union's operations outside areas precisely set by the treaties. It especially concerns the Union's institutional provisions which are more and more often correlated with provisions stipulating subjective rights, which results in areas formally excluded from the measures of Union institutions to be – *nolens volens* – covered with the European Union measures. A first example can be the issue of judicial independence, which is *expressis verbis* a regulation covered with the scope or exclusive competences of Member States, yet, by extensive interpretation of the right of an individual to a fair

trial (subjective right), it has been extended to institutional provisions, which the Union has 'appropriated' by recognising its competence in the scope of stipulating the judiciary in Member States. Another example of a judicial mechanism of competence creep can be the famous decision of the Court of Justice of the EU in the case of Bosman, 1995. Although, the Union has never had any competence to stipulate law in the area of sports, the Court of Justice stated therein that sports is a specific manifestation of business activity and, as such, is subject to the Union law, even in the part concerning free movement of employees. In consequence, one of the results of the decision in the case of Bosman was that the number of foreign players from the EU, playing in one team, could not be limited, which used to be a standard clause e.g. concerning football teams. The third source of competence creep is the intensifying conclusion of international agreements by the European Union and joining various regional covenants, which are e.g. not accepted by at least some of the Member States. The European Union's accession to such an agreement results in each Member State being bound by the provisions thereof, which obviously restricts their freedom of action. Here, the most recent example is the declaration of the European Union's accession to the Istanbul Convention that is the Council of Europe Convention on preventing and combating violence against women and domestic violence. Currently, the Convention has been included in their legislation by the majority of the Member States; however, in some States the Convention has been recognised as non-compliant with the constitution (Romania) and, in others, it has not been finally ratified despite having been previously signed (Bulgaria, the Czech Republic, Slovakia, Lithuania, Latvia). The European Union, the political agenda of which fully coincides with the contents of the Convention, wanting to force Member States to include the Convention in their particular legal systems, takes steps to bind the Union as such with the provisions of the Convention, which will *ipso iure* cause its binding force also in the States, which have been reluctant. Another, fourth source of the phenomenon of competence creep is the so-called soft European law. The soft law is especially willingly used in the European Union while stipulating various guidelines, recommendations, propositions or standards.

Formally, they are not binding; however, in practice, adherence thereto is strived for by the introduction of various mechanisms of evaluation and assessment of given areas of politics in implementation by the Member States. The fifth source of the competence creep comprises various aspects of economic management such as, for example, aid packages, which are related to certain terms and conditions that must be met by the Member State in order to be a beneficiary of aid measures. Here, the best example is, of course, the Next Generation mechanism and related national recovery plans that are, in fact, the instrument used by the European Union to enforce various legislative and non-legislative measures undertaken by the Member States which will be compliant with the political line of Brussels. Finally, the last one last, sixth source of the occurrence of competence creep is, which may seem incomprehensible, the approach of the Member States themselves. Undisputably, national governments are also responsible for the competence creep. This has been caused by the fact that e.g. a lot of 'Union' measures for combating the crisis in Europe have been, in fact, adopted by the Member States upon their request. For instance, the European Stability Mechanism. Although all members of the Euro zone are a part of it, it was established by the governments as a new intergovernmental organisation which was supposed to generate cooperation and coordination of fiscal policy. Governments of Members States are also responsible for the fact that 'soft law', the power of which is based on the shame of not following one's non-binding commitments, often originates from the so-called 'Open Method of Coordination' between governments of Member States, which can result in far-reaching changes in internal systems of these states. Responsibility of the Member States for the spreading of competence creep is also sometimes an effect of the Member States that, wishing to implement an unpopular or controversial solution, prefer to include it in the Union agenda, since in this way, its further implementation is carried out within performance of the Union law and not independent activity.

While analysing competence creep sources, specific manifestations and consequences, it is emphasised that competence creep selects a group of 'winners' and 'losers'. Seemingly, this group is obvious, since the European Union and its institutions are on the side of winners, whereas,

Member States whose competences are slowly, yet, consequently, shrinking are on the side of losers. Nevertheless, such an image is dangerously flattening relations between the EU and Member States. In fact, in reality, competence creep winners are primarily the national and European executives as well as national and European courts, which are growing in power and influence to the extent that, today, the courts, and especially the Court of Justice of the EU is the 'Master of the Treaties', a phrase which has been for years referring to Member States. While Member States are not necessarily on the side of losers in the competence creep process, rather their parliaments are which are gradually losing the scope of their legislative power, as it is 'Europeanised' and transferred to the European level, as well as the level of strictly executive regulations that remain the domain of the executive legislation. Therefore, the issue of competence creep cannot be perceived only as a legal issue that boils down to 'exceeding competences', but rather as a political issue that affects the ontology of the integration process. In fact, in essence, competence creep is a democratic issue. First of all, competence creep does not have legal legitimacy. Secondly, it is very often non-transparent and usually observed only *ex post*. Thirdly, the beneficiaries of this process are the authorities that do not have sufficient democratic legitimacy i.e. governments and courts. While authorities classically perceived as democratic (parliaments) are a 'victim' of the competence creep process, which minimises their legal and political position.

Of course, in its details, the phenomenon of competence creep is much more varied and complex. Moreover, it also causes doctrinal disputes, however, not concerning the essence of the phenomenon, but rather its proper definition and certain and unquestionable indication of what exhausts the concept of competence creep and what is an element outside of thus specified set. Despite pending disputes, it can be assumed that the concept of competence creep means the capacity of the European Union to act in areas in which it has not been directly granted any competence. In effect, competence creep is, in other words, a systematically extended decision-making scope of the Union (a definition in a political science), or – to put it differently – slow erosion of the normative contents of Article 5 of the Treaty on European Union (TEU), which *expressis*

verbis stipulate that 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein' (a legal definition). It should be added that according to the TEU 'competences not conferred upon the Union in the Treaties remain with the Member States'. It is worth remembering that thus formulated principle of conferred competences is, at the level of the TEU, additionally secured with the principle of subsidiarity and proportionality. The first one meaning that 'in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (Article 5 par. 3). Whereas, 'under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objective of the Treaties' (Article 5 par. 4).

It should be noticed that, although *telos* of both principles co-existing with the principle of conferred competences, i.e. the principle of subsidiarity and the principle of proportionality was different, i.e. it was supposed to act to the benefit of Member States by acting as their shield in possible competence-related disputes with the European Union, unfortunately, the practice went in a completely different direction. In effect, dispositions of provisions installing both principles are today a kind of a trampoline for the phenomenon of competence creep, that is, conversely, the phenomenon of shrinking competences of Member States. It especially concerns the principle of subsidiarity which, in fact, due to its pivotal nature reversed its meaning and normative sense attributed thereto. From *a priori* principle protecting Member States against the Union's interference, it became a principle masking measures undertaken by the Union in the area of non-conferred competences. As a result, disposition of the provision of Article 5 par. 3 of the TEU was subject to far-reaching transformation and became one of many gateways to introduce competence creep. In consequence, subsidiarity proved to be, from the point of view of protecting interests of Member States, a treaty Trojan horse, since it only seemingly protects

Member States against the extension of EU measures, while, if in not if fact, in the shape in which the principle of subsidiarity is authorised under Article 5 of the TEU, it constitutes a basis for measures exceeding conferred competences 'in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States' or 'by reason of the scale or effects of the proposed action, be better achieved at Union level.' It should be remembered that, in a political sense, what is better and more efficiently achieved by the Union is decided on by the Council and the Commission, and in a legal sense – by the CJEU.

In conclusion, it should be regrettably stated that both the principle of subsidiarity and proportionality, which in the treaty version mean that 'Union action shall not exceed what is necessary to achieve the objective of the Treaties', became the driving force for the phenomenon of competence creep. Instead of protecting the Member States, they achieved a status of a treaty permit to the Union's measures outside the areas directly vested in the Union, provided that such measures are considered necessary, better, and primarily more effective. Therefore, competence creep, which has not been forecasted by anyone in the course of constructing the treaties, are paradoxically based on the principles which were originally intended as the weapon of Member States. Sadly, the saying that 'he who lives by the sword shall die by the sword' came true. Member States were fighting with the principle of proportionality and especially subsidiarity, almost flaunting them as an emblem of respecting their sovereignty in the conditions of integrating Europe, while both of these principles struck them, effectively extending the area of the Union's activity. It seems wrong in this case to delude oneself and put emphasis only on the one side of the interpretation of the principle of subsidiarity. While commenting on this principle, its defensive potential, indicating that the Union cannot act if the Member State in a given area manages better, was, in fact, underlined. It was, therefore, naively believed that subsidiarity protects Member States against the Union's actions. Simultaneously, it was forgotten that this principle has an equally important offensive potential, in compliance with which the Union takes action, if necessary or more effective for implementation. It is not particularly needed to argue that the practice of applying Article 5 of TEU

proves best that the offensive potential of the principle of subsidiarity has been emphasised, as if forgetting about its primary protective function towards Member States. As a side note, it is worth mentioning that we deal with a similar interpretative conversion in the case of Article 4 of the TEU and the famous principle of respecting the constitutional identity of Member States. It was also a kind of shield protecting these States against unauthorised interference resulting directly from the treaty directive of respecting basic constitutional and political structures of Members States, while consistent judicial decisions of the CJEU slowly, yet, effectively eroded the principle of constitutional identity, gradually narrowing the concept of identity and, primarily, separating its relation to the constitutional system, which is *prima facie* contrary to the *nomen omen* constitutional identity.

It is worth noticing that the phenomenon of extending Union competences, which have never been directly vested in the EU, is accompanied by the maximisation of the so-called aim of the European Union, which has become the guidepost for measures of all Union institutions. It is even indicated that in the case of the European Union, the aim is, in fact, a brutal tool, which 'depletes Member States in terms of competences' by interfering in their autonomy. The aim, especially treated instrumentally, leads to giving up an autonomous identity and subjecting to the aim, as well as, obviously, to the entity defining this aim. Therefore, the phenomenon of competence creep is critically reviewed, since due to this instrument being, in fact, illegal and democratically illegitimate, it sways the European Union's legal construction rooted in treaties.

The aim of the European Union, which is supposed to justify, among others, competence creep, is currently unequivocally identified as *plus d'Europe*. As a result, among the interpretations of treaties, the teleological and functional interpretations prevail, while other interpretative techniques (e.g. historical interpretation) are of a secondary significance, which drives the phenomenon of competence creep even more, especially when correlated with the conception of the autonomy of legal concepts and terms, adopted on the grounds of the European Union. The latter are more and more often given separate significance that differs from the one known from particular national systems, which are often strictly

instrumentally directed in such a way as to serve the idea of reinforcing the European Union.

Whereas, the substance of such interpretation comprises general legal principles of the EU, which, as has been noticed, are, in principle, interpreted unidirectionally, i.e. from the Member State to the EU, which results in the Union undoubtedly gaining in the balance of principles and values the status of an asymmetric structure at the expense of Member States. It is primarily caused by the fact that in the interpretation of treaties, the aim of the Union and legal principles of the EU, the Union is seen in the foreground as such, and not the Member States. From this point of view, interpretative techniques are explicitly pro-Union, and with reference to Member States – ambivalent, to say the least. The above is best proven by two basic aims of the European Union, i.e. development of the Union and its effectiveness. Both aims are, in practice, interpreted in the same manner, i.e. as intensification or reinforcement of the integration, since it best represents the development and ensures the effectiveness of the EU. Therefore, the aims of the Union, i.e. its development and efficiency, do not leave any alternative. All mechanisms, both legal and practical, which act *in plus* for the European Union and its institutions, and, at the same time, *in minus* for Member States, will always be more effective and developmental. The unquestioned *telos* of the Union is its maximisation and it always means simultaneous minimisation of Member States.

In practice, competence creep takes on various forms. For example, legislation which is gradually covering new areas, which have not been foreseen in the treaties. Another, the most visible or even vivid, form are the judicial decisions of the Court of Justice of the EU, which uses the aim of the Union and is becoming more and more active and thus, gradually unfavourable to the Member States. It is proven by the issue of a dispute on the primacy of the constitutional or Union law, which was not, for a long time, unequivocally solved, and the courts of both parties (i.e. the EU and Member States) applied against each other a kind of mutual deterrence policy, which meant that none of the courts dotted the i's and crossed the t's, thus leaving the unspecified area, which, to a certain extent, satisfied both courts of Member States and the CJEU. Today, as

we know, among others, based on the dispute on the so-called legitimacy of the CJEU, the primacy of the Union law is more and more often decidedly and unequivocally supported, also with regard to its relation to constitutions of Member States, while using, among others, the aims of the Union, i.e. establishment and development of cooperation, and assuming that without recognition of the primacy of treaties, also with regard to constitutions of Member States, achievement of the Union's aims is hindered or even impossible. Another form of competence creep are international agreements concluded by the Union with third countries and other international law entities, especially in the economic area, which are increasingly narrowing the significance of Member States and, in many cases, making them only the addressees and executives of contractual obligations. Furthermore, a form of competence creep are also more and more numerous acts of soft law of the EU, generating recommendations, standards, expectations and guidelines regarding Member States, which the latter are trying to respect, mainly due to political reasons, and not wishing to be put at risk of Union ostracism and decreasing the so-called Union rating, which is *nomen omen* also not that clear and based on transparent criteria, and which is a form of competence creep as well. It intuitively requires adjusting to the Union form, even where the State does not have a 'hard' obligation, since it authenticates the State on the European Union forum and, as a result, makes it possible to be a beneficiary of various financial support programmes. Finally, a form of competence creep is the administrative practice and various political measures, which gained the name of the so-called parallel integration which takes on a form of various guidelines and Union policies gradually narrowing the role of Member States.

All of these forms make a so-called 'covert integration', which causes acceleration and centralisation of the European Union's measures and, in feedback, generates pressure on amending treaties, which is allegedly supposed to favour the convergence of Union policy and law, which are consecutively separating, taking into account the factual and formal dimension of integration. The competence creep is related to this elementary component of a much wider and more dangerous process of covert integration in the areas which remain reserved for the Member

States, and the process takes place outside the formal European political decision-making arena. For this arena, the basic entity used to be the Member States; however, for some time they are being more and more often ignored and decision-making mechanisms are constructed in a way so that the Member States are marginalised or even omitted.

The latter has been even specifically defined as state bypassing. It occurs where instead of Member States, other entities e.g. self-governments, pressure groups, etc. are expected to act. The conception of state bypassing or deciding outside of the state is strictly correlated with the popular theory of multilevel management. It distinguishes the so-called state actors, represented by governments of Member States, and non-state actors. Originally, the latter were Union institutions. Nevertheless, over time, the number of actors engaged in the multilevel management processes increased by proposing, apart from classic actors, also other entities both with regard to state actors and non-state actors. The first group includes sub-state actors. The aforementioned division and, as a result, also the multiplication of actors are strictly related to the conviction of the growing role of the so-called unbundling of territoriality, i.e. occurrence of new areas of presence in the public space, including in the decision making process outside and supra state, and, as a result, actions in these areas taken by various, relevant actors. Sub-state actors include, among others: cities and towns, regions, local private and public institutions, non-governmental organisations, lobbyists, political parties, interest groups, courts (especially since they are legitimised with an attribute of independence). Whereas, the group of supra state actors includes, among others: international organisations, large corporations, Euroregions, associations and other supranational organisations, families of European political parties and so-called Europarties. Of course, the fact that currently we are dealing with a growing tendency to bypass a state, is not solely related to the exaggeration of entities engaged in the multilevel management process. It also results from the fact that entities characterised with a plainly natural tendency to bypass states, are more and more engaged in this process. It primarily refers to entities which are historically, mentally, legally, politically and territorially not particularly related to a state. Such entities are especially

prone to bypass a state in the European decision-making process, at the same time stating that outside and supra state decision making is a modern form of governance, while governance in state and with state is an anachronism in the era of increasingly globalised relations. Thus, the state's participation in the multilevel management is depreciated and delegitimised, and replaced by outside state decision making as significantly more modern, democratic and effective. Due to these reasons, nowadays, the tendency to bypass states is also observed in actors that are, paradoxically, related to the state in various ways. These are self-governments, non-governmental organisations, various associations, business entities and even political parties. Especially self-governments and non-governmental organisations more and more willingly decide to join European decision-making procedure with state bypassing, the more so, as they are to an increasingly greater extent funded with non-state resources. Thus, a mechanism is created, which almost structurally separates these entities from the state, which only deepens the state bypassing process. Therefore, it should be stated that the phenomenon of state bypassing is not, in fact, a defect, but a purposefully forecasted effect of the European integration tightening processes. It means that it will certainly gain an even bigger scale in the foreseeable future.

The newest example of such state bypassing, on a large scale, was the conference on the future of Europe initiated by the European Commission and the European Parliament. As defined, it was supposed to bypass state entities (e.g. national parliaments) and activate so-called civil society organisations, which allegedly know better how the Union should look like in a few or even several years. Incidentally, the entire project of the conference on the future of Europe is a downright evidence for competence creep and, at the same time, state bypassing. The conference, especially if it was to lead to the revision of treaties, has not, in fact, been intended as a method of amending EU law at all; however, it was deliberately conducted under the slogan of acting 'closer to the citizens', with a simultaneously maximum distance from Member States, which are supposedly feeding on nationalisms and do not want to get rid of their sovereignty. Worse still, the ill-concealed intention of the conference was not the pluralist discussion on how Europe and the European

Union should look like in the future, but the establishment of a loud and clear and, primarily, allegedly legitimised body of acolytes supporting the idea of 'more Europe'. In effect, social consultations with civil society organisations or think tanks were conducted, of course, provided that they had a clearly profiled pro-European approach, verified with the criterion of acceptance of the so-called Union values and the general policy of Brussels aimed at creating a mechanism of reinforcing the Union and diminishing the role and significance of Member States in the name of better effectiveness of the entire Union and the necessity of its accommodation to the global terms and conditions of acting in the international space. As a result, two birds were killed with one stone. First of all, Member States, whose e.g. parliaments were supposed to 'only' be a forum for discussion for others, yet, they were not foreseen as a serious conference participant, were dismissed from the discussion. Secondly, and most importantly, only precisely selected organisations, accepting the quantum of 'European values', were invited to the discussion, which of course meant that sceptical and conservative organisations were thrown overboard, not mentioning the explicitly anti-Union organisations. In its assumption, therefore, the Conference on the future of Europe was intended as a concert of integration supporters, who, during the discussion, repeated over and over again the conceptions to a large extent being a product of the Union establishment and think tanks for a long time engaged in the Union reinforcement project, whose propositions were known in advance and directed at the idea of 'more Europe' (*nomen omen* think tanks to a very large extent funded by the Union itself). At the same time, the Conference was a marketing ploy showing its allegedly full democratism. Member States were deliberately bypassed and European *demos* was referred to, since it had been acknowledged that national states disturb the articulation of pro-European ideas and propositions, at the same time conserving particularism instead of all that was called Europe and Europeanism.

The fact that this conference, allegedly only polling social attitudes, would serve further measures extending the Union, was obvious from the very beginning. Today, the consequences of, among others, the conference are already the following slogans: 'faster, further and bolder',

which, against many Member States, wish to accelerate the consolidation of the EU and transformation thereof into a centralised object with a marginal role of national states. Among others, the conference on the future of Europe was recently referred to by the Czech presidency which presented a large document of 'improving' the EU, which strives, in fact, to eliminate unanimity whenever possible without amending treaties, unless there is a clear opposition of Member States. In effect, the Czechs opposed and we know that the idea is already praised in e.g. Berlin. Over 60 areas, with a silent attitude of 27 States, would be transformed into areas where decisions are made by the majority of votes (and all this without a formal amendment of the treaties!).

The appetite for extending the EU's competences is continuously growing. If we realise that the European Union is systematically developing solutions aimed at maximising its role and, at the same time, minimising the role of Member States, we will realise a dangerous point for the future we have found ourselves in. The dispute for lawfulness is, in fact, a dispute for subordination, a dispute on how far the EU can simply take the systemic substance from Member States piece by piece without even amending the contents of Union treaties. The same concerns the so-called European values, which are instrumentally interpreted not in order to protect the axiological order of the Union, but to treacherously adjust the Union to a set aim that is a highly centralised structure strikingly reminiscent of a state which was mentioned by Italian communists in their famed manifesto Vontotene. This aim is also supported by the mechanism of 'money for lawfulness', which, in fact, strives to enforce an absolute ideological obedience of Member States, as well as by the mechanism of Next Generation. National recovery plans made up on the pretext of fighting the COVID pandemic are, in fact, mechanisms of small and larger blackmails used by the European Commission against Member States in order to force changes that would have never been implemented otherwise. The so-called milestones provided for in national recovery plans are, in fact, Union policies which will be enforced in detail by the European Commission in each Member State, and which are simply aimed at forcing the States, under sanction of not granting funds, to implement policies arbitrarily developed by Union institutions.

Unfortunately, it is clear that all conflict situations reinforce the power of the European Union at the expense of Member States. The recent EU gas regulation, a decoy in effect of the energy crisis caused by Russia's aggression on Ukraine, is the best evidence thereof. The majority of Member States reviewed the regulation as a success, since it finally does not include the requirement of decreasing the obligatory gas consumption by 15%, but instead, it suggests to do so. However, two fundamental systemic traps are hidden in the same regulation. First of all, the legal basis of the regulation that indicates the requirement of majority instead of unanimity, which has not been questioned by anyone (despite the fact that the issues of energy and raw materials security are the domain of the States, and not the EU), secondly, the possibility of raising an alert by the European Commission, which will cause what is a suggestion today to become an absolute obligation. We should not be deluded that such an alert is going to be raised, although such an alert – in the scope of institutional changes in the EU – should have been raised a long time ago. Competences slowly creeping from the States to the Union have long ago turned treaties upside down, which causes the European Union to resemble a gargantuan monster constantly greedy for Member States' competences. The Union, intended as a structure secondary towards the will of sovereign states, which in specific areas agreed to act together in order to better, i.e. more efficiently, implement specific aims and tasks, today, is turning this rudimentary approach at the basis of the integration's beginnings, upside down. In consequence, the secondary structure, that is the European Union, gains a status of a primary and fundamental structure, whereas the Member States are becoming, in fact, secondary and complementary in their tasks with regard to the EU.

BASIC LITERATURE

Alberts T., *The Future of Sovereignty in Multilevel Governance Europe – A Constructivist Reading*, 'Journal of Common Market Studies' 2004, No. 1, pp. 23–46.

Allen D., *The structural funds and cohesion policy: Extending the bargain to meet new challenges*, [in:], *Policy-Making the European Union*, ed. H. Wallace, M.A. Pollack, A.R. Young, Oxford, 2010, pp. 229–252.

Callanan M, Tatham M., *Territorial interest representation in the European Union: Actors, objectives and strategies, 'Journal of European Public Policy'* 2014, No. 2, pp. 88–210.

Craig P., *Competence: Clarity, Conferral, Containment and Consideration*, 'European Law Review' 2004, No. 3, pp. 323–44.

Davies, G., *Democracy and Legitimacy in the Shadow of Purposive Competence*, 'European Law Journal' 2015, No. 1, pp. 2–22.

Garben S., *Competence Creep*, 'Journal of Common Market Studies' 2017, No. 1, pp. 1–18.

Garben S, *Competence Creep Revisited*, 'Journal of Common Market Studies' 2019, No. 2, pp. 205–222.

Jeffery C., *Sub-national mobilization and European integration: Does it make any difference?*, '*Journal of Common Market Studies*' 2000, No. 1, pp. 1–24.

Meunier S., *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment*, 'Journal of Common Market Studies' 2017 No. 3, pp. 593–610.

Keating M., Hooghe L., Tatham M., *Bypassing the nation-state? Regions and the EU policy process*, [in:] *European Union: Power and policy-making*, ed. J. Richardson, S. Mazey, New York 2015, pp. 445–466.

Piattoni S., *Multi-level governance: A historical and conceptual analysis*, '*Journal of Common Market Studies*' 2009, No. 2, pp.163–180.

Prechal S., *Competence Creep and General Principles of Law*, 'Review of European Administrative Law', 2010, No. 1, pp. 55–22–22.

Swenden W., *Is the European Union in Need of a Competence Catalogue? Insights from Comparative Federalism*, 'Journal of Common Market Studies' 2004, No. 2, pp. 371–92.

Tatham M., *With or without you? Revisiting territorial state-bypassing in EU interest representation*, [in:] *Political Representation and European Union Governance*, ed. P. Mair, J. Thomassen, New York 2011, pp. 76–99.

Weatherill S., *Competence Creep and Competence Control*, 'Yearbook of European Law' 2004, No. 1, pp. 1–55.

Zdeněk Koudelka

Legal aspects of the European Union's federalisation: contemporary times and probable variants of future changes

The subject of this article is the analysis of the European Union's legal nature. In the introduction, traditional models of public law have been outlined. In the further part of the text, particular features are analysed mainly from the perspective of a federation and confederation (citizenship, direct binding of normative acts, majority voting, international legal personality). The contents of the paper do not comprise tackling a simple thesis that the European Union is an entity of its own kind (*sui generis*), but studying its particular manifestations.

A significant place is also taken by the concept of sovereignty and in what circumstances sovereignty can be strived for in European Union Member States or, on the contrary, in the European Union as a whole. The thesis includes an assessment whether the federalisation of the European Union is possible from the point of view of the constitutional law of the Czech Republic or in what circumstances this could be possible.

Basic theses of the dissertation are that the European Union in terms of its legal grounds is today a confederation, but with significant elements of a federation, which has an impact on the sovereignty of Member States. There is, however, an actual possibility of extending these federalisation elements also without amending basic treaties on the European Union.

In terms of the constitutional law of the Czech Republic, the constitutional definition that the Czech Republic is a sovereign state is of great importance, as it is incompatible with a federation in which each member state does not have sovereignty. Without amendment of this provision of the Constitution, reinforcement of federalisation

tendencies in the European Union is an infringement of the Constitution of the Czech Republic.

Types of state-legal formations

Before starting the analysis of federalisation aspects of the European Union, legal possibilities of a closer cooperation of the states should be specified, as they provide grounds for the assessment of the current legal reality of the European Union.

State doctrine differentiates the following types of states and formations:

1. **A unitary state** – a single state which is not divided into other units that also have a nature of a state, but only into units of a territorial government. Its legal basis is a constitution. It has one constitution, one citizenship and one set of state authorities. An example being the Czech Republic. Within a unitary state a given territory can be governed in compliance with special rules – a unitary state with an autonomous territory. For instance, the Czechoslovak Republic 1920–39 with the autonomy of Carpathian Ruthenia (however, in practice, very limited until the autumn of 1938) and as of autumn of 1938 with the autonomy of Slovakia and post-war Czechoslovakia 1945–68 with the autonomy of Slovakia. Furthermore, the autonomy of Greenland and the Faroe Islands within Denmark, the autonomy of Wales, Scotland and Northern Ireland within the United Kingdom of Great Britain and Northern Ireland, the autonomy of Mount Athos in Greece, etc.

   A unitary state as a model of interstate relations is impossible. Since the hitherto states cease to exist and are degraded to simply units of higher territorial self-government or autonomous territories without sovereignty (Scotland in Great Britain, Tibet in China, Corsica in France).
2. **Federation (a union of states)** – a compound or federal state. It is composed of units which also have a nature of a state. The legal grounds thereof is a constitution which can be amended

by the majority of votes. Apart from the federal constitution, there are also constitutions of member entities of the federation (member states). Decisions of federal bodies are directly binding for the citizens. In the case of a federation, a theory of sovereignty divided between the federation and member states is binding; yet, in the case of a dispute, the federation has an advantage, since disputes are settled by federal bodies (parliament, court), unless there is a civil war (the USA 1861–65).

In a federation, a double citizenship occurs – a citizenship of the federation and citizenship of the federation's member state. In a federation, there is a full dual system of state bodies (federal bodies, bodies of a federation member). For example, in the Czech and Slovak Federation, the federal bodies were: the head of state – the president, parliament – federal assembly, federal government, federal Supreme Court, and republic bodies of the Czech or Slovak Republic: the head of state – presidency of the national council, parliament – national assembly, republican government and republican Supreme Court.

Federation always has an international legal personality and in the scope of international relations we distinguish national and international federations. National federation is a federation in which a federal state can occur in international relations (Czechoslovakia 1969–92). International federation is a federation in which a federal state can act in full and member states of the federation can act on their behalf in a limited scope (Czechoslovakia in the autumn of 1992, Austria, Germany, the Soviet Union – Ukraine and Belarus have been independent UN members since 1945). Another division of a federation concerns the fact if member states can leave the federation (the Soviet Union, Czechoslovakia) or not (the USA, Germany, Austria, Russia).

A federation is improper for an interstate union, unless it is also aimed at establishing a unified nation (political nation) as a source of a federation's legitimisation. By joining the federation, states maintain their state nature, but lose sovereignty even if member states of a federation can act in a limited scope in international

relations (an international federation) and have the right to leave the federation. In a federation, the position of a federal centre is usually reinforced with time at the cost of member states. It is visible in the example of the USA and Switzerland. In these states, federal authorities have currently a series of rights which even the biggest supporters of the federation did not dream about at the moment of establishment thereof. This reinforcement results from the activity of the federal parliament, as well as federal courts, which usually settle jurisdiction disputes to the benefit of the federation.

3. **Confederation** – a union of states; confederation alone is no longer a state. Its legal basis is an international treaty, which can be amended only upon consent of all entities. Decisions of confederation bodies are binding only for member states. Only upon adopting such decisions and implementing them into their legal orders by member states, they become binding for citizens and other persons in member states. There is no confederation citizenship. There is a possibility of leaving the confederation. Examples of a confederation being the German Confederation 1815–66, Senegambia 1982–89.

   A confederation is a proper model of a functional interstate cooperation. Member states maintain sovereignty, including an international legal personality, and can leave it at any time. Citizens have a direct relation to their states, and not to the confederation. However, it must be a confederation without federal elements. On the contrary, from the point of view of reinforcing the position of member states, it is advisable to connect confederation with elements of a real union.

4. **A real union** – a union of states led by a common head of state, but also other bodies. Mutual relations of states making a real union are regulated by treaties. Although in legal terms, a real union is composed of several states, in international practice, it is perceived as one entity, since it has common institutions in the scope of international relations and politics.

An example being Austria-Hungary in the years 1867–1918. The main source of the union was a common monarch, although with different titles (Austrian Tsar, Hungarian King, but also Czech King, Croatian King, Moravian Margrave, Silesian Prince, etc.) and joint dynasty with a common right to succession (pragmatic sanction). Loyalty towards the monarch was a source of legitimisation of this state union. Common authorities were established in fields dominated by the monarch – the minister of defence and army resulting from the monarch's position as the commander in chief, minister of the imperial and royal court and of foreign affairs resulting from the monarch's position as the head of state representing it in international relations, minister of finance in order to finance common affairs and common currency. The other bodies were independent with parity parliamentary delegations created in order to solve common problems.

There was no joint constitution or citizenship. Citizenship and constitution were Austrian or Hungarian. On the outside, Austria-Hungary was perceived as one entity in international relations, since treaties and diplomatic relations (diplomatic missions) were concluded on behalf of the monarch, who was the same person for both states.

The currency was uniform – Crown, coins were produced separately in Vienna and Kremnica with different images (the imperial Austrian eagle and the crest of Hungary), but in the same nominal value and composition of metal, and were used in the entire real union. Banknotes were issued by a common Austrian-Hungarian bank.

An example of common bodies is the establishment in Germany of common provincial courts for various countries. These include: the common Supreme Administrative Court, the Supreme Social Insurance Court, the Supreme Financial Court and the Supreme Labour Court for Berlin and Branderburg and the Supreme Social Insurance Court for Bremen and Lower Saxony.

A real union is the most appropriate type for an effective interstate connection with maintenance of member states'

independence. The model of a small number of common bodies allows effective unity in selected areas without the necessity of establishing supranational bodies. However, a real union can function in a small number of member states (2–5). The more member states, the bigger pressure there will be on adopting confederation elements or changing into a confederation.

5. **A personal union** – states who only have a common head of state. France and Andorra. Great Britain, Canada, Australia, New Zealand.

   If there are no other connections between states than a head of state, it is not a functional basis for an effective interstate cooperation. A personal union constitutes only a premise for possible closer cooperation, which, however, does not result from the fact of a personal union, but from any other mutual international agreements.

Nevertheless, it should be underlined that the above list is a kind of a theoretical review, whereas, in practice there are many indirect forms, and names sometimes do not reflect the contents. For example, Switzerland is currently a federation; however, in Romanian languages, the name of the Switzerland Confederation is used. Confederated States of America 1861–65 had a constitution as the legal basis of their confederation; however, they understood it as a treaty adopted by sovereign states. That is, all theory is grey, but the golden tree of actual life springs ever green.

What is the European Union?

European lawyers like to say that the European Union is the only one of its kind (*sui generis*) and it cannot be unequivocally included in simple forms of state cooperation. From the point of view of history and theory of state, however, there is no reason to include it in any typical category on the basis of characteristic features of the European Union. It is certain that the European Union is neither a Unitarian state, nor

a real or monarchal personal union. Therefore, two categories – federation and confederation are left.

We have already defined federation as having its legal grounds in a constitution as a legal act subject to amendment, primarily by the federation bodies. Other features include the directly binding nature of normative legal acts of the federation with regard to people and citizenship of the federation.

We have defined a confederation as having legal grounds in the form of an international agreement, which is binding for member states, and amendment thereof needs consent of all states – parties to the agreement. Another feature is the fact that normative legal acts of the confederation are binding for member states and not directly for citizens and the Member State has to transform them into its legal system.

Since, from the legal point of view, a fundamental legal basis of a given entity is a confederation, the European Union is currently a confederation. Its legal basis is primarily the Treaty on European Union and the Treaty on the Functioning of the European Union, as well as accession treaties of the states that joined the union later.

Moreover, a confederation element comprises directives of the European Union, which are not directly binding and must be transformed into the legal order of a Member State. However, judicial decisions of the CJEU have also shifted this confederation element to the federation form by giving a directly binding nature to a directive, it is not transformed by the Member State at all or it is transformed imperfectly. Whether transformation is perfect or imperfect is decided by the CJEU.

The European Union is a confederation with elements of a federation, which primarily included citizenship of the European Union and direct binding force of provisions of the European Union. Another important element is a legal thesis of the Court of Justice of the European Union and the Commission of the European Union, which place the entire law of the European Union over the legal order of Member States, including their constitutions. For settlement, it is meaningless whether the theoretical issue is a precedence of the law or only its predominance. In consequence, according to the authorities of the European Union, union law

provisions must be always adhered to, regardless of the Member State law, including its constitutional provisions.

Reinforcement of this confederation is also contributed to by common currency. However, this is a material-economical, not legal, element. Common currency can also be used by states that are not in the confederation or federation (the West and Central African CFA Franc, the CFP Franc). Whereas, the Protectorate of Bohemia and Moravia had its own currency (Crown), although it legally belonged to the German Reich, where the Mark was currency, which was binding in the territory of the Protectorate of Bohemia and Moravia next to the Protectorate Crown. Therefore, the existence of own currency is important; however, it is not an unequivocal element distinguishing a federation, confederation or even another type of coexistence of states.

The majority decision-making process is also advocated and reinforced in the European Union at the expense of unanimity. Unanimous voting is certainly a feature of a confederation. On the other hand, majority voting cannot always be qualified as a decision of a federation. For instance, in the Czech and Slovak Federation the principle of majority prohibition in the Federal Assembly meant that the number of deputies necessary to adopt a motion had to be obtained both in the Czech and Slovak part of the People's Chamber of the Parliamentary Assembly, and thus, in fact, the consent of the representation of both parts of the federation was required. In a confederation, even the majority of votes can be adopted, but only when it is used in areas which have been explicitly entrusted by the states to the confederation on the grounds of an international agreement.

The European Union is a large-scale confederation, thus, a strong confederation. Moreover, due to the acceptance of this fact by Member States, the European Union has already been developing its federal grounds, by continuously extending the scope of activity, even by the majority of votes, beyond areas explicitly entrusted to it by basic treaties, with weak and general reference e.g. to the common market.

Characteristics of the federation of the European Union

1.1. Citizenship

Citizens are important elements of a state. A state cannot exist without citizens. Citizens have special political rights, as well as obligations, different from other state residents (foreigners with a permanent residence or state citizenship). Therefore, citizenship is a basic feature of a state. In federal states, we have dual citizenship, where a citizen is simultaneously a citizen of the member state of the federation and a citizen of the federation as a whole.

From this point of view, introduction of the citizenship of the European Union next to the citizenship of a given Member State is clearly a feature of a federation. Its factual significance is diminished, however, by the fact that the predominance of citizenship of a Member State is consequently maintained. The European Union does not have its own citizenship. Citizenship of the EU is strictly related to the citizenship of a Member State. Whoever obtains a citizenship of a Member State automatically acquires EU citizenship, and whoever loses the citizenship of a Member State, also loses EU citizenship, unless they acquire citizenship of another Member State.

What is important, EU citizenship does not impose any obligations on the citizen, only rights. The contents of the rights resulting from the citizenship of the EU are not very significant – the right to vote in local elections and elections to the European Parliament, the right to apply for consular assistance abroad in the embassy of another EU state, if in such a state the embassy of a state of which a person is a citizen, does not operate.

However, given the continuous growth of the European Union power and creeping extension of its competences, it is not surprising that in the future the contents of rights can be extended and obligations directly related to EU citizenship can be introduced. Therefore, EU citizenship itself is a federalization element, albeit actually not very important. If, however, the obligation to have the EU obligation is introduced, it would be an explicit reinforcement of federalization tendencies in the EU.

1.2. Direct binding force of the secondary law of the European Union

The directly binding nature of regulations of the European Union (Council of the European Union) towards citizens of member states is, undoubtedly, a strong federalization element. In the traditional understanding of a confederation, only member states can be bound and not their citizens. Inherently, this binding primarily concerns entrepreneurs but, also, in specific and more and more frequent cases, persons who do not conduct business activity – both citizens and legal persons.

The federalization element is reinforced by a combination thereof with the following principles:

- voting by majority of votes in the Council of the EU,
- primacy of the EU law over the law of Member States.

The directly binding nature of the secondary law of the EU as a federalization element has been reinforced by the interpretation of the Court of Justice of the European Union, which has also granted it to directives, if a Member State does not transpose it at all or transposes it incorrectly in its legal system. And what is a correct transposition and what is not is decided by the Court of Justice of the EU, the body of the European Union.

Whereas, the principle of direct binding force of regulations was agreed on by the Member States in international treaties – the primary law of the European Union, the direct binding force of directives in the case of their improper transposition is not a result of conscious and explicit consent of Member States, but judicial decisions of the Court of Justice of the European Union, that is, a body of the European Union. The Court of Justice of the EU also granted direct binding force to basic European international treaties (European primary law).

1.3. Voting by majority in areas which have not been explicitly transferred to the EU under treaties

If a decision made by a body composed of representatives of several states is subject to unanimity, sovereignty of states if fully kept. In principle, it is of no significance what scope of competence is transferred to the common (confederate) body, since each decision made by such a body in a specific case must be accepted by member states. However, even voting by majority does not negate sovereignty of a state with regard to areas to which a state has given an explicit and definite consent during its accession by concluding or joining an international treaty.

Finally, there is no sovereignty of members of the United Nations, whereas, its most important body from the point of view of the main objective of the organisation, that is, supervising keeping peace in the world, is the Security Council composed of only 15 members and, thus, in which a vast majority of Member States of the UN is not represented. However, the rights and obligations of the Security Council are clearly defined, and the states agreed thereto when they adopted the UN Charter.

The decision making by a majority of votes itself is not one of the federation features and can be accepted in confederation bodies or international organisation bodies. However, another assessment will appear if the extension of the European Union's competences beyond those explicitly transferred under international treaties (primary law of the European Union) is subjected to majority voting. This group often includes regulations or directives, which do, in a general and superficial manner, refer to the common market and have nothing in common with the policy of a single market (personal data protection, firearm regulation, etc.). In the European Union it is a qualified majority of 55% of states, in which 65% of European Union people live.

Majority voting is currently applied in the European Union in the case of a vast majority of regulations and directives concerning issues related to a single market. Unanimity is maintained in the issues of foreign policy and military. However, the Lisbon Treaty allows introducing majority voting in cases that are subject to unanimity (but not in military cases),

if the European Council gives a unanimous consent, and the national parliament does not object within six months. In the field of foreign policy, even the veto of the national parliament is not included.

The fact that the European Council has to make a decision unanimously, keeps the rights of a Member State in the scope of introduction of a majority decision making in a given area. It is obvious that the Lisbon Treaty has built bridges for majority, instead of unanimous, decision making in order to overcome potential difficulties related to the reinforcement of European integration by changing fundamental international treaties and, thus, the necessity of its proper ratification, including the consent in parliaments or even referenda, with constitutional solutions of particular Member States.

This possibility of using bridges to reinforce majority voting without amending fundamental international treaties concerning the European Union is the biggest motivation to abuse this provision. Given the fact that a particular head of state or government gives consent to reinforce European integration, and once given the consent is permanent, it cannot be withdrawn even in the case of changing political representation. And this is a one-way road to reinforce majority decision making. There is no coming back.

1.4. Theses of supremacy of the EU law over constitutional rights of states

In the European Union Member States a basic legal issue is the relation between their national constitutional norms and the European law. The result can be different in particular Member States, since although the European law is the same, the constitutional norms differ in particular Member States. The question becomes substantive in the case of a conflict between constitutional and European norms. In such a case it is not only a legal conflict, but usually also a political conflict. A solution thereof has never been and never will be a strictly legal issue, but it will always be related to a political fight and rivalry between the significance of values included in the colliding legal systems. It is true that nothing

is black and white and the fight for values is an expression of what is at a given time prevailing in the opinions of knowledge holders.

The issue of a relation between the European Union law and the constitutional law of a Member State is growing as the European Union institutions are appropriating new competences, which have not explicitly been transferred to the European Union within fundamental and accession treaties of particular states to the European Union (or previously, the Community). Also, extending these new competences to a very softly or unclearly defined defence of the so-called 'European values' collides with values of the Member State, which have a constitutional expression and protection.

Fundamental sources of European Union law and, in particular, the Treaty on European Union and the Treaty on the Functioning of the European Union, are silent with regard to the relation to national constitutional provisions. It is understandable, though, that it constitutes a basic problem of the relation between the European Union legal system and legal systems of particular Member States. Authors of treaties wanted to avoid a serious problem with negotiations. On the other hand, clear negligence of this issue leads to disputes. Therefore, no one should be surprised with conflicts that arise with regard to the essence of European integration, if the authors of fundamental treaties did not want to take a stand with regard to certain issues. After all, these are substantive matters and not of small importance, and it was not overlooked but the dispute has been purposefully moved from the time of negotiating treaties to the time of application thereof.

At the moment of concluding particular treaties which are a course of the primary law of the European Union, representatives of Member States did not want to deal with this issue. Each textual recognition of regulations on the relation between European law and the constitutional law will raise questions of the nature of the European Union and sovereignty of Member States. Either European law prevails, but then the European Union becomes a state and there cannot be any sovereignty of Member States; or the national constitution prevails and has primacy over the law of the European Union. However, the latter is not appreciated

by the supporters of the superiority of the European Union and its legal system over Member States and their legal orders, including constitutions.

As a result, the primary law of the European Union does not say whether European law is superior towards to the Member State's constitution. Silence of the European treaties did not stop the European Court of Justice from commenting on this issue. In its opinion, the European law has primacy over the law of the Member State. The court took this position in 1964 in the course of existence of the European Economic Community, and has been using it continuously even after amendments of primary treaties and transforming of the Community into the European Union.

Thus, it perceives this predominance of European Union law as general, i.e. European law also has primacy over a constitution of the Member State. The principle of primacy applies regardless if the law of the Member State, including a constitution, discusses the relation between a national law and EU law.

The constitution, although it includes the most important legal norms of a given state, is a part of its legal order, and the Court of Justice does not make any exceptions from the principle of primacy of European Union law over national law. Supporters of the primacy of European Union law, in principle, settle only the terminological dispute whether there is a primacy of application or superiority of European Union law. Nevertheless, the result is always the same – in the relation between European Union law and national law of the Member State, European Union law predominates and prevails over the Member State's law, including its constitution. Primarily, the court adjudicated against regulations as directly binding European Union law norms with regard to persons, but, by implementation of an imperfect (according to the court) transformation of directives by the Member States, it also made them directly binding, effectively establishing the predominance of the European Union as a whole. After having also previously declared the directly binding nature of fundamental treaties (primary European legislation).

This opinion of the Court of Justice is also included in the Final Act of the Conference of the Representatives of the Government of the Member States, convened in Brussels on 23.07.2007, which drew up the draft

Lisbon Treaty and adopted the Declaration on the primacy of law no. 17, of the following wording:

> The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of the EC law as set out in 11197/07 (JUR 260): 'Opinion of the Council Legal Service of 22 June 2007: It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ ENEL, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

The Declaration is an attempt at incorporating the opinion of the Court of Justice in fundamental international treaties concerning the European Union. This is, however, a partial attempt, not worth the question of collision of the constitutional law of a Member State with Union law. The declaration is not a part of treaties; therefore, no provision of the treaties refers thereto explicitly as an appendix; it is also not a part of a final act of the Lisbon Treaty, as it has only been attached thereto. Despite the fact that declarations are published next to the Lisbon Treaty, and some of them are only unilateral declarations of the states, they are not a part of the same international agreement, that is, they are not a part of the primary law of the European Union.

The Lisbon Treaty constituted a reaction to rejection of the ratification of the Treaty establishing a Constitution for Europe, in which superiority of the Constitution for Europe and primacy of the law legislated by the European Union bodies over the law of the Member States were explicitly stated. If the Lisbon Treaty did not include this principle, it can also be interpreted as rejected by the Member States. In essence, if no other Member States opposed this principle in the Constitution for Europe, there would be no reason not to include it in the Lisbon Treaty.

The position of the Court of Justice of the European Union is understandable from the point of view of supporters of the federalization of the European Union. It reinforces the power of the European Union as such and the power of the court as its body. It decides on the proper interpretation of Union law and, thus, also specifies what has primacy over the law of the Member State, including its constitutional provisions. A certain role is also played by the fact that judges of the Court of Justice of the EU have had a positive approach to European law and European integration for a long time. As a rule, opponents of the European Union and supporters of state sovereignty do not apply for membership in Union institutions as well as, in this case, the CJEU. As far as judges are concerned, (as lawyers they have already dealt with European law before transferring to the court) the relation of these lawyers to the European Union is even more inherent. What would they do if European Union law vanished? And even if it does not vanish, they do not want to admit that other laws may be more important than European law.

The interpretation of the primacy of European law is based on international law, where it is commonly adopted that an international obligation cannot be rendered invalid due to its inconsistency with internal law. On the other hand, however, international law norms are based on the principle of reciprocity, and obligations resulting from international treaties concerning states that have acceded thereto. There is no global legislature that would be able to impose their will on everyone.

The European secondary law is not a literal analogy of international law. The fundamental inconsistency consists of the fact that the secondary law of the European Union can create new obligations for the Member States, which have not been known at the moment of the Member

State's accession to the European Union, and to which the state has never consented, and which was adopted by a majority decision against its will. Therefore, there is a difference between the European primary law composed of international treaties concluded by Member States, to which all Member States always have to agree, and the European secondary law (regulations, directives), which can be adopted against the will of the Member State.

The thesis on the primacy of the secondary law of the European Union (a regulation, directive) over constitutional law of the Member State is a fundamental federalization element. The Member State which adopts this thesis, in reality, waives its sovereignty and – without an explicit expression thereof in an international treaty – accepts that its position in the European Union is reduced to the position of a regular member state of a federation.

1.5. International legal personality

A sovereign state always has an international legal personality. In the case of federations it always is a federation and sometimes also a member state of a federation (international federation). However, primacy in international policy and legal negotiations is always vested with the federation, which also has the right to war and peace. In some other federations (national federations) only a federation as a whole has an international personality.

Granting the European Union with the international legal personality is not in itself a federalization feature, since international organisations, which fully maintain sovereignty of their Member States, also have an international legal personality. It could, however, be transposed into a federalization feature in the case of extending competences of the European Union in the scope of foreign and defence policy, and even in this case voting by a majority of votes prevails over unanimity. The right to war and peace is decisive. If Member States lose their sovereign right to decide when and with whom they want to wage war or make peace, a sovereign state cannot be discussed.

The issue of sovereignty

The issue of sovereignty is a decisive factor concerning the inclusion of a state in a confederation or federation. That is, in practice, who holds the power of the final word in each dispute. In a federation the sovereignty is unanimously vested with federation bodies. They have the power over war and peace, foreign policy, constitution of the federation and, thus, division of competences between the federation and member states, whereas changes in these competences in various scopes requires a qualified consent of the majority of member states of the federation. In a federation, the final word in solving disputes between a federation and a member state is also vested with the federation. In reality, usually supreme or constitutional courts of the federation act in this matter.

The concept of a divided sovereignty also occurs in the theory of federation which assumes sovereignty of the federation as a whole and a member state simultaneously, whereas the division of competences between a federation and member states decides on who is vested with sovereignty in a given area. Nevertheless, this theory is not commonly accepted. There is only one sovereignty on a given territory.

The theory of a divided sovereignty is rather addressed at supporters of the position of member states. Since the federation maintains its advantage with the following:

- the division of competences is specified in the federal constitution, amendment of which is vested with competences of federal bodies, although a certain cooperation of federation member states is required,
- it always has an international legal personality, although it can give it in a limited scope also to the member states of the federation,
- disputes between the federation and its member states are settled by a federal body, usually a court appointed by the federation.

In a confederation, sovereignty belongs to a member state. A confederation cannot declare war or make peace on behalf of the member state. Sovereignty covers governance over the legal system binding in a given territory. Therefore, the sovereignty feature is also the fact that the state constitution cannot be subject to another legal order.

The state includes its basic values in constitutional acts and thus specifies itself as a state. A state is an organisation of social governance over a given territory. Therefore, these are the basic values of people making this society. In order to settle the issue of who has sovereignty – a state or the European Union, it is crucial which society has the final word on a given territory, which within a state means sovereignty as sovereign unlimited power, or society (citizenship) of a member state, or citizenship of the entire European Union. Community with sovereignty and its legal order are of a decisive importance for regulation of people's lives in a given territory.

What decides on the primacy of constitutional and European law is the fact, whether a state loses sovereignty at the moment of accession to the European Union, or not. If it happens, the law of the European Union has primacy over the law of the state, including its highest (constitutional) principles, since it is no longer the law of the sovereign in a given territory. If a state keeps sovereignty upon accession to the European Union, the consequence of this sovereignty is the predominance of the state legal order in its territory.

It does not mean that a sovereign state cannot give priority to the law legislated by the international organisation and institution over its own provisions binding in its territory. It also concerns the law of the European Union. However, it is always its own decision, which can be appealed, that specifies the scope of this primacy and the decision does not cause legal results for resolution of this issue in other Member States.

In a confederation a state always has a possibility of leaving. In the case of a federation there can be an inseparable federation (the USA) and a federation with the possibility of a member state leaving (Czechoslovakia as of 1991, the Union of Soviet Socialist Republics, the Federal Republic of Yugoslavia). In the European Union the possibility of a member leaving is kept; therefore, from this point of view the European Union can be categorised as a confederation.

The approach of the constitutional law of the Czech Republic to the federalization of the European Union

The Czech Republic has extensive experience with federalism due to the existence of the Czech and Slovak Federative Republic 1969–92. It was a historically short, yet, very intensive period of time. The constitutional act on federation was born during the Prague Spring 1968 and was adopted in the autumn of 1968 after the August occupation by states of the Warsaw Pact. Then, the Federation operated both in a communist (1969–89) and democratic (1989–92) regime. The last two years of the existence of the Czech and Slovak Federation were filled in with searching for various ways of changing the federal structure, including the proposition of transforming it into a confederation. These searches were sometimes accompanied by efforts aimed at reconciling what is inconsistent. For example, some Slovak lawyers started to differentiate the concept of sovereignty and supremacy, currently commonly perceived as synonyms. They argued that the announcement of the sovereignty of the Slovak Republic within the Czech and Slovak Federation will not infringe the sovereignty of the federation.

Finally, all ended with a dissolution of the federation top-down when the constitutional act on the dissolution of the Czech and Slovak Federation was adopted by the Czech and Slovak Federal Assembly. Therefore, there was no revolution or disintegration bottom-up by the decision of federation member states on leaving, as in the case of the Union of Soviet Socialist Republics of Yugoslavia.

The constitutional definition of the Czech Republic as a sovereign state is of a decisive significance for the federalization of the European Union. Since in the case of a federation, sovereignty is vested with the federation and not with a member state, transformation of the European Union into a federation is inadmissible from the point of view of the constitutional law of the Czech Republic.

Furthermore, the perpetuity clause can be indicated, which forbids changing fundamental elements of the democratic rule of law, including any interpretation of legal norms, and not only by changing them explicitly. Sovereignty is an important element of each state, including

the democratic rule of law. From this point of view, it can be stated that the Constitution also forbids amending itself, if the constitutional change would lead to losing the sovereignty of the state, that is, it also forbids transforming the European Union into a federation, in which the Czech Republic would only be a subject of federation deprived of sovereignty.

The question remains if the introduction of certain federalization elements within the European Union infringes this constitutional provision. Nevertheless, the Constitutional Tribunal recognized the Lisbon Treaty as compliant with the constitution, but only in a situation when it simultaneously rejected subordination of the constitution to European Union law:

> in the case of an explicit conflict between the internal constitution and European law, which cannot be solved by any reasonable interpretation, the constitutional order of the Czech Republic and, in particular its focal point, must have primacy.

It cannot be allowed to empty sovereignty by gradual and fragmentary extension of the competences of the European Union at the expense of Member States. In this case the fundamental defence of the sovereignty of the Czech Republic is provided by the judicial decisions of the Constitutional Tribunal rejecting superiority of the law of the European Union over the constitutional order of the Czech Republic, including the fact that the Constitutional Tribunal refused to respect the legal opinion of the CJEU in a specific case, in which the CJEU conducted preliminary ruling proceedings. However, it should be noted that the European Union is silent on the topic of this decision of the Constitutional Court of the Czech Republic, when it otherwise states that also the constitutional law of the Member State is subordinated to the law of the European Union.

Probable variants of future changes in the European Union

Supporters of the federalization of the European Union will continue to aim at reinforcing integration of the European Union and transforming it into a federation. They can do so openly, by changing the basic international treaties or secretly, by transferring consecutive areas from the principle of unanimous decision making in the Council of the European Union into the principle of (qualified) majority. The latter is more probable, since it does not require ratification by Member States, in which, due to the political resistance, ratification referenda or consent to ratification in parliament would not be required. This path is promoted by Germany which claims the need for extending the majority decision-making process.

Supporters of the Euro-realistic wing will strive to prevent occurrence of other federalization elements and weaken the existing ones. It means the return to unanimous decision making and avoiding extension of the European Union's competences at the expense of the Member States. They will also reject the primacy of European law over constitutions of Member States or limiting this predominance to areas explicitly transferred to the European Union under treaties.

Even the dissolution of the European Union cannot be excluded, which would probably not lead to a complete negation of European integration, but to the establishment of more smaller integration centres and, on the other hand, to establish a pan-European economic cooperation in compliance with classical contractual rules (agreement on free trade, single customs territory, etc.) without the necessity to establish a new supranational entity. In principle, it would constitute a return to the times of the European Economic Community.

Since none of the previous options enjoys an explicit support of the majority, the *status quo* will probably be maintained at least in the nearest future. However, it will repeatedly give rise to both political and legal conflicts. The essence of such legal conflicts will be the extent to which constitutional tribunals and other institutions of Member States specified in their constitutions as sovereign states, will accept or reject the idea of subordinating constitutions of Member States to Union

law. That is, to what extent they will protect the constitutional principle of a state's sovereignty.

Summary

Today's European Union is a confederation in terms of legal grounds made of international treaties and not national constitutions. However, this is a solid confederation and has some characteristic elements of a federation. As an element of a federation we primarily consider the direct binding nature of regulations and directives of the European Union, which have not been transposed to national law, in conjunction with the fact that in many areas they can be adopted by a majority of votes, as well as in conjunction with the thesis of the Court of Justice of the European Union that regulations and directives of the European Union have primacy over constitutions of Member States.

These conclusions of the Court of Justice of the European Union explicitly infringe the sovereignty of Member States and, if adopted, will effectively transfer the European Union into a federation, without explicit consent of Member States given by their heads of states, governments and parliaments. Heads of states, governments, parliaments and constitutional tribunals are responsible for resisting the temptation of secretive transformation of the European Union into a federation, as well as protection of sovereignty and predominance of a constitution of their state. If they fail to do so, with time, there may be fundamental changes in the statehood.

A historical example is the gradual fall of the Czech state under the governance of the Habsburg monarchy. At the beginning of the 17th century the Czech state existed. In the 19th century the Czech state did not exist, but the concept of the Czech Kingdom prevailed and the Habsburg monarch had titles of the Czech King, Moravian Margrave and Silesian Prince. However, it is impossible to indicate a specific date when the Czech state ceased to exist. It had been dissolving in gradual, small, yet, numerous centralising steps within the Habsburg monarchy until it simply did not exist. This can be the future for the European Union

Member States, since the supporters of the federalization of the European Union know that it will not be forced by a unanimous, open decision due to the necessity of ratification in parliaments or even referenda in Member States. However, it does not mean that they will not want to force the federation by gradual steps, without a formal amendment of the contents of fundamental treaties.

From the point of view of the Czech law, transforming the European Union into a federation is inadmissible. If the European Union is to be transformed into a federation, and even if its federalization elements are to be reinforced, it is necessary to amend the constitution of the Czech Republic that would revoke the definition of a state as a sovereign state. If such a constitutional amendment is not introduced, and, at the same time, federalization elements are reinforced in the European Union, the inconsistency between the constitutional law of the Czech Republic and the law of the European Union will be growing. Legal inconsistency will also be a political inconsistency.

BASIC LITERATURE

Constitution of the Czech Republic no. 1 Journal of Laws of 1993.
Declaration of provisions of treaties, Declaration no. 17. Published with the Lisbon Treaty, no. 111/2009 Collection of international treaties.
Drulak P., *Jak nemlčet v Bruselu*, „Mladá fronta *Dnes*" 5.9.2022.
Judgement of the Constitutional Tribunal of 26.11.2008, Pl. ÚS 19/08.
Judgement of the Constitutional Tribunal of 31.01.2012, Pl. ÚS 5/12.
Judgement of the European Court of Justice of 15.07.1964, no. C 6/64.
Judgement of the European Court of Justice of 17.12.1970, no. C-11/70.
Král R., *Zásady aplikace komunitárního práva národními soudy*, Prague 2003.
The Constitutional Act no. 542 Journal of Laws of 1992, on dissolution of the Czech and Slovak Federative Republic of 25.11.1992.
The Treaty establishing a Constitution for Europe.

Vladan Petrov, Miloš Stanić

New wave of federalism in the European Union. Right constitutional moment?

The legal nature of the European Union

From the scholarly standpoint, a lot is being written about the legal nature of the European Union. Accordingly, numerous stances were taken on the topic. According to one of them, there is no doubt that the Founding agreements are, legally speaking, international agreements, regarding to their legal effect and the way they were created, which implies that the European Union represents a classic international organization in the sense of public international law. Bearing that in mind, it does not have the original competences characteristic for international states, but functions by exercising the powers assigned to it by the Treaties, namely the Treaty on the European Union, the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights. The European Union is not yet a state, regardless of the introduction of the principle of the supremacy of European Union law in relation to the law of the member states. This doctrine of the primacy of the European Union as it is, is formulated and developed by the European Court of Justice and accepted, to a greater or lesser extent, by the courts of the Member States. However, it is noted , perhaps more realistically, that it can be described as a creative development of international law, showing, at the same time, the dynamic potential of international law. Therefore, the prevailing view seems to be, from the perspective of national constitutional law, that the Union is indeed part of international law and therefore an international organization, in the classical sense.

A somewhat more moderate view was expressed by the French Constitutional Council, emphasizing the autonomous nature of the legal order of the Community, but at the same time never insisting that this autonomous legal order has ceased to be part of international law. Also, the European Court of Justice has pointed out in its judicial practice that, although communities are established by an international treaty and therefore derive from international public law, they cannot be considered as typical international organizations. In the *Van Gend en Loos Court and Costa v. ENEL cases*, the European Court of Justice makes supranational law absolutely independent of international public law and defines it as a completely independent (autonomous) legal order, which has become an integral part of the legal systems of member states. Consequently, their courts are obliged to apply European Union Law.

There is also a perspective which appreciates the common characteristics of the Union with federal structures, but also points out that it does not function exactly like a federal state. This can be clearly seen if we compare the European Union and, for example, Canada, Australia, Germany or the United States. Furthermore, there is also an understanding which considers the European Union as a sovereign state with a federal structure, in which the member states have essentially, although perhaps not legally, lost their statehood. Additionally, it is sometimes suggested that the Union could be defined as a confederation. However, due to the stigma of weakness and instability, which originates from historical confederations, generally scholars avoid to define it in this way.

In the part of the theory, a kind of compromise solution is sought after, therefore the European Union is perceived as a mixed structure that goes beyond the definition of a traditional international organization – the entity that contains both federal and confederal characteristics. Thus it is said that it is "more than a confederation of states, but it is not a federation either. It actually represents a new structure that does not belong to any traditional legal category. Its historically unique political system has continuously evolved over the past fifty years". Therefore, it is concluded that it is a special, *sui generis* legal structure in which features of confederal and federal systems are interwoven. Hence, it is often legally defined as a supranational international organization. Accordingly, it is

suggested to come up with the new terminology, in order to be attractive and accurate, which should cover all the mentioned aspects. In Germany, a *state union* (*Staatenverbund*) is proposed, while in France a *federation of states*, whose name is particularly popular among French authors. However, the problem is that none of these names are widely accepted.

The European Union and sovereignty

Sovereignty, regardless of the fact that it is, one might say, a classical institution of constitutional law, cannot be understood statically, because its nature and content have changed over the years, especially with the deepening of international cooperation and integration. This trend is particularly pronounced within the processes taking place at the level of the European Union. In theory, there are basically two points of view. According to the first, "the concept of division of competences between member states and the Union based on voluntary participation is the basis for deviation from the traditional closed understanding of state sovereignty." Membership and the concept of joint/shared sovereignty also carry many advantages for member states. A flexible perception of sovereignty in the ideal world of concepts allows member states to preserve their sovereignty in relation to European integrations. That is why the concept of political sovereignty is proposed, because, as a rule, political decisions will exert various pressures that will affect a certain state. For this reason, states in the majority of cases accept the execution of obligations assumed by contracts and obligations imposed by European Union law. Here it should be noted that nothing has changed in the legal sense, and that the states are still sovereign. One should however recognize the effect of political forces that can practically affect the exercise of the unlimited sovereign power of the member states.

The European Court of Justice, in the famous already mentioned *Van Gend and Loos* case from 1963, established that the "European communities form a new order of international law, for the benefit of which states have limited their sovereign rights." On one hand, the sources of communitarian law included the provision that states voluntarily limit

their sovereignty, in order to achieve a new order within the framework of international law. On the other hand, facticity has shown that states do not want to give up their exclusive right to decide when it comes to certain issues of key importance (from their perspective). In fact, practice has shown that the source of European law are the member states, which are the "*masters of the contract*" (*Herren der Verträge*), and notwithstanding that the exercise of their sovereignty has changed, they are still sovereign, as the original holders of competences. The new sovereignty of the Union is not built on anything, except on the states, since they are still its building blocks and may leave the Union unilaterally. The German Federal Constitutional Court has clearly emphasized that "the state is not a myth", but is the basic form of organization of Western society. Member States are the original holders of competence and remain independent units. The member states must be understood as the "holders of their own destiny". Again, on the other hand, the Union is undoubtedly profiled as a kind of entity, as kind of sovereign that independently and individually executes the competences entrusted to it by the transfer of certain competences of the member states.

Constitutions "which contain provisions dedicated to European integration and European law regulate, in this respect, first of all, the consequences of the transfer of the legislative power from its own bodies to the bodies of the European Communities. However, along with allowing limitations of the sovereign competences of their states, these constitutions, quite naturally, often emphasize certain conditions, standards and values that the Union should satisfy, indirectly recognizing that it is something more than a simple economic union". However, the vast majority of member states firmly place their constitution at the top of the legal pyramid. The answer probably lies in the fact that supremacy, although a reality, has not yet been internalized in the consciousness of societies based on the idea of the nation state. It was expected that the new member states and their constitution makers would be even more sensitive about the weakening of their sovereignty, the expectation that turned out to be justified, because the new member states were conservative, that is, cautious in adapting their constitutions to membership in the Union. Thus, even today, after more than fifty years of European

integration, there is only a limited amount of specificity of the European Union in national constitutional texts, and it is quite clear that, from the point of view of national constitutions, generic references to international organizations include the Union. In fact, the majority of countries have left the deliberation on the question of the relationship between Community and national law to judicial practice, which has found appropriate solutions in all or, at least, the older member states.

The issue of constitutional identity as the last level of protection of national constitutional orders

It is well known that "the legal system of the European Union establishes a link to the constitutional system of the member states because it emphasizes that the European Union respects the national identity of the member states, which is inextricably linked to their basic political and constitutional structures, and respects the basic state functions. This reflects a pluralistic approach to the relationship between the law of the European Union and the constitutional law of the member states and through the requirement to respect the constitutional identity of the member states opens the possibility for the constitutional courts of the member states to, under certain limited conditions, set constitutional limits for the primacy of the law of the European Union". The popularity of the term 'constitutional identity' is explained by the pressure exerted on national constitutions by globalization and Europeanization, and it is a unique form of defense of vital national constitutional values. Constitutional identity is a flexible term and it depends on the state itself whose values it includes. In fact, most often it is the constitutional court that determines what falls under constitutional identity, whereby the vagueness of the term leaves room for flexibility in responding to specific situations of conflict between the constitution and European Union law.

The understanding of constitutional identity in practice became relevant in the seventies of the last century when the German Federal Constitutional Court through the decision of *Solange I* stated that Article 24

of German Basic Law "does not open the way for changing the basic structure of the Basic Law, which forms the basis of its identity, without formal amendments to the Basic Law, i.e. it does not allow changing in such a way, by the norms of international organizations," which was confirmed and further deepened by its subsequent decisions, primarily in the *Solange II* cases and the *Maastricht Decision*. However, the Federal Constitutional Court of Germany is not the only constitutional court that had developed the concept of constitutional identity.

The Constitutional Court of Italy, almost at the same time, formed its doctrine of *counter limitations* (*controlimiti*), which limits the primacy of the European Union law in the cases of threats to constitutional identity. However, in the *Granital* case, it stated that it is unlikely that the situation of non-harmonization of European and domestic norms will actually occur in practice. The French Constitutional Council developed the doctrine of *reserve de constitutionnalite*, i.e. the doctrine of accepting the primacy of European Union law within certain French constitutional limits. In the decision on the Constitutional Treaty of the European Union from 2004, the Spanish Constitutional Court emphasized that the Spanish state has retained its sovereignty, and that the sovereign competences of the state can be limited only if and to the extent that European Union law remains compatible with the identity of the Spanish Constitution. This doctrine was recently reaffirmed in the *Meloni* case. A similar way of thinking is shown by the jurisprudence of certain Eastern European constitutional courts, such as the Czech Constitutional Court, which sometimes engaged in sharp debates with the European Court of Justice, when it comes to this issue.

The European Court of Justice and the relationship between European Union law and national legal systems

We have seen that the question of the relationship between the two legal systems was left to the courts, some to the European Court of Justice, some to national courts, especially constitutional courts. A key role was, and still is, in the hand of the European Court of Justice, which as far

back as 1964 in the case of *Costa v. ENEL* established that, unlike ordinary international agreements, the Treaty on the European Economic Community created a special legal order, which in its entry into force became an integral part of the national legal systems of the member states – hence which their courts must apply. The Court also confirmed the legal nature of Community law in the case of *Humblet v. Belgium*, while in the *Internationale Handelsgesellschaft case*, the Court pointed out that the constitutional provisions, including the basic ones, must be in accordance with the principle of primacy of Community law, although, practically speaking, situations in which there is a collision between the norm of Union law and the national constitution are rare. In other words, this decision defined the absolute importance of the doctrine of primacy of Union law. In the event that community law and national constitutional provisions regulate certain issues differently, the law of the European Union will prevail. The reason for this attitude of the European Court of Justice is extremely pragmatic, since through the principle of primacy, it tries to ensure uniform and effective application of Union law in all member states. In other words, if states were allowed to derogate from the norms of Community law with unilateral national regulations, Community law would lose its purpose.

Therefore, this order, which is autonomous, exists independently of the national law of the member states and general international law, but at the same time it is also an "integral part" of the legal order that is applied in the territory of each of the member states. The mutual relationship between two legal systems is based on the principle of the supremacy of Union law, whose principle implies that every norm of Union law, both primary and secondary law, has precedence over every norm of national law, even when it is a constitutional norm. This principle was not explicitly stated in the primary treaties, but has emerged through a teleological judicial interpretation of the Treaty on the European Economic Community. In fact, the European Court of Justice derived the principle of supremacy from the legal order of the European organization, its constitutional nature and autonomy. The member states or the vast majority of them, on the other hand, started from their own constitutional solutions and doctrinal understandings.

Federalization of Europe

Thoughts about "the federal Europe", emerged on the continent in the past century. For the majority of Europeans, both World War I and World War II meant the beginning of the demolition of the continent and the downfall of European civilization. Future wars in Europe must be prevented in any possible way. After World War II new ideas of federal Europe appear. The most important and highly quoted is the speech of former British Prime Minister Winston Churchill in 1949. This speech become world famous, and also the partnership of France and Germany, which is underlined again, became inextricably in integrations of the continent. After this, in 1947, more than 800 European intellectuals and politicians formed the European Union of Federalists. The event took place in The Hague and it gathered a lot of followers with ideas of federalism but also several of them with a more traditional approach of cooperation in Europe. The first outcome of the debate in the late 1940s was the Council of Europe, created in 1949.

The European Coal and Steal Community established the first common institutions of Europe (after the Council of Europe). Soon after the Treaty of Paris, the Treaty of Rome was prepared for signing. The official name of the treaty was the Treaty establishing the European Economic Community. This treaty led to the founding of the European Economic Community on 1 January 1958. This treaty established a more powerful executive branch – the European Commission. Another step towards federalism was made in 1979, when members of the European Parliament were directly elected for the first time. The Treaty of Rome treaty was amended in 1992 by the Treaty of Maastricht establishing the European Union with the European (Economic) Community as one of three pillars. For the first time European citizenship was introduced. The Amsterdam Treaty, officially the Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain 44 related acts entered into force on 1 May 1999. Amsterdam slightly changes Maastricht. This treaty gives space for the Common Security and Defense Policy of European Union with the emphasis on projecting the EU's values to the outside

world, protecting its interests and reforming its modes of action. The Treaty of Nice in 2001 amended the Treaty of Maastricht. It reformed the institutional structure of the European Union several years before eastern enlargement in 2004. This treaty for the first time established the Community/Union conditions which need to be fulfilled to reach some decision in the Council. First of all, the Treaty of Nice changed voting conditions for member states and also introduced conditions for new members. In order for a decision to be reached the double majority of member states and votes cast is needed, and a Member State could optionally request verification that the countries voting in favor represented a sufficient proportion of the population of the Union. The federalist idea was put back on the agenda in 2000 by German foreign minister Joschka Fisher in his famous speech at Humboldt University in Berlin on 12 May 2000. Actually, after World War II two ideas emerged together with two theories of integration on the European continent. The first idea is that European countries need to build cooperation among themselves through the integration of some really important functions, basically in economic terms. This idea led to functionalism as a theory of European integration. The second idea marks the importance of establishing Europe as a political federation, which led to federalism as an idea of European integration.

Conclusion – Is this the right constitutional moment?

Is this the right constitutional moment for the new federalist wave in the European union? In our opinion it is not. Of course, this does not mean that we are approaching a "worst-case" scenario. On the contrary, with the right approach and perhaps a change of the current perspective, as well as good thinking, it is certain that an optimal solution could be reached, practically tailored to everyone's needs. However, such a solution must take into account the largest number of interests and bring them closer together. Therefore, it is necessary to keep on with the quest of searching for optimal solutions, since the constitutional moment for the European Union to become a federation has not yet

arrived. A moment is a combination of spontaneous and organized circumstances and forces. Without it, it is pointless to talk about a new constitutional step. How do we know that the moment is not right? It is obvious that the consensus is still far from obtainable. We can aspire to it, but the entire process is in the political sphere, which shows that the constitutional moment is not close. Without a constitution, there is no question of the process of further federalization, and all previous attempts failed at that step. Certainly, the strongest states of the Union will lead certain processes, and we can only state that despite the times that demand quick reactions, it is not bad to stand still a little bit and think about what to do next. Certainly, perhaps these circumstances on the global stage will create new constitutional moments.

It seems to us that the final goal was to come to the establishing of a stronger institutional structure through gradual steps. It is, however, obviously not so easy to do. Why did the EU not carry its integration through the projects from Maastricht? Systemically speaking, the problem is that this federalism did not want to be a federation. There is Luhmann's (systemic) thesis according to which a system that develops, progresses and falls into crisis must reduce its internal complexities in order to return to equilibrium. This is even more important for federations, since they are by definition even more complex than unitary states. Precisely because of this, the rule of reducing complexity in a crisis is not only more important but also more difficult for federations. But basically, the same rule of reduction applies to all modern political systems, which the author talks about: "The ability of a system to reduce its internal complexities depends basically on the skill to present such a reduction as indispensable for the promotion of the public good." Our argument is that the way in which a complex community reduces its complexities speaks the most about its constitutional nature". The problem with the European Union from that point of view is that, unlike historical examples of federations (USA, Switzerland, Germany), it *de facto* reduces the complexity of the system in crisis, but it does so in an illegitimate way. The European Union seems to be caught between a rock and a hard place. What should be the solutions in the future in order to achieve optimal organization at the European Union level?

Theoretically speaking, it seems that the European Union, as a *sui generis* model, deserves a higher level of intuitiveness in the field of searching for a compromise solution between federalism and confederalism, as well as within federalism itself. Probably, innovation of something new in a theoretical sense is seeded. The United States of America created a model of a federal state, and perhaps the European Union will eventually emerge with some model of its own, currently non-exitent and unknown. One should remain open-minded in this sense. Therefore, in order not to waste the opportunities in the future, we should be patient and wait for something from the foreseeable future.

The fact that the European Union differs from federal political systems in terms of its historical origins and the strength of its constituent units does not mean that the attempt to solve European problems by using instruments from the "federalist fund" should be rejected. The idea of using existing solutions is not to turn the European Union into an ideal federal political system, but a way to bring it close enough in order for problems that it faces to be significantly reduced or completely removed. The period of European integration from 1951 to the end of the nineties of the last century can be considered as an experience of rational balancing of processes and crises. It was a period of successful "hidden federalism" as *modus vivendi* of the community and its integration. Today, with enough facts and indicators, one could claim that it is contradictory, but the golden age of integration has irretrievably passed. When it comes to the practical part, the key words are interests and compromises. First, it is necessary to find solutions that will be in everyone's interest, and discard those that are not i.e. wait for a more appropriate moment for them. As a result, any new area of integration should be justified by the potential benefits. This means that the potential benefits of greater centralization in any policy areas should outweigh their potential costs. Secondly, the most logical conclusion is that this Federalist aim will be possible only in a context of differentiated integration, with the Eurozone developing as the federal core of Europe. A realistic integration policy must expect that not every step along the road to deeper integration will automatically be welcomed by each and every member state and its citizens. There are countries that have already decided they do not wish

further integration. Therefore, future integration has to be approached more in terms of groups of countries. Until recently the prospect of differentiated integration was used as a threat, designed to put pressure on reluctant governments into agreeing to further integration. Nowadays, differentiation in integration must be seen as an opportunity. Anyway, patience is necessary, as well as respect for the interests of the member states, in order to constantly improve the structure of the European Union, which should be based on the true will of the member states. In that way, that structure will be long lasting and suitable for the changes in the future. We have witnessed many times in the history of the European Union that the process of integration had stood still, and then after the changed geo-political circumstances, it gained its momentum, sped up again. Therefore, the key words are patience, thoughtfulness, care for interests, and the creation of a coherent political community that will want further constitutional steps in order to reach deeper integration.

BASIC LITERATURE

Cloots E., *National Identity, Constitutional Identity, and Sovereignty in the EU*, "Netherlands Journal of Legal Philosophy" 2016, no 2.,

Đorđević L., *Kontrola ustavnosti pravnih akata Evropske unije*, "Zbornik radova Pravnog fakulteta u Nišu" 2013, no 65.

Fasone C., *Constitutional amendments' theory and troubles at supranational level: Constitutional change in the EU from the perspective of Richard Albert's analysis*, "Revista de Investigações Constitucionais" 2021, no 7.

Hamuľák O., *National sovereignty in the European Union: View from the Czech perspective*, Springer, 2016.

Horvatić Ž., *Pravni sustav Europske unije i pravni temelj njegovog utjecaja na pravne sustave država članica Europske unije*, "Godišnjak Akademije pravnih znanosti Hrvatske", 2013 no 1.

Meškić Z., Samardžić D., *Pravo Evropske unije*, Sarajevo 2012.

Novak S., *Dijalozi između ustavnih sudova država članica Europske unije i Suda Europske unije*, "Pravni vjesnik" 2020, no 3–4.

Pavićević V., Džamić V., *Koncept suverenosti: razvoj i savremena tumačenja*, "Međunarodna politika"2012, no.1145.

Reestman J-H, *The Franco-German constitutional divide: Reflection on national and constitutional identity*, "European Constitutional Law Review" 2009, no 5.

Samardžić S., *Od skrivenog federalizma do skrivenog hegemonizma: kriza vladajućeg modela evropske integracije i odgovori*, "Theoria" 2018, no 2.

Stanić M., *Dvosmerni odnos prava Evropske unije i nacionalnih pravnih sistema država članica*, [in:] *Constitutio lex superior, Sećanje na profesora Pavla Nikolića*, ed. O. Nikolić, V. Čolović, Beograd, 2021.

Todorović N., *Perspectives of federalization of European Union: Comparative federalism towards federal Europe*, Brno, 2014.

Witte de B., *The European Union as an international legal experiment*, [in:] *The Worlds of European Constitutionalism,* ed. De Búrca, J.H.H Weiler, Cambridge 2012.

Vukadinović R.D., *Uvod u institucije i pravo Evropske unije*, Kragujevac 2012.

Tanja Karakamisheva-Jovanovska

Thoughts on possible EU federation

What is the EU? Federation, confederation, new federal order, new legal order?

Depending on whom we are talking to and whether the question is based on a legal, political, economic, social or international aspect, there are many answers to the question of what the EU is exactly.

For the political science experts, the Union is, first, a political union that functions through its own institutions which create their own policies, relations, influence and processes. These political institutions have their own political influence and create specific effects within the political system.

For the lawyers, on the other hand, the EU is a specific form of legal system based predominantly on legal principles, such as the rule of law, autonomy, supremacy and direct effect of EU law, proportionality and subsidiarity, respect for human rights and freedoms etc. International law experts, however, consider the Union to be a typical international organisation like the UN, the Council of Europe, or OSCE.

For the economists, the Union is a functional economic system in which the common market and the single currency, the euro, play the crucial role in the common economic and financial functioning of the EU Member States.

For the sociologists, the Union is a social and cultural community, united in the diversity, community of different cultural identities which together create the joint European identity.

For the federalists, the EU is a political union that contains many federal elements which should ultimately shape the Union as a classic federation, based on the examples of the U.S. or the Federal Republic

of Germany. For instance, *Moravcsik* described the EU as 'an exceptionally weak federation'. On the other hand, other scholars contend that the EU 'represents a new kind of a federal order'.

It should be emphasized that, theoretically, EU federalism is being considered from two aspects – constitutional and functional. These two concepts interpret functionalism and constitutionalism differently in the hierarchy of the EU political system.

The functionalism is seen through the EU institutional prism, how the political institutions are functioning and interconnecting, to whom they are responsible and who supervises their work, while the constitutional federalism is viewed through using the constitutional and/or legal language in discussing the key democratic principles, such as, principle of division of power, sovereignty, legal provisions for the decision-making process, principles of the rule of law, direct effect and supremacy of EU law, protection of human rights and freedoms, etc. This legal language is specifically used by the Court of Justice of the EU. In recent cases, including *Komstroy* from September 2021, the Court reasons from the premise that the EU is a 'new legal order'.

On the other hand, the former president of the European Commission, *Jacques Delors* described the European Union as an "unidentified political object" while some scholars on international law consider that the "EU is an unidentified *legal* object".

These different approaches and understandings open the door to different interpretations on the character and nature of the EU, diverging views about what the European Union is, and how it should be considered and understood in international law.

For many international lawyers, the answer is relatively simple. They define the EU as an international organization with many specific features, such as the way that EU law is integrated into the legal systems of its Member States. They are still not convinced that the EU is somehow in a class of its own.

Bearing in mind these different views on EU character and nature, a general conclusion could be drawn that the answer to the question 'what is the European Union?' largely depends on the legal and political

context in which the question is posed as well as whom you are asking to give an answer.

What are the major weaknesses that the EU is facing?

The functioning of the EU so far has revealed several key weaknesses and problems which will be further covered in this paper. The great EU weakness is the so-called democratic deficit of the EU institutions. The commonly perceived image for the Union by European citizens is that the EU is politically run by technocratic elites that distance themselves from the European citizenry. The citizenry believes they have little direct democratic influence on the process of appointing officials to the "European offices". The ignorant politics of the EU technocratic elites toward European citizens is considered as the key turning point for the continuous decline of EU citizens' support in the past three decades. For instance, the European commission in the past was seen as the defender of citizens and their rights in the face of the national governments. Today, the citizen's impression is that the Commission has turned into an enabler of national governments against the interests of the citizens.

While in the past the European parliament and Commission saw themselves as allies against the intergovernmental Council, today the impression is quite opposite. The Commission obviously does not feel it has a duty of enforcement to the citizens, because it considers governments rather than citizens to be its only legitimate interlocutors.

The role of the European Council has never been clear enough. It seems that with the Lisbon Treaty reform the situation with this institution became even more confusing. Having in mind that the national ministers who are sitting in the EU Council of ministers are more and more subservient to the national governmental leaders, this servile position directly affects the relations and positions that are built between these two institutions.

The voting in the Council is usually secret and there is no way for the citizens to know how their country voted in the Council, what stance their minister took in a debate. The result is that while the Council is

the most powerful political institution in Europe, most citizens have never even heard of it. Ironically, while many Europeans know all functioning details about the working of the former Trump or now Biden administration in the US, they have little or no information and knowledge of what the European Commission and Council are or what they do.

The EU treaties should clarify the nature of the European Commission and European Council in terms of what they are. Are they real executive institutions or a mixture of executive and legislative institutions? Who are they accountable to, and who gives them their mandate?

On the other hand, the position and the functioning of the EU Parliament are still dependent on the national parties and national policies. Under 60% of MEPs belong to a national government party and their real bosses are sitting in the Council. The MEPs' political dependence leaves an "inherent inequality" between the two legislators. It is something that could be resolved by having transnational lists and uniform electoral rules in the next 2024 parliamentary election but, as we know, this idea was overruled by members of the Council in 2019.

The European Parliament is not the EU's legislator in the substantive essence, it has no right of legislative initiative, and it is not based on equal voting rights. It is, therefore, not the place of European democracy precisely because the MPs are not elected in a general and equal elections within one electoral system and one electoral model, therefore the election results do not fully represent the sovereign states of Europe.

Consequent to this, party roots in European society have disappeared. Instead of representing interests of European society, parties have become almost indistinguishable from the national states. They govern rather than represent. They focus their electoral involvement around their desire to stay in power. This retreat of politics into the national states has had the effect of creating parties that operate like a cartel.

Cartelized political parties create cartelized European politics. Ordinary citizens began to think and judge in terms of the power of an untouchable European political class.

The EU party system needs reform.

This reform is related with the challenge to create a separate European demos whose interests would be represented through the European

political parties that will deal only and exclusively with the European issues and policy-making, and not, as until now, exclusively with national interests.

When citizens talk about the EU, they think of it as something "out there" in Brussels. There are Europe's national states, with their national capitals, on one hand, and there is the EU, with its institutions and policies, on the other. The two are more often conceived as separate planets. They are obviously connected in various ways, but we still conceive of the EU as "something out there", as a structure above Member States that constrains and directs their behavior in various ways. This way of thinking about the EU is reflected in how we think about its democratic legitimacy.

The EU is weak in the democratic legitimacy.

The Union has more 'output legitimacy' than 'input legitimacy'. There are simply different pillars of democratic legitimacy within the EU – Member State governments constitute one pillar, with each government elected, and so representing its own national population at the EU table.

Another pillar is the democratic legitimacy of the European Parliament.

Since the European Parliament is elected every five years and has a direct input into who becomes the President of the European Commission, it constitutes a pillar of legitimacy that directly connects the EU citizens to the EU institutions. We often say that the European Parliament is the initiator of a European democracy. But is it true? Are there sovereign European citizens? Is there one European demos? The answer is "no".

The European Parliament is not the EU's legislator in the substantive essence, it has no right of legislative initiative. The right of legislative initiative in the Union still belongs exclusively to the European Commission which seriously violates the principle of separation of power and undermines the essence of the rule of law as a dominant principle in the Union. The rule of law seen as supremacy of the legal norms with regard to the execution of the power related to the law, is disrupted with this distorted division and realisation of functions of the holders of that power. The mission of parliamentary "reincarnation" is not impossible in the EU. What is necessary to be done?

The EU needs to locate the real weaknesses of the parliamentary democracy and find appropriate solutions that would neutralize its

negative effects. Reinstituting of the European Parliament's power is an essential step in the process of reviving the real democracy in the Union.

Instead of key decisions to be made by EU institutions which were not elected by the citizens (such as the European Commission, the Council of the EU, the European Council) essential legal changes are needed in the direction of strengthening the democratic capacity of the Union and directing the political energy to the European Parliament as the only body with electoral legitimacy in the Union.

Although the reforms that took place in the European Parliament, in the part of giving consent for the election of each commissioner separately and for the whole Commission together, were not democratic enough, they still made certain changes in the position of the Parliament. The problem with the disrupted separation of powers is emphasised with the Treaty of Lisbon, where the concentration of legislative, executive and coordinating powers of the EU Council is not questioned at all. The current president of the European Commission, *Von der Leyen* has committed the Commission to support the idea of introducing transnational lists in the 2024 election. This way the candidates for the Commission presidency in future could be elected across all member states. Research has shown that knowledge of the candidates standing for Commission president will increase voter participation and the effect of them standing across all member states could increase the domestic focus on European issues in election campaigns.

As already emphasized, the EU lacks the resilient collective identity of citizens, the common public sphere and the common political organizations that characterize a European demos. The foundations and procedures of democracy and solidarity are developed most strongly at the national level.

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

The question that any objective legal analyst should ask the EU is why there is no radical reaction to France, Germany, Spain, Italy and other

EU founding countries when their constitutional courts oppose the principle of direct effect of EU law through introducing their own constitutional doctrines for protecting their constitutional identity, on one side, and then there are hysterical and radical EU reactions to Hungary and Poland supplemented with severe punishment for violating the rule of law principle when their constitutional courts react in the direction of protecting the national constitutional identity, on the other side?

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

What is the difference between the Italian Constitutional Court *controlimiti doctrine*, the Italian *Taricco judgments*, the German Constitutional Court's *Solange case law*, the *Maastricht judgment and the Kompetenz-Kompetenz* doctrine, the French Conseil Constitutionnel *constitutional identity doctrine*, on one hand, and the Polish and Hungarian Constitutional court's protection of the notion of "historical constitutional identity" of Poland and Hungary which aims to protect the countries from European encroachment, on the other?

What future for the EU?

Bearing in mind all the above-mentioned weaknesses, European citizens have the right to ask what is the future of the European Union?

The question of the future of the European Union provokes an endless discussion. One of the key points of this discussion is that the future of the EU depends on the returning of the European principles and values that were at its origin – guaranteeing that rule of law, human rights and freedoms, law and justice, democracy and sovereignty, are not just formal concepts and written principles, but daily reality. Returning to the concept that the Member States are "The Masters of the Treaties" will give more power to the national citizens to help in the current pressing policy issues, such as migration, climate change, great power competition, etc.

There are different approaches among the scholars when answering the bitter questions regarding the future of the EU. Some prefer to upload

more competences to the EU institutions, to vest the EU federative and state-like capacities like strong external borders and the capacity to protect the territory within these borders. Others rather see competences downloaded to a more legitimate national platform for action.

The corona crisis and especially the current war in Ukraine have fully exposed the EU's deficiencies. The crisis demonstrates that the EU itself cannot deliver any results on solving fundamental problems, such as health and security. This situation injected a sense of urgency to the EU reform process and shows that the Union needs to be made fit for the challenges of the 21st century.

European integration and, in some cases, disintegration is a process that will continue to be a problematic question. The Western Balkan integration in the EU continues to be an open and political issue. Double EU standards toward the Western Balkan countries show obvious hypocrisy of the EU institutions. The EU *acquis communautaire* are differently applied in the old and in the new EU candidate countries. My country, Republic of Macedonia is a clear example of that hypocrisy.

Europe has not been carrying out its real project, either internally or internationally. The answer to the question about the future of the EU can only be to return to the original project for Europe of its founders:

"Europe must conceive a soul. Europe must become a Guide for Humanity again. Europe is not against anyone. United Europe is a symbol of the universal solidarity of the future. Before Europe becomes a military alliance or an economic unity, it will have to be a cultural unity in the fullest sense of the word. The unity of Europe will not be achieved, neither solely nor mainly, through European institutions; it's creation will follow the evolution of spirits".

The EU needs to enhance its political visibility and to have a more active role in dealing with global challenges and regional crises, while maintaining its distinctive characteristic as a soft power. It must show to European citizens that it could counter the economic recession and to re-launch the economies of its members making effective use of the EU recovery program.

The EU will have to demonstrate a new and shared political determination to boost the EU dimension, complementing the impact of each

individual Member State. In this context, forming the new EU federation with a new robust structure is not the option.

Instead of wasting energy on aimless discussions about the possible EU federation, it is necessary to direct all capacities towards creating development programs and improving capacities in all of the EU's policies, starting from trade to climate, from energy to environment, from education to research and innovation, etc. in a direction of strengthening Europe's internal and external projection.

The EU is not integrated and homogeneous enough to function as a classic federation. The EU needs to preserve the hybrid nature of the existing political system, especially when it comes to favoring the model of a consensus at various levels – among the Member States, within each European institution, and then between them.

Conclusion

From all the above mentioned, the conclusion is that the key problems with which the EU should deal more seriously, and related to its future, is not whether EU federation or confederation is needed, but how the European citizens could "win the battle" with the technocratic, unelected structures that sit in the EU institutions, as well as with the cartelized political parties that are looking only for their interests. Legitimate questions that EU citizens should seek more precise answers to:

1. How these electorally invisible and unknown technocrats can get out of their comfortable chairs and enter the electoral "arena" where, with a program and vision, they will fight for a seat in the well-paid EU offices,
2. How to overcome the democratic deficit of the EU which has been a cancerous wound of the Union for several decades,
3. How to make the Union a more active and influential factor in world politics,
4. How can the EU preserve the national and constitutional peculiarities of its member states without using blackmail and pressures from the stronger countries,

5. How to overcome the artificial division of old and new democracies,
6. How to be equal before law and justice in the EU,
7. How to solve the problem with the displaced separation of political power,
8. How the Union should act in crisis conditions, while avoiding falling into a crisis itself,
9. How to build a Union in which the law rules and basic human rights are respected,
10. How to overcome the problems with the efficiency of the rule of law principle as a pillar stone of the European Union, with the legitimacy of the European political institutions and European political parties, with the lack of European demos that have to bear EU sovereignty.

Without precise and satisfactory answers on these issues that are of crucial importance for the EU's existence, the EU cannot function as a true global and European political actor.

BASIC LITERATURE

Besselink L. *National and constitutional identity before and after Lisbon*, "*Utrecht Law Review" 2010. Vol.* 36.

Burgess M., "Federalism", [in:] *European integration theory*, Oxford 2003.

Burgess, M. *Federalism and European Union: The Building of Europe, 1950–2000*, London 2000.

Elazar, D., *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements*, Rowman and Littlefield, Lanham 2008.

Law, J., *How Can we Define Federalism?*, "Perspectives on Federalism", 2013, Vol. 5, no. 2.

Odermatt J., *Unidentified Legal Object: Conceptualising the European Union in International Law*, "Connecticut Journal of International Law" 2018, Vol. 33, No. 2.

Carmen Moldovan

European sovereignty: myth or possible reality?

Introduction

The notion of sovereignty within the European Union is a topic highly discussed and still relevant despite the integration process and the supremacy of the European Union legal order over the domestic rules. It is a political, social and legal concept which impacts the relationships between the Member States on one side, and between them and the European institutions and bodies, on the other side.

The aim of the paper is to address the concept of sovereignty, its meaning from the perspective of International Law and the special features that this concept has for the European Union as a legal entity itself and in consideration of its Member States. The analysis will show that sovereignty is not a concept of the past nor it is dead within the European Union.

Its meaning and scope evolved but it is still relevant. The scenario of achieving European Union federalization raise the question of the holder and legal base for the sovereignty of the new legal entity as a subject of International Law. The opposed scenario is that such a result is impossible in the foreseeable future due to the diversity of the Member States and some irreconcilable national approaches that may determine leaving the European Union. Sovereignty is a very sensitive topic in both hypotheses and the paper aims to address the relation of federalization and the principle of state sovereignty.

The main points of the analysis center on the concept of State sovereignty in International Law, the special features and evolution of sovereignty in the European Union as a consequence of the European

integration process, the relevance of the resistance of States to the consolidation of the European Union and the role of this classic notion for a future entity acting as the United States of Europe as a new subject of International Law and what the impact will be on the current Member States. Different terms were proposed to be used for addressing the sovereignty dilemma within the European Union and the impact on its members. The prospects of concluding a constitutive treaty of a formal federation are far off and uncertain in the foreseeable future, due to the lack of will from States. Thus, the sovereignty principle is still relevant and inextricably connected to States and its relevance is proved by the mere fact that the completion of a federalization process will only be possible with the acceptance from their part.

The nexus between federalism and sovereignty

There is no consensus concerning the meaning of the terms *federation* and *federalism,* but the etymology is not contested; the terms derive from the Latin *foedus (*plural *foedera)* meaning covenant, contract, treaty, designing an alliance with other States based on friendly relations. Yet, there is no comprehensive definition of federalism and no precise interconnection between federation and the federalism process.

Federation is usually described as a form of a sovereign state, a union of people, based on constitutional provisions in which power is not centralized and its exercise implies the actions of regional institutions. Federalism is considered a process that results in the creation of a federation. Within the European Union, federalism is strongly related to the integration process.

The idea of a federation of European States is not a new one and it appears frequently in the public discourse. It was mentioned in 1950, by Robert Schuman in terms that highlight the idea of solidarity and the preservation of peace, which was one of the most important aims:

> Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first

> create a de facto solidarity. … The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims…. By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.[1]

The idea of peace was strongly attached to the European States and an important element of the evolution of the Coal and Steel Community towards the European Union that we know today. Undoubtfully, this process was spectacular and made possible by the ideas of solidarity and trust. Systemic changes and increase of competences for the European Union institutions over time concerning the decision-making process and their implementation had as a result the strengthening of the position of the European Union in relation to third parties and in relation to its members.

The evolution of the architecture of the European Union determined innovations concerning terms and also the concept of shared sovereignty, the idea of the dissolution of the unitary nature of States, the only legal subjects entitled to exercise sovereignty and the question on the real possibility of federalization of the European Union.

Previously, at the 1948 Congress of Europe in The Hague, two ideology trends took shape: the federalist line (supported by France, Italy, Belgium, The Netherlands) and the unionist line (supported by Great Britain and Scandinavian countries).

[1] Schuman Declaration 9 May 1950, https://european-union.europa.eu/principles-countries-history/history-eu/1945–59/schuman-declaration-may-1950_en.

The idea of a federation of European States is often compared to the United States of America and one of the most important questions is, if this idea is really possible to be translated into reality, what the new legal entity look like in the sense of how its competences would be exercised.

The idea is not new, it was affirmed in Europe for quite some time, the term "United States of Europe" (French: États – Unis d' Europe) being used by Victor Hugo, including during a speech at the International Peace Congress held in Paris in 1849.

In the context of the European Union, federalism may be described as the expression of a system of pluralistic associations of States which implies activity from two sets of governments, legislative and executive authorities, in their specific fields of actions, in a balanced relationship. This describes to a great extent the manner that the European Union is functioning now in many areas. Federalism as a process may not be separated from the concept of sovereignty, a crucial concept for States, society and the international community in its entirety.

The idea of federalization of the European Union cannot be addressed with the exclusion of the national sovereignty principle and how it will be impacted by such a structural and systemic change of the European architecture.

State sovereignty as a principle of International Law

The principle of state sovereignty is still a very important one for the international legal order and the exercise of other rules and principles are centered around it (such as non-intervention, equality, inviolabity of frontiers, inviolabity of state territory).

Sovereignty is a political construct whose origins go back to the Peace of Westphalia in 1648, with the aim of separating the authority of the sovereign from that of the Catholic Church. The Westphalian system established that States held sovereignty over their territories and internal affairs without interference from other States.

The traditional or classical sense of sovereignty as described by Jean Bodin in 1577 refers to a unitary sovereignty that cannot be divided, which is tautological, strongly connected to the ruler or the king.

In time, as a result of evolution of the European societies and due to the democratization process, it was no longer strictly related to the king and became oriented towards the state itself as state-sovereignty.

The most important question, from the federalization process, if this meaning remained unchanged, rigid and inflexible or it evolved as much as to accommodate and adapt to new realities.

Although the principle of sovereignty was recognized a long time ago, and the evolution of States is inextricably connected and influenced by it, International Law does not contain a comprehensive definition of it; therefore the identification of its meaning, elements, and features is relevant for the identification of its limits or restrictions, such as national jurisdiction and State immunities.

The complexity of the concept is amplified by the fact that the modern meaning of sovereignty refers also to the peoples within the State, not exclusively to the state itself as a legal entity.

The concept of sovereignty continues to be a subject of analysis, debate and research concerning its meaning, scope, features, and limits and may present different approaches from one continent to another and from a period of time to another.

The point of congruence is that it represents a fundamental principle of International Law and an essential element for the existence of the State, applicable in relation to other States. This corresponds to the traditional view of sovereignty which emerged after the Peace of Westphalia in 1648 which established a modern system of sovereign States.

The concept is strongly related to the existence of the independent State, as a subject of International Law, which generates a series of consequences, such as equality between States in international relations, immunity from jurisdiction, full and absolute competence for regulating all types of social relationships.

The strong connection between sovereignty and equality between States is clearly established in the United Nations Charter, according to Article 2 para 1, which reads as follows:

> The Organization is based on the principle of the sovereign equality of all its Members.

It is also enshrined in subsequent legal acts such as the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, *Helsinki Final Act, Charter of Paris for a New Europe*; they all determined its high value in International Law and highlighted connections with other fundamental principles such as non-intervention, self-determination, territorial integrity and peaceful settlement of disputes.

The classical approach of the concept of sovereignty is focused on features such as indivisibility, absolute, independency, applicable in a unitary manner on the state territory.

From a territorial perspective, State sovereignty and other fundamental principles of International Law mentioned previously apply to all components of a state's territory within its borders (land, sea, air), where it enjoys indisputable exclusivity and full jurisdiction. All elements of State sovereignty refer to and are analyzed in relation to the physical territory of the state depending on the stage of evolution of the rules and concepts of International Law.

Sovereignty, an essential attribute of the State both at the international and domestic level, describes the powers of the States and actually presents multiple meanings, it is indivisible, exclusive, inalienable and represents a guarantee of the development of relations between States, based on independence and the lack of subordination of a State to the others.

In the analysis of the content and implications of the principle of sovereignty, many academic works have as a reference the conclusions of the case of *Palmas Island*, which analyzed the territorial dimension of sovereignty as follows:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. …. Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.[2]

At the same time, it should be emphasized that the arbitral award took into account the dynamic nature of the concept of sovereignty, and stated that:

> Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place.

[2] PCA, Island of Palmas Case (or Miangas), United States of America v. The Netherlands, Award of the Tribunal, 4 April 1928, https://pcacases.com/web/sendAttach/714, p. 839.

> Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory.[3]

Sovereignty is based on the idea of exercising control or a manifestation of authority over a certain territory of the State and other spaces with special legal status and includes control over all people in the territory, which has the meaning of exercising competence (prescriptive competence, jurisdiction to judge, enforcement jurisdiction).

The link between sovereignty and State is almost tautological. The meaning of the principle of sovereignty is the result of evolution and has a different meaning than it presented in the 16th and 17th centuries when it appeared as a result of the European monarchies' intention to strengthen their position in relation to the Church.

Sovereignty implies the possibility to negotiate and conclude international agreements that are binding upon them and assume international obligations, without any limitations concerning the scope of such acts. The noncompliance with the international obligations established by the consent of States triggers the mechanism of international responsibility, yet such a situation is not a limitation of sovereignty.

Over time, the concept of sovereignty acquired new connotations concerning its meaning, but it did not evolve as in the sense of expanding its applicability in the case of organizations constituted by States. International Law and international relations changed and the increase in the number of organizations has increased considerably, and this plurality of entities exercising powers and competences impacted on these changes.

Briefly formulated, from the International Law approach, sovereignty remains strongly connected to the State as a legal entity, it belongs to the people and the State is acting as the administrator of sovereignty.

[3] Ibid, p. 840.

Legal nature of the European Union from the perspective of International Law

The concept of sovereignty within the European Union must be analyzed together with the integration process, which determined changes for the concept itself in the European Union legal order, yet the question is exactly how and to what extent the features and the nature of the principle is affected and what would be the coordinates of its future evolution.

The European Union, as a legal entity is *a sui generis* construction or an international special regime that deviates partially from the general or classical rules of International Law and its functioning and evolution had influence over the concept of sovereignty.

The European Union was described as a "cooperative federalism", yet its nature is very complex, it combines diversity of the Member States with the idea of unity and at the same time it enjoys the capacity to adopt and enforce decisions of the European bodies.

From a legal perspective, the European Union represents a treaty-constituted body, concluded between sovereign States and this is the mechanism by which it derives its authority, and not the direct will of the nations, or a single entity.

However, according to rules of International Law, the scope of legal personality of international organisations is limited by the provisions of their constitutive act and they are considered "derived" subjects from the will of States expressed in the constitutive treaty. The sovereignty of the Member States is not impacted or reduced by the creation of such a legal entity.

The notion of legal personality of international organisations was addressed by the International Court of Justice in its 1949 Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations,* concerning the possibility of the right to bring claims in order to obtain reparation for the damages caused to an agent during the performance of its duties. Although the Court issued this Advisory Opinion more than 70 years ago and it did not provide a definition of this notion nor of its scope, it has not lost relevance.

The view of the principal judicial organ of the United Nations was that the establishment of international organisations does not deprive the Member States of their competences. From this perspective, sovereignty does not constitute a trait of an international organisation and the legal personality is limited and connected to its principles and purposes.

The discussion is more complex in the case of supranational organisations, such as the European Union, entrusted with special competences. It represents a very complex mix of political and legal elements which evolved over a long period of time, that holds its constitutional authority on the national orders of the Member States.

Despite the two levels or double layer order that might create the illusion of a perfect framework for exercising joint competences, there are cases of strong dissonance between the European Union institutions and some of its Members on fundamental issues of the European order such as the respect for the rule of law, non-discrimination and human rights protections, and immigration, which could weaken the functioning mechanism and the framework for implementing and respecting the common values mentioned by Article 2 of the Treaty on European Union, which reads as follows:

> 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.

Taking into consideration that sovereignty constitutes an attribute of the nation State, the question if sovereignty can be shared or divided is a legitimate one and the answers are strongly related to the European Union and its functioning.

However, the European Union as it is in the present days, a powerful supranational organisation, does not enjoy sovereignty, applicable only

to State legal entities. States that agreed to be members of the European Union deviated only to a lesser extent from the classical sense of sovereignty as they transferred competences to the European Union institutions, and not sovereignty *per se,* which cannot be seen as divisible and possible to be exercised in multiple levels and layers. Moreover, those competences can be retrieved by withdrawal from the treaties on the basis of which the European Union is functioning.

In this regard, one of the greatest challenges was the withdrawal of the United Kingdom from the European Union. The former member took back control over the borders, politics and all fields of government, as a result of the will expressed by referendum of its nationals in 2016, after years of reservations and opting-out to of European legal acts. It is quite interesting to mention that it was the first time that an explicit provision of the Treaty of the European Union provides the procedure to be followed in such a case and although Article 50 is merely procedural in its content and very synthetic, the European Union and the United Kingdom managed to negotiate the withdrawal conditions and conclude the agreement.

The dilemma on sovereignty of Member States of the European Union corresponds in a great extent to the debate on national sovereignty very present within the United Kingdom during its membership, and invoked as a legal basis in order to justify its conduct and choices.

The process of the United Kingdom leaving the European Union did not really weaken the Union and did not lead to a decrease of its credibility at the international level, nor caused instability within the Union despite the "exit" discourse that nationalists' trends try in some States to promote, if it suits their political strategies.

The meaning and scope of sovereignty seen through the lense of International Law is quite different from the European perspective, which questions if the concept is rigid and remained unchanged over the years or if there is an evolution of the modern or European sovereignty principle.

One of the most important distinctions between the two approaches is determined by the acceptance of the idea of limits that may affect the state sovereignty, previously considered as equivalent to the exercise

of an absolute and exclusive authority. The answer to this question is in the affirmative, as one field that appeared and developed to a great extent is the protection of human rights, which is a feature of democratic societies and an important value of the European Union as well.

European integration and the sovereignty of Member States

In practice, there is an erosion of the meaning of sovereignty by its classical definition and elements in the context of the European integration. The concept of national sovereignty was always in the center of the debate on the nature of the European integration and in particular on the relationship between the European institutions and national law, which is an issue very strongly related to the application of the principle of sovereignty itself. The concept was adjusted within the European Union and the integration process, which implies maintaining the legal identity and personality of its Member States.

The complete integration process will be a very difficult one from this perspective, because the Member States did not lose their status of legal subjects, they did not evolve to a new type of state entity, they did not make a transfer of sovereignty to the European Union to such a great extent, as for it to enjoy all the attributes of sovereignty.

Although sovereignty within the European Union is not coherent – it does not have a comprehensive definition, competences exclusively belonging to States according to the traditional meaning of the concept – it cannot be given up or excluded from the general debate, unless the European Union changes its nature and becomes a different legal entity, respectively. In such a hypothesis the debate would move towards another complicated issue: who is entitled to make the full sovereignty transfer, to whom sovereignty belongs to in this case or is there any place for this concept anymore.

Even if providing an answer to such a question would be extremely useful and would put an end to all controversies in the matter, it is not the case. The concept of *post-sovereignty* was created and used in order to address the changes in this regard in the case of the transformation

of the European Union from the supranational organization that it is today towards a new form of statal entity. Its meaning is completely different to the classical sense of sovereignty – that it should be abandoned, due to its lack of relevance.

From the perspective of the relationship between sovereignty and European integration, there is a mutual information and transformative effect. The relationships within the Union evolved towards equilibrium between the States within the Council which take a lead from the federal institutions and the European Commission. The federal scenario is at a very low pace, but not totally excluded or impossible.

Unlike the classical dimension of sovereignty, the European Union perspective is characterized by changes in the meaning, scope and competences. One may argue that this corresponds to the evolution of the concept; however, this is applicable for the European Union, it is not a general tendency.

The sovereignty of the Member States is no longer absolute, but limited in some regards, as prerogatives that belonged to States can now be exercised by the European Union even against the will of the member States and there is a fragmentation of the principle. As an example, the European Union enjoys exclusive competence in some fields.

To designate the special situation of sovereignty of Member States, distinct from the classical sense, terms such as *pooled sovereignty*, *divided sovereignty, shared, delegated sovereignty*, *joint sovereignty* or *synarchy* are used and it may be accepted as adequate to describe the factual and legal situation within the European Union. The term *synarchy* was created in order to accommodate the disadvantages of the sovereignty concept and to designate a new form of organisation which may reconcile the ideas of diversity and that of political unity.

On the other hand, from the perspective of the functioning of the European Union, the maintenance of national sovereignty is determined by one important principle of the European legal order, more precisely, the principles of subsidiarity seen as an instrument in limiting the actions of the European institutions in those fields where no exclusive competence is established. At the same time, recognizing the application of the subsidiarity principle provided a means for facing

the opinions skeptical or critical to the European construction, despite the fact that, at first, it was actually of secondary importance and it proved its role after the Danish rejection of Maastricht.

Sovereignty as a concept presents an external and an internal dimension. The external dimension, crystallized in Europe in the sixteenth and seventeenth centuries, assumes that a state must have control of its external policies and excludes external authority structures and was considered an element of political success.

The internal dimension of sovereignty – meaning the capacity for autonomous internal governance of member states was most affected by the European Union legal order. The question if the Member States of the European Union are still sovereign does not have a clear answer, there are still blurred lines between the domestic legal provisions and the European normative texts.

The Court of Justice of the European Union, in its *Van Gend and Loos* Judgment noted that Member States limited their sovereign rights by bestowing them on the institutions of the Community in this famous wording:

> The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals… It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this community through the intermediary of the European Parliament and the Economic and Social Committee.
>
> The conclusion to be drawn from this is that the community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which

> comprise not only Member States but also their nationals. Independently of the legislation of Member States, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

Other legal constructions supported and affirmed by the European Court of Justice complete the idea of a limited sovereignty for the Member States and ensure the supremacy of European Union law over the national rules and institutions. The doctrine of direct effect is another example, and it comprises that European Union law enters the domestic legal order and has a consequence a limitation of the sovereignty of the Member States.

Directly or indirectly, the creation of the European Union had as a consequence the loss of control of states over some important fields associated with the exercise of exclusive competences from the State. Individual States lost unilateral control over the many changes brought about by successive treaties, and unwelcomed since it encroached on larger and larger areas of domestic policymaking.

For example, Title V named *International agreements* of the Treaty of the Functioning of the European Union provides all the details including those of a procedural nature concerning the conclusion of agreements by the European Union and the effects of such treaties for the Member States. Thus, according to Article 126:

> 1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or

is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.
2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

At the same time, the relation between the European Union and its Members is not a simple one, and the Union is relying on States and recognizes their essential features. According to the Treaty of Lisbon

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.[4]

National identity of the Member States represents one of the elements ensuring the diversity of the European Union that may actually constitute an obstacle in the creation of a complete European federation. The scope and meaning of the concept of sovereignty is closely connected to the domestic structures of the States, which impacts the political organization and practice.

Formal sovereignty within the European Union is seen sometimes as a thing of the past, yet even the European Commission considers the sovereignty of its Member States. The Conference for the Future of Europe mentions actions of a European body integrating the existing European energy institutions should coordinate the development of renewable energies depending on the needs, capacity and resources of Member States while respecting their sovereignty.

[4] Article 3 para.2

It is not clear how the idea of sovereignty mentioned explicitly in this text can accommodate all implications and solve all dilemmas concerning it.

Moreover, a federal type of organisation needs to find a balance between the federal authorities and those of the individual States, in all fields, and also between the legislative, executive and judiciary powers.

The idea of sovereignty within the European Union is strongly related to the concepts of democracy and legitimacy of a government in relation to its citizens or subjects; yet, the holder is not the Union as a legal entity, despite the transfer of competences from states to the European institutions in some fields.

It is unquestionable that the creation of the Union and the subsequent treaties that established new competences for the European institutions are based on the unanimous consent of States, yet the rules binding on States and having priority against the domestic legal order can be made without such consensus. And this is the point from where the idea of a limited or pooled sovereignty may be argued.

Is the European Union a *de facto* federation?

From the perspective of the functioning of the European institutions one more question may arise: how much will differ the European Union as a supranational organisation from the European Union as a federal state? There is not a simple answer to this question and the aim of the present paper is not to provide clear answers, rather to ask questions and explore different angles of the process.

Due to the functioning of its institutions and special features, the European Union is not a typical international organization in the sense of an association of States, but it encompasses limited elements of state unions in the form of federation or confederation, even if it cannot be identified or characterized as such, enjoying international legal personality distinct from that of its members.

The European Union has determined common goals for the Member States, in the Lisbon Treaty (*The Union's aim is to promote peace, its values*

and the well-being of its peoples) and its architecture includes an internal market, an economic union and judicial bodies with the competence of interpreting European Union law, in order to ensure its priority in relation to the domestic laws of its Member States and to secure the area of freedom, security and justice for individuals, regardless of borders.

The entire development of the European Union affected major fields previously reserved for the competences of States such as foreign politics, justice, currency and determined its real influence in the world and changes in all sectors of life for the nationals of the Member States.

Even if the European Union is *per se* a subject of law, due to its international legal personality and in this quality, it has relations with other international legal entities and States, it is an actor in international relations, a powerful voice in some fields such as international trade, acting with the aim of protecting European interests, similar to a sovereign state, the Member States still enjoy their full international legal personality and may conclude treaties on their own in any field.

This situation describes a wider perspective for the States and a double dimension of the sovereignty as a component of the State itself as a holder of rights and international obligations and a primary subject of International Law may be seen as a contradiction because it needs to reconcile all different roles of the State and the extent of the competences arising from the principle of sovereignty and those transferred to the European Union itself.

From this perspective, the Union may be seen as a *de facto* federation or association of States. However, this image does not solve the sovereignty dilemma and, even worse, it adds more complications to this topic, considering that this element is essential in the context of international relations and the complete renunciation from the States to this defining element appears difficult or unlikely to be accepted or even addressed, simply because the result would be the cessation of the status of legal subject and its legal personality.

Moreover, the political system and the integration process do not meet the requirements of a federation, and the main impediment is represented by lack of a European nation.

Sovereignty is not a hermetic concept to be addressed only at the level of the European Union, simply because States still have different types of relationships with other States and international organisations outside Europe, where the issue of an evolution of the concepts is not topical.

The relation between the Member States and the European Union is interconditioned as the Union cannot exist without its members. It was the will of the States, expressed in international treaties, to create and develop the European Community and later on, the European Union. Its importance and high relevance are also proven by the consensus in adopting decisions, through diplomatic negotiations, and from these lenses, the European Union is an association of sovereign States.

Moreover, the treaties shall be enforced after the ratification process in accordance with domestic law and constitutional procedures. Member States enjoy a double position: on the one side they are creators and, on the other, the recipients of European law and, even if the power of Member States is not absolute or unlimited, their role is still predominant.

Thus, the reality of the European Union legal order and functioning mechanisms cannot be conceived without the role and contribution of its members. The presence of Member States through either representatives elected by the people, heads of states or heads of governments, is indispensable in the main institutions – the Parliament, the Council and the European Council.

The architecture of the European Union is a very special one, characterized as supranational, a feature that differentiates the Union from the classical international organizations; decisions are made by the European institutions, while Member States retain powers and competences in those fields that are not under the exclusivity of the Union. If the process of federalization of the European Union will be a successful one, Member States have no other option than to transfer all elements of their sovereignty to this new legal entity and entailed this operation in a treaty, similar to all treaties that were previously adopted by Member States and which made changes in the functioning and powers of the European institutions. But the prospects of such an acceptance from the States are not optimistic.

However, from a critical perspective, there is a different status even among the Member States; one of them is more influential than others and exercises its sovereignty to a great extent, by impacting on the policies and measures undertaken at the level of the European institutions. Germany is such an example, although it regained its full sovereignty only after 1994 and reinforced it in the context of European integration.

Is a complete federalization process possible?

The european integration process is very complex already and it is not entirely clear how it will evolve in the future. Maybe one possibility is that of a multi-level governance, with multiple modalities of authority and actors or shareholders involved in the decision process in smaller units, having the ability to make decisions in any field of action.

The change in the meaning of the concept of sovereignty and interdependence of the Member States of the European Union make the Union as a whole very ambiguous, considering that there are no claims of sovereignty from its part. The system and mechanisms of the European Union and the transfer of competences are also strongly connected to the idea of enhanced cooperation between its members.

Unlike the European Union and the status of its Member States, the United States of America, a confederation to which the first is often compared to, was created as a result of a different process, outside the absolutist approach of sovereignty that existed in Europe at that time.

The 1776 Declaration of Independence was adopted by the Continental Congress, comprising 13 American colonies which declared themselves independent, but Great Britain recognized the United States of America as a sovereign and independent nation later, in 1783 by the Treaty of Paris.

The source of sovereignty of the United States of America is not entirely clear: is it an expression of the colonies or is it an effect of the recognition by Great Britain? The Constitution of the United States contains the supremacy clause of the "law of the land" which sets the external sovereignty of the United States.

Returning to the European Union, one of the most sensitive topics related to the federalization process is that of the lack of a constitution or constitutional treaty, the failure to adopt such an act, due to the firm manifestation of the will of some States.

The approach is keeping the term sovereignty in its actual place, but redefining or reshaping its content induces the idea of a metamorphosis of the concept towards a new idea that might be quite different from the original one. Thus, proposing another term – such as synarchy might be better suited and accommodating all changes and creating sufficient space for new developments, as the idea of sovereignty of an international legal entity, even a supranational one, is out of the question.

Formally, the Member States of the European Union are not a federation, yet, *de facto* in many areas, they act like one, due to the innovation of institutions. Trade agreements, coinage of money are two relevant examples.

Conclusions

From the perspective of the idea of strengthening the European Union, the notion of state sovereignty may seem rather as a paradox. The concept of national sovereignty within the European Union encountered significant change compared to its classical meaning and Member States enjoy only a relative freedom and power.

Even if the European Union is not formally a federation and it may not be easily seen as achieving this goal, one scenario is that eventually the idea of national sovereignty will be eroded to a great extent and Member States will be put under pressure.

The debate on federalism and how it can accommodate the principle of national sovereignty leaves no place for conceptual purism concerning sovereignty seen in its traditional or classical sense, rather a perspective that takes into consideration the evolution and autonomy of sovereignty.

The present international order and European Union framework are very different from the Westphalian system of sovereignty, all principles of rules applicable between States evolved and crystallized their meaning,

scope and interconnections with rules that appeared and evolved at the same time.

Sovereignty is not only a legal concept, it is a social construct and a foundational feature present in many fields of human lives; consequently, it continues to be relevant and in accordance with the classical perspective of the term. Its evolution in time strongly suggests that it will remain relevant in the future as long as states will continue to exist and exercise their prerogatives.

The model of the European Union in sharing competences and instituting a common framework for the Member States could serve as a model for other regions and the example of the African Union created in 2002, the successor of the Organisation of the African Unity (created in 1963), is relevant for this discussion. One important difference from the perspective of sovereignty is that the initial organisation aimed at defending the sovereignty of its members. It is difficult to predict if the European Union will pass the test of time or if the federalization process will be complete, yet we know for sure that the idea and the creation of the Union itself was an expression of creativity and changed the paradigm of states' relations and international organizations.

Despite divergent opinions on sovereignty, the concept itself, especially on its external dimension proved to be flexible enough, which allowed the creation of new institutions and mechanisms applicable to its Member States. Europe is the creator of the concept of sovereignty and serves as a model of cooperation and mutual interference. The concept of sovereignty in Europe is not suited anymore or an analysis on black and white; there are many blurred lines in the exercise of elements that marked the traditional or classical notion of state sovereignty or nation sovereignty and the existence and functioning of the European Union prove exactly this point.

Addressing the issue of the evolution of the sovereignty concept within the European Union does not necessarily imply considering a clash between the well-stablished notion of state sovereignty and the acceptance of new evolution and changes in the functioning of the European institutions.

BASIC LITERATURE

Anghel I.M., *European Union's Member State Sovereignty*, "Annals of the Constantin Brancusi University of Targu Jiu Juridical Sciences Series" 2010, no. 2.

Avbelj M., *Theorizing Sovereignty and European Integration*, "Ratio Juris" 2014, vol. 27 no. 3.

Balan M., *Drept constituțional și instituții politice*, București, 2015.

Besson S., *Sovereignty, International Law and Democracy*, "The European Journal of International Law" 2011, vol. 22 no. 2.

Brown Wells S., Wells S.F., *Shared Sovereignty in the European Union: Germany's Economic Governance*, "Yale Journal of International Affairs" 2008, vol. 3, no. 2.

Cannizzaro E., *Fragmented Sovereignty – The European Union and Its Member States in the International Arena*, "Italian Yearbook of International Law" 2003, vol. 13.

Chryssochoou D.N., *The European Synarchy: New Discourses on Sovereignty*, "Goettingen Journal of International Law" 2009, vol. 1, no. 1.

Combacau J., Sur S., *Droit international public,* Paris 2016.

Connolly C.K., *Independence in Europe: Secession, Sovereignty, and the European Union*, "Duke Journal of Comparative and International Law" 2013, vol. 24, no. 1.

Crawford J., *Brownlie's Principles of Public International Law,* Oxford 2012.

Faulhaber L.V., *Sovereignty, Integration and Tax Avoidance in the European Union: Striking the Proper Balance,* "Columbia Journal of Transnational Law" 2010, vol 48, no. 2.

Grosse T.G., *Sovereignty in the European Union: A Critical Appraisal*, "Polish Quarterly of International Affairs" 2016, vol. 25, no. 3.

Keohane R.O., *Ironies of Sovereignty: The European Union and the United States,* "Journal of Common Market Studies" 2022, vol. 40, no. 4.

Lanza E., *Core of Stress Sovereignty and Boundaries of European Union's Identity in the 'Lissabon-Urteil',* "German Law Journal" 2010, vol. 1, no. 4.

Lindseth P.L., *Sovereignty, the Nation-State, and Integration History*, "Irish Journal of European Law" 2015, vol. 18, no. 1.

Osiander A., *Sovereignty, International Relations, and the Westphalian Myth*, "International Organization" 2001, vol. 55, no. 2.

Moldovan C., *Drept internațional public. Principii și instituții fundamentale*, București, 2019.

Marquardt P.D., *Subsidiarity and Sovereignty in the European Union,* "Fordham International Law Journal" 1994, vol. 18, no. 2.
Sidjanski D., *The Federal Approach to the European Union or the Question for an unprecedented European Federalism,* "Research and Policy Paper" 2001, no. 14.

Jacek Saryusz-Wolski

Strength or Dialogue? Power politics in the EU

Being one of six co-rapporteurs for the European Parliament's position on the revision of the Treaties, allows me to offer you a slightly different perspective. Hence, I will not limit myself to a mere description, aiming at better understanding of the Union, but I will attempt to answer the question of what to do. In short, we will move from diagnosis to therapy.

I am convinced that it is power that shapes and will shape the relationship between the EU and the Member States. This is primarily due to the deep nature of the Union. There are very different countries: small, large and medium-sized, which automatically translates into unequal power relations. In addition, these inequalities are reinforced in the Council by the existing voting system of the so-called double majority, which favours the largest countries in the Union and weakens the voice of medium and small ones. It mainly favours Germany and France.

The second factor affecting power politics in the Union is the lack of adequate checks and balances. In the EU system, there are no mechanisms in place which could effectively protect smaller states. Instead, there is a tendency to create a concert of powers within the EU, sometimes referred to as "the Directory", which is based on collusion between large states. We are, of course, referring here mainly to the German-French tandem or duo.

Another element in favour of more consciously following the logic of the power of the European Commission is the fact that the space for dialogue is in principle systemically limited. Irish political scientist Prof. Peter Meyer, in his 2007 article 'Political Opposition and the European Union', wrote about the fact that organised political opposition – an absolutely

essential element for any democracy – has not been developed in the Union, making EU democracy underdeveloped. In fact, it is very, very flawed. In the current Union, the lack of a political opposition translates into the pursuit of an extremely anti-democratic policy, a "cordon sanitaire" that consists of isolating, excluding and keeping out of the decision-making process those individuals, parties or groups with whom the political mainstream, composed mainly of the largest countries and the largest political forces, disagrees. In this formula, there is no dialogue possible, but there is a systemic acquiescence to the use of force, which is manifested in the observed institutional, political and legal violence of the EU institutions.

An example of such violence is the coercion of unruly / unbridged states into submission by deliberately including two or more policy areas in the negotiating package, so called "issue linkage", combining them in such a way as to achieve the desired effect at the expense of the state concerned. We can see this classically in the example harassment of Poland over the National Recovery Plan, or post-Covid funds. As a result, the structural imbalance in the Union and the associated systemic inclination towards power politics, (following "Darwinian" interpretation of the nature of the Union) leads to the phenomenon known as oligarchic centralization of the Union. A manifestation of this is the process of appropriation and usurpation of competences by EU institutions such as the EC, the CJEU or the EP. Briefly, this is about the gradual and unlawful assumption of competences by EU institutions at the expense of the Member States, contrary to the provisions of the Treaties. The aim of this process is to expand the EU's political system beyond the treaties' limits and create an 'ever closer union', i.e. an oligarchic superstate. What is at issue here, is the blatant violation by the EU institutions, especially the European Commission and the CJEU, of the following, *nota bene* key principles enshrined in the Treaty, i.e. the principles of subsidiarity, proportionality and proximity. These principles derive directly from the Treaties and the limits of competence are prescribed in the Article 5 TEU. Both Member States and EU institutions are, after all, obliged to comply with these principles, yet they themselves violate them, thereby violating the rule of law. For when it comes to treaty

obligations, practice looks different to theory – radically different – as demonstrated, for example, by the aggressive interference of the EU institutions in the organisation of the judiciary in Poland with the aim of forcing unlawful changes. This is clearly an *ultra vires* action and an evasion, or even a violation, of the Treaties. This *ultra vires* aims at converging with the main political trend and objective to socially engineer public opinion in the Union, into believing that the courts are a competence of the Union, even though this is not true. This is to facilitate further unlawful interference, and ultimately to lead to a treaty change of regime, if it happens, to lead to a change of government in the Member States, what in the literature is called "regime change". In addition, nowhere in the treaty will one find provisions that empower the EC to change governments in the European Union.

The question is, therefore, how to effectively counteract the pathologies discussed? Firstly, we cannot pretend and delude ourselves that the Union is based on dialogue and treats everyone equally. This is simply incompatible with reality, even utopian. Let us also bear in mind that by adopting the paradigm of a policy of force in the EU, and this is what must be done, one must adapt one's actions and use the available political instruments, including the *veto*. The alternative is simple and in line with the old maxim 'We are either at the table or on the menu'.

The first is to amend the Treaty in order to reduce competences, to restore those truly delegated and genuinely vested in the Union by the sovereigns, i.e. the Member States, and to introduce systemic, structural limits, constraints and barriers. Article 48(2), on the modalities of Treaty change, makes it clear that this change can be either an increase or a decrease of competences. Unfortunately, the latter is politically unrealistic at the moment.

The second is the constitutional shield, which is being built not only by Poland, but also by the Polish Constitutional Court, which is the reason for constant attacks. This is the meaning of the key judgment of 14 July last year, which says that the Union cannot act *ultra vires* and go beyond its competences, and, if it does so, it is unlawful and has no binding force from a legal point of view.

Thirdly, the CJEU – the Court of Justice of the EU should, although it does not currently do so, act in accordance with the rules in force, under the principles of subsidiarity and proportionality. In the parliamentary report that I drafted for the Conference on the Future of Europe for the Constitutional Affairs Committee, I propose solutions to put a stop to this. This is the so-called 'red card', a rule that will force the European institutions to abandon proposed legislation if a majority of national parliaments oppose it.

I also propose a second solution – the creation of a kind of Chamber of Control and Appeal against the verdicts of the CJEU, because today there is no such second instance. This unique situation of complete impossibility to appeal against a verdict is a departure from the basic legal principles of our political culture. I therefore propose that a Subsidiarity Chamber be set up within the framework of the CJEU, made up of the presidents of the national constitutional courts, which would defend compliance with the principle of subsidiarity of EU acts and laws. In this way, the principle of subsidiarity would be put into practice in a tangible way, and would not just remain an empty clause in the Treaty.

Finally, referring once again to the panel's title question, I would like to emphasise that in EU politics the power of argument is becoming less and less important and the argument of force is gaining ground. This is a reflection drawn from observations made over long years. The Union has become a punishing and imposing Union, prescribing and not, as it should, organising the community. Let us remember that Poland and the other Member States have the tools and potential to act effectively and oppose this in the EU forum, although we do not see the effect of this today. By taking proactive and assertive action against the centralist ambitions of the Union's mainstream driving force, we are also setting an example to other countries of how to change the Union for the better. For this we need political will, which needs to be organised, but that is a whole other chapter in history.

Notes on authors

GHISLAIN BENHESSA – doctor of Laws, lecturer at the Faculty of Law of the University of Strasbourg, vice-president of the l'Association Culturelle des Juristes, author of several books on the theory and philosophy of law, including: *Le Totem de l'Etat de droit* (2021), *L' État de droit à l'épreuve du terrorisme* (2017), *La valeur juridique des recommendations de bonnes pratiques* (2014).

SEBASTIAN KALETA – lawyer, member of the Sejm of the 9th term; secretary of state in the Ministry of Justice of the Republic of Poland, chairman of the commission for the reprivatization of real estate in Warsaw. Former vice-president of the Institute of Public Initiatives Foundation. A graduate of the ARGO Top Public Executive program, which was organized in cooperation with the IESE Business School in Barcelona by the National School of Public Administration.

TANJA KARAKAMISHEVA-JOVANOVSKA – professor of constitutional law and political science, lecturer at the Faculty of Law of the University of St. Cyril and Methodius in Skopje, former member of the Venice Commission of the Council of Europe on behalf of Macedonia. She has published many books, including: *Law of the European Union, from Paris to Lisbon* (2012); *Constitutional Law and Political System* (2013); *Political Parties and Interest Groups* (2016); *Contemporary Political Systems* (2017).

ZDENEK KOUDELKA – professor of constitutional law, currently rector of the Karel Engliš University in Brno, former Deputy Prosecutor General

of the Czech Republic, former member of the Chamber of Deputies of the Czech Republic, former local government official. Author of several books on constitutional law, electoral law and mutual relations between national and European law.

CARMEN MOLDOVAN – professor of international law, lecturer at the Faculty of Law of the Alexandru Ioan Cuza University in Iasi, Romania, head of the Department of Public Law and co-founder of the Center for International Law. She will be interested in: international law, European law, the problem of state responsibility, the European Union as a subject of international law.

ANNE-MARIE LE POURHIET – professor of constitutional law, lecturer at the Faculty of Law of the University of Rennes, former lecturer at the University of Paris I Panthéon-Sorbonne, vice-president of the French Constitutional Law Association. Currently a member of the Res Publica Foundation chaired by Jean-Pierre Chevènement. Member of the Executive Council of the Société d'Histoire du Droit and member of the High Legal Commission of the Principality of Monaco.

VLADAN PETROV –professor of constitutional law, lecturer at the Faculty of Law of the University of Belgrade, currently a judge of the Constitutional Court of the Republic of Serbia, member of the Venice Commission of the Council of Europe on behalf of Serbia, member of the board of the Institute of Comparative Law in Belgrade, former vice-president of the Legislative Council under the government of the Republic of Serbia. Author of several books on constitutional law and parliamentary law.

JAIME NOUGERIA PINTO – professor of international relations, political scientist, historian, lecturer at the Institute of Social and Political Sciences of the Technical University of Lisbon, former director of the Futuro Presente magazine, director of the Luso-African Culture Foundation, writer, author of several dozen books on international relations, recent Portuguese history, African history and political ideas.

JACEK SARYUSZ-WOLSKI – doctor, economist, political scientist, continuously a member of the European Parliament since 2004. One of the main negotiators of Poland's accession to the European Union. In the years 1991–1996, the first plenipotentiary of the Polish government for European integration, later secretary of the Committee for European Integration. In 2004–2007, vice-president of the European Parliament of the 6th term, in 2007–2009, chairman of the Foreign Affairs Committee of the European Parliament.

MILOŠ STANIĆ – doctor of constitutional law, lecturer at the Faculty of Law of the University of Belgrade, assistant judge of the Constitutional Court of the Republic of Serbia, specialist in constitutional law and international law. Author of publications in the field of constitutional law and its relations with European and international law.

JAROSŁAW SZYMANEK – professor, political scientist, specialist in the field of comparative constitutional law, director of the Center for European Policy Research, lecturer at the Academy of Justice in Warsaw, expert in the Bureau of Research Chancellery of the Sejm, former national contact point on rule of law in European Commission, author of several books on constitutional law, contemporary political systems and European integration.

When discussing the future, we must bear in mind that Europe has genetically been a continent full of diversity. Europe has always been rich in cultures, languages, religions, customs, nations, and states. This elementary heritage is not, as the acolytes of one great European state want, an obstacle to our development, but a drive of all changes. This is because change is not created by simple, primitive uniformity made in the USSR, but precisely by pluralism. The same pluralism that today, in the name of European political correctness, is forgotten and seen as an anachronism, although since Pericles' famous speech it has been considered a treasure of European civilization. Europe needs diversity of states and nations. Europe needs a plurality of courts and views, because only this will stimulate its actions. Europe needs a Europe of Homelands, because only such a Europe captures the spirit of the Old Continent. Europe needs scenarios other than the familiar scenario that Europe can either be German or will not exist at all. One mythical hijacking of Europe is enough for us. Let us not permit new ideologues or one nation to hijack Europe again! We may not allow Europe to be taken away from us, all Europeans, in the name of building an imaginary fantasy of Federal Europe...

Sebastian Kaleta, Jarosław Szymanek

ISBN 978-83-66454-99-6