ALEKSANDER STĘPKOWSKI*

European Integration and Political Evolution of the Modern Nation-State

ABSTRACT: *This paper draw attention to the fact that the current processes of the convergence of national legal systems within the EU have their source beyond contemporary political integration of the Old Continent. Contemporary European integration is merely one stage of the processes that are launched over a longer period and develop in a way that is not accidental. The cultural choices that triggered integration processes make the process hardly manageable in political terms but rather predetermine political choices. Therefore, institutions having some primary constitutional functions appear to provide a concurrently important contribution to parallel and more important socio-political processes. First, it concerns judicial bodies providing a review of the actions taken by public authorities. The performance of those duties reveals its important function in the political subordination of national authorities to the authorities providing legal patterns for such a judicial review. In this way, administrative courts played an important role in the emergence of parliamentary states in the 20th century, whereas constitutional courts played a key role in the process of transposing sovereign competencies from nation-states to institutions operating at the supranational level. This process of the vertical transposition of sovereign powers beyond nation-states continues even when constitutional courts declare their determination to protect the sovereign position of their national constitutions, as the process is already too advanced to be stopped. Parallel political process leads to attributing the European Parliament with sovereign legislative powers, simultaneously reducing the importance of the legitimacy attributed to the EU by national governments. In this way, a postmodern supranational state is emerging. Even if this process assumes some transitional periods suggesting its lowering down or some alternative paths of the integration, the only possible endpoint seems to be a unified supranational European parliamentary state. Moreover, it seems hardly possible to prevent this process otherwise than through a radical change in intellectual culture that predetermines contingent political actions.*

* Full Professor, University of Warsaw, Faculty of Law and Administration, astepkowski@uw.edu.pl, ORCID ID: 0000-0002-8760-0601.

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1. Introduction

European integration is often considered a virtually unprecedented process and, in many respects, it is indeed so. However, it reveals some striking parallels with the historical development of the modern nation-state. From the broadest perspective, both processes could be described in terms of the gradual transfer of the basic attributes of sovereignty (the power to set commonly bounding legal rules, that is, to legislate) to an even higher level of social life and could be regarded as different stages of the same process. Indeed, contemporary European integration exemplifies the transfer of these competencies to the level of supranational organisations. However, what is at stake here is not simply individual political decisions that mark successive stages of political integration of Europe but a process characterised by a considerable degree of autonomy from politics. More precisely, the process is not an effect of this or that course of political decisions but rather inspires those decisions.

To demonstrate these regularities, the main mechanisms of social control over political power will be described. Analysing them at the level of public law, it is possible to clearly state not only the very fact of the occurrence of these processes but also to predict the direction of its ongoing development. This paper aims to briefly present this development, focusing on the judiciary and its function in this process.

2. Modern way of conceptualising social control over political power

The process which is to be described here is intrinsically linked to the inner intellectual structure of modernity. Therefore, it reflects peculiarities of the ideas inspiring the modernisation process, which seems to be the quest for effective social control over political power. Yet again, to better understand the modern conceptualisation of social control over political power, it is necessary to briefly present the pre-modern approach.

In pre-modern culture, politics was understood as an activity of a virtuous man. Therefore, premodern politics was focused on ensuring that only virtuous men would be admitted to politics. In contrast, modern culture challenged the validity of this position by taking as an axiom the conviction of the irresistible power of human selfishness, which invariably nullifies moral efforts towards acquiring virtue. Adopting this optics, it was no longer possible to recognise virtue as a viable and

autonomous regulator of social life, ensuring the effective control of those in power. For modern social control to be real, it should be based on a criterion external to man, thus creating opportunities for objective social control. For this reason, from a modern perspective, real control of power had to be stripped of the human factor as much as possible and based on depersonalised institutional mechanisms.[1]

3. Dual perspective for modern control of power

In this context, particular importance was attached to legal control as provided by the courts. With the help of objective (i.e. expressed in statutory enactments) legal standards, its mechanisms were supposed to replace the moral evaluation of those in power, depriving the virtue of any significance in politics. This change was believed to make social control of political power possible, real, and objective. For this reason, the control exercised by the courts was considered on the grounds of modern political theory to be the most appropriate.

However, where sovereign actions involve the exercise of attributes of sovereignty, that is, legislation, it is futile to find an adequate basis for legal control exercised by the courts, and the essential mechanism of control over the exercise of sovereign power must be purely political, starting with popular elections. Thus, modern control over the government has two closely correlated dimensions: political and legal.

■ *3.1. Political dimension*

Politically, the main regularity of these processes was that bodies initially intended to provide social control, assumed real power over time, and began to exercise the attributes of sovereignty. This involved the transfer of decision-making centers to higher levels of social life. In the first instance, associated with the transition from pre-modern social reality to modern institutions, feudal corporate structures were brought under strict control by the royal administration during the period of enlightened absolutism. It was this administration that, over time, took over the functions of regulating social life hitherto performed by the dispersed corporate structures, which were first effectively marginalised and later abolished by law. Subsequently, these processes were dominated by the drive to politically subordinate the royal administration to the control of elected representative bodies. Once this was achieved at the beginning of the 20th century with the creation of a parliamentary state, the representative bodies, originally in charge of providing

1 It was well expressed by the Montesquieu in respect to judicial power, however the modern approach applies to every one branch of power. Ch. Montesquieu (1859, p. 131): '... la puissance de juger, si terrible parmi les hommes, n'étant attaché ni à un certain état, ni à une certaine profession, devient, pour ainsi dire, invisible et nulle. On n'a point continuellement des juges devant les yeux; et l'on craint la magistrature, et non pas les magistrats'.

political control, gradually dominated the administration, subordinating it using the principle of the rule of law, where law was understood as statutory enactment adopted by the representative body (parliament). This allowed the transformation of modern constitutional monarchies into parliamentary states.

However, this constitutional arrangement soon became considered as insufficient to create a just social order. The sense of this insufficiency has inspired efforts towards the creation of supranational structures intended to respond to all deficiencies in the modern parliamentary state. Although theoretically fully dependent on the decisions of the modern nation-states that created them for their existence and functioning, in practice, those supranational structures started to dominate national politics and gradually began to autonomise from member-states. The latter, despite attempts at political counteraction,[2] are increasingly becoming executors of political decisions taken by the international administration. This international administration may be subjected to the representative bodies at the supranational level.[3] These processes are thus moving inexorably toward a meta-state that emerges based on the international cooperation of the modern nation-states, which will be, over time, subjected and dominated by this superstructure.

■ *3.2. Legal dimension*

In legal terms, the process summarised above involved the creation of new judicial structures and branches of law. The new courts were to exercise control over the centers of power losing their (so far existing) dominant political position. In the period of declining feudalism, this involved the *de facto* reduction of the powers of the ordinary courts administering feudal *ius commune*. Sometimes, this occurred in a formal way, resulting in the emergence of a reserved judiciary (in France) usually originating in internal control as provided within the administrative structure (German Administrative Justiz, French Conseil Royal). Other times, ordinary courts formally empowered for the judicial review of administrative bodies declined ruling on matters involving the exercise of political power (Italy, Belgium).

2 The Lisbon Treaty has provided *ex ante* 'early warning' mechanism in the second subparagraph of Articles 5(3) and 12(b) of the TEU, which allow national parliaments to monitor compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol No. 2. Based on these provisions, the national parliament (or its chamber) has eight weeks from formal information about a draft legislative act to send to the Presidents of the European Parliament, the Council, and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity, which might result in the withdrawal of the legislative proposal. To date, the procedure has been applied only three times and the proposal has been withdrawn only once. The procedure requires considerable cooperation among national parliaments; hence, it is neither simple nor efficient without a serious impact, also because of the limited scope of application of the subsidiarity principle.

3 The method of strengthening democratic legitimation for the EP is well described by Sadurski, 2006, p. 32.

As the drive to subordinate the actions of the administration to the law intensified, separate administrative courts were established. The practical application of the principle of legality within the judicial review of administrative action appeared to have an important political effect as it provided essential support for parliaments in their efforts to subordinate administration. The latter had been operating at that time by virtue of the royal authority constrained only by the law protecting individual rights. However, as the judicial review intensified, administration started to be increasingly subordinated to the will of parliament as expressed in statutory law. This process was accomplished when the practical transformation of the principle of legality took place, requiring administrative authorities to not only respect legally protected individual rights but also have a statutory basis for every administrative action. In this way, the operation of administrative courts allowed parliaments to gain full political power dominating the administration within the framework of the modern parliamentary state.

However, once the parliaments reached full political power and subordinated administrative authorities, a pressing need to bring also acts of parliaments under some legal control arose. This was provided by creating constitutional courts to administer the constitutional review of statutory law. In doing so, constitutional courts adjudicated on a very restricted textual base consisting of the relatively concise text of the national constitution. To ensure the satisfactory intensity of constitutional scrutiny, this inspired creative interpretation of the constitutional text, as well as recourse to international law and the jurisprudence of international courts. This, indeed, has considerably limited the political freedom of national parliaments. However, the side effect was gradual empowerment of the international integrative organizations and the courts operating within their framework. As the legal process was concurrent to the political process of creating the international structures of economic and political integration in Europe, inevitably (not necessarily intentionally), the constitutional courts started supporting the process of transferring sovereign powers to the supranational level. This was to help discipline national parliaments and make them implement integrative policies taken by the international administration properly.[4] This process results in the disintegration of modern nation-state sovereignty and its transfer to postmodern supranational structures.

4. Vertical transposition of the sovereignty within European integration

The transgression of modern political theory developed in the 17th and 18th centuries, which resulted in the gradual disintegration of national sovereignty, does

4 See: Stępkowski, 2010, pp. 392–394.

not deny the theoretical premise upon which the modern concept was founded. Rather, it has been its consequence. John Locke emphasised that the political communities created as a result of the social contract are mutually in the same situation in which individuals remain in the state of nature.[5] However, while the only implication of Locke's statement was the necessity of federative power in the state, its logical corollary must also be the possibility of states entering into a new meta-social contract on a supranational level. Although Locke abstracted from this possibility, it turned out to be an inevitable consequence of the development of the modern sovereign state and had a real effect in the Treaties providing the European Union's (EU) primary law.

However, the analogy between the formation of supranational postmodern political and legal order and that of modern nation-states goes beyond the question of contractual genesis and also applies to the further development of these political organisms. It is sufficient to consider that the forming supranational organisations are quite commonly and increasingly required to subordinate the way they operate to the constitutional principles, which are characteristic of modern states.[6] Meanwhile, some scholars stress that the growth of decision-making powers among supranational organisations creates the need for such organisations to review the way in which these sovereign powers are exercised. In this context, it is explicitly spoken about giving the international order constitutional forms.[7] As a result of this process, referred to as 'governance beyond the nation-state',[8] modern states are undergoing a fundamental transformation, incorporating these organisations into a system of supranational structures that make legally binding decisions for these states.

This process started in Europe with the establishment of integrative international organisations, which could be considered the two pillars of integration. On the one hand, the Council of Europe (1949) and the European Convention of Human Rights (ECHR) (1950) system, transformed European ethical and political identity according to radicalised individualistic anthropology and provided a new political and ethical identity for postmodern Europe. On the other hand, the European Steel and Coal Community (1950), the European Economic Community (1957), and the Euratom (1957) gradually integrated into one multidimensional structure and elaborated the structures for European governance and a common European economy.

5 Locke, 1824, p. 217: 'There is another power in every common-wealth, which one may call natural, because it is that which answers to the power every man naturally had before he entered into society … So that under this consideration, the whole community is one body in the state of nature, in respect of all other states or persons out of its community'. (II, 12, § 145).

6 Klabbers et al., 2009, pp. 59–60.

7 Cf. Klabbers et al., 2009, p. 80.

8 See: Hurrell, 2007, p. 95 *passim*.

From 1979, European communities were provided with their own democratic legitimacy. The democratic elections of the European Parliament were initially considered to be of secondary importance. However, over time, it started to be considered concurrent to the legitimacy provided by the governments of member states and resulted in attributing European Parliament power to co-legislate with the Council from 1987, and subsequently, the legislative power has been gradually extended. This inspired the European Parliament to dominate the legislative process by acquiring autonomous power to legislate, which has been clearly manifested in the proposals of the European Parliament for the amendment of the Treaties as adopted in November 2023. The proposed amendments 'aim to reshape the Union in a way that will enhance the Union's capacity to act and strengthen its democratic legitimacy and accountability'.[9] On the one hand, the project leads to the subjection of the Commission to the will of the European Parliament as its Executive[10] and to a considerable reduction of the impact the member states (Council) have on the composition of the future Executive.[11] On the other hand, the proposed amendments clearly demonstrate a tendency towards the ultimate liberation of the EU from the constraints of the principle of conferral as declared in Article 5 of the Treaty on European Union (TEU). The means to this goal seems to be the proposed amendment of Article 11, paragraph 4, subparagraph 1 of the TEU regulating European citizens' initiative. This results in introduction of a new subsection 1a to this TEU provision attributing Parliament and the Commission with new legislative powers, no longer restricted to *serving the purpose of implementing the Treaties*[12]. In this way, the Parliament and the Commission will be attributed with extremely wide discretionary legislative powers allowing them to circumvent ordinary legislative procedure as specified in Article 289(1) of the Treaty on the Functioning of the European Union (TFEU) and depriving the Council of any impact on this new legislative procedure, which potentially deprives the principle of conferral of its significance.

This political process might be justly considered as leading to the emergence of postmodern political statehood and the transgressive continuation of the modern process of the emergence of modern nation-states. Characteristic elements of this process are also well described in terms of so-called 'reflexive modernisation' in contrast with the 'first' or 'simple' modernisation that took place in the 19th century. From this perspective,

9 Explanatory statement of the report on proposals of the European Parliament for the amendment of the treaties (A9-0337/2023) as adopted on 11 of November 2023. https://www.europarl.europa.eu/doceo/document/A-9-2023-0337_EN.html#_section3.

10 See proposed Amendment 43–50 providing for changes in Article 17 of the TEU.

11 See proposed Amendments 48 and 49.

12 See proposed Amendments 17 and 18.

> the nation-state, as one of the basic institutions of the first modernity undergoes a fundamental transformation in the process of reflexive modernization... The reflexive modernization of statehood leads, firstly, to the production of a multiplicity and multiplicity of new forms of transnational 'governance beyond the nation-state. In doing so, the nation-state is not completely replaced or even supplanted, but is incorporated in various ways into new international governments and organizations, new transnational institutions, new forms of regionalism, and so on. The result of this development, to the extent that it is already becoming known, are new comprehensive systems of '(world) governance'... [13]

This process finds its institutional expression in the functioning of the EU and the Council of Europe, along with the ECHR system. The concurrent functioning of the institutions also causes us to expect their future integration initiated by the formal accession of the EU to the ECHR, as announced in Article 6(2) of the TEU.[14] Meanwhile, it should be added that these processes, taking place at the supranational level, also have their reverse expression. The latter consists of the affirmation – oftentimes provided by the supranational structures – of localism explained in terms of pluralism. However, in reality, this affirmation, in a slightly different way, also leads to the decomposition of the structures of the modern nation-state. It suffers from the disintegrative effect of the diverse forms of regionalism on the one hand and from the transfer of sovereign decision-making competencies beyond national politics on the other. The slogans of localism are to serve the affirmation of pluralism, understood in the postmodern sense, as a process bringing about a politics of radical, pluralist democracy rooted in locality.[15] As such, the process reflects the vision of postmodern politics as outlined in the 1970s by Jean-Francois Lyotard.[16] However, the postmodern vision of politics based on radical pluralism and locality is only one face of the postmodern socio-political process – the one directed towards the decomposition of the modern structures fundamental for the nation-state. The second is parallel and results in

13 Beck and Grande, 2009, p. 72.

14 Cf. Stępkowski, 2010, p. 406–408.

15 Lash, 1994, p. 113: '... reflexive modernity proffers a politics of radical, plural democracy, rooted in localism and the post-material interests of the new social movements'.

16 Jean-Francois Lyotard in his *Instructions païennes*, having acknowledged that the postmodern idea on which political decisions could be based is the idea of multiplicity or diversity, he asks how the regulatory functions of a politics so conceived could be given to be pragmatically effective and whether a politics based on the idea of multiplicity is possible at all. Lyotard admitted at the time that he was unable to propose an answer to these questions, but the notion of 'reflexive modernisation' seems to offer an attempt at a practical answer. See: Lyotard and Thébaud, 1985, p. 94. About founding the postmodern politics on the idea of pluralism localism and multiculturalism. See also: Morawski, 2001, pp. 40–41.

the establishment of supranational structures replacing the political sovereignty of modern states.

5. Judicial paths of Europeanisation

It is hard to overlook that political decisions taken at the EU level already determine the shape of the national legal systems of its member-states. In this context, national states, led by national parliaments, increasingly have the function of executing political decisions made at the community level, and one can probably speak of an emerging *de facto* tendency to shape the division of competencies between the Union and member states in such a way that the latter are assigned an executive role. The EU plays 'an increasingly important role in establishing rules' to be implemented by member states.[17] For this reason, national administrative law is already, for the most part, a means for the 'administrative implementation of Community law'.[18] Thus, a process of the transformation of sovereign nation-states into 'self-disciplined members of a cosmopolitan European Empire', also called 'cosmopolitan states', is taking place within the EU.[19] While the enthusiasm of sociologists inspired by critical theory[20] for these processes may not please everyone, it is difficult to deny the validity of their description.

Analogous properties can be attributed to the Strasbourg system of human rights protection. Although *prima facie* the European Court of Human Rights (ECtHR) has only guarantee functions, it also exerts certain constructive influence on the shape of national institutions. An example could be the Strasbourg Court's jurisprudence, according to which a member-state is legally obliged to be the ultimate guarantor of pluralism[21] understood in the (already mentioned) post-modern way. Meanwhile, based on the human rights protection argument, ECtHR jurisprudence has elaborated a method of gradually restricting the sovereignty of member-states with the notion of the margin of appreciation (*marge d'appreciation*) enjoyed by the states regulating the social matters interfering with human rights.

Prima facie, the concept reaffirms the sovereign position of state in regulating the status of individuals. However, the Strasburg Court decides whether the

17 Beck and Grande, 2009, p. 136.

18 For more, see: Tkaczyński, 2005, pp. 310–313.

19 Beck and Grande, 2009, p. 139.

20 This intellectual provenience is openly admitted by Scott Lash in: Beck et al., 1994, pp. 110–111.

21 'State must be the ultimate guarantor of pluralism' (*Manole et al. v. Moldova*, 17.09.2009, § 99; and *Informationsverein Lentia et al. v. Austria*, (24.11.1993), Serie A nr 276, § 38); 'The Court has often emphasised the role of the State as ultimate guarantor of pluralism and stated that in performing that role the State is under an obligation to adopt positive measures ...' *(Yumak & Sadak v. Turkey (8.07.2008), § 106).*

state has infringed the limits of this margin. Hence, the ECtHR decides on the scope of the state's sovereign powers. Moreover, in the last decade of the twentieth century, the margin of appreciation was no longer considered a category requiring judges to exercise judicial restraint but as the notion contingent to judicial restraint,[22] hence a concept providing flexibility to jurisprudence and not so much expression of respect to the sovereignty of a member-state.[23] Thus, a tendency to consider the Court's discretion as the sole criterion for determining the extent of this margin of appreciation emerged. However, this means that the Court started to decide on the extent of state sovereignty under the ECHR.

Therefore, without a substantial basis in the provisions of the Convention, the ECtHR has long varied the scope of this margin of state discretion depending on the issue under consideration.[24] Indeed, it is hardly imaginable that in jurisprudential practice, it could be otherwise. Therefore, it is by no means surprising that the position is gaining approval in the literature.[25] Therefore, ECtHR judges repeatedly reveal their inclination towards reducing the states' 'margin of appreciation'.[26] At the same time, upholding the ECtHR states' margin is increasingly criticised not only in the literature but also by an increasing number of members of the

22 Dissenting opinion by Judge Martens in *Cossey v. UK* (27.09.1990) Seria A nr 184: § 3.6.3 as well as the academic writings referred to there: Eissen, 1990, p. 141. Judge Martens has presented his standpoint also as an influential academic writer: Martens, 2000, p. 750.

23 Bakircioglu, 2007, p. 711.

24 See dissenting opinion by Judge Bonello in *Ždanoka v. Latvia* (17.06.2004), § 3.1: 'The case-law of the Court seems to distinguish, in descending order of amplitude, between "a wide margin of appreciation", "a certain margin of appreciation" and "a margin of appreciation"'.

25 Heine, 1995, p. 177; See also Werd, 2004, p. 94.

26 Characteristic in this respect is the position taken by Judges Wildhaber, Pastor Ridruejo, Costa, and Baka in dissenting sentences, partially distancing themselves from the judgments that were delivered on 8 July 1999 in the cases of *Karataş* v. *Turkey* and *Sürek* i *Özdemir* v. *Turkey,* where the range of the margin of appreciation was considered deliminated by the scope of the judicial restraint. Hence, ultimately, these are judges who decide on the margin of appreciation: 'In the assessment of whether restrictive measures are necessary in a democratic society, due deference will be accorded to the State's margin of appreciation; the democratic legitimacy of measures taken by democratically elected governments commands a degree of judicial self-restraint'.

panel with dissenting opinions.[27] Now, the Court makes increasingly strident calls for the restrictive use of the category of the margin of appreciation.[28] It started to find it inadmissible, basing the judgement on the margin of appreciation with regard to ideological neutrality and basing its decision on the need to preserve pluralism.[29] Thus, it turns out that the meaning given to pluralism by the ECtHR not only ceases to include the possibility of variations between states, but such national variations are even considered as a threat to pluralism. This approach well demonstrates that the modern category of national identity is considered

27 A characteristic example is provided in the case of *Chapman* v. *UK* (18.01.2001) 33 E.H.R.R. 399, held in the context of the protection of the rights of the gypsy minority, but the wording there was in the nature of general talk about minorities, sometimes vulnerable minorities considered in terms of 'diversity' precisely, of which the gypsy minority is only an exemplification. In § 93-94 we read:
The applicant urged the Court to take into account recent international developments..., in reducing the margin of appreciation accorded to States in light of the recognition of the problems of vulnerable groups, such as Gypsies. The Court observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (...), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community. However, the Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation...
However, seven judges have submitted a joint dissenting opinion in which they emphasized (§ 3):
We cannot therefore agree with the majority's assertion that the consensus is not sufficiently concrete (...). In our view, this does not reflect the clearly recognised need of Gypsies for protection of the effective enjoyment of their rights and perpetuates their vulnerability as a minority whose needs and values differ from those of the general community.

28 See § 4 of the dissenting opinion of Judge Malinverni and a similar opinion of Judge Rozakis in the same case *UK & Hanseid v. Norway* (16.04.2009):
The Chamber has applied in the circumstances of the case the concept of the margin of appreciation with a degree of automaticity, as the Court has done many times in similar situations, although the facts of the case do not require – I would say 'allow' – such a step to be taken. Indeed, if the concept of the margin of appreciation has any meaning whatsoever in the present-day conditions of the Court's case-law, it should only be applied in cases where, after careful consideration, it establishes that national authorities were really better placed than the Court to assess the 'local' and specific conditions which existed within a particular domestic order, and, accordingly, had greater knowledge than an international court in deciding how to deal, in the most appropriate manner, with the case before them. Then, and only then, should the Court relinquish its power to examine, in depth, the facts of a case, and limit itself to a simple supervision of the national decisions, without taking the place of national authorities, but simply examining their reasonableness and the absence of arbitrariness.

29 *Lautsi v. Italy* (3.11.2009), § 47: 'Le devoir de neutralité et d'impartialité de l'Etat est incompatible avec un quelconque pouvoir d'appréciation de la part de celui-ci quant à la légitimité des convictions religieuses ou des modalités d'expression de celles-ci. Dans le contexte de l'enseignement, la neutralité devrait garantir le pluralisme'. The judgement was overturned by the Great Chamber in 2011; however, it still testifies to the existing tendency in the case law of the ECtHR.

an obstacle to be eradicated within the postmodern process! Not surprisingly, nation-states are no longer regarded as structures creating and protecting axiological and cultural pluralism (contingent on national diversity). Rather, such a function is attributed to the concept of 'international society' (whatever it is) and to supranational structures.[30]

6. Constitutional judiciary as a promoter of Europeanisation

The above-outlined process promoted at the supranational level is strengthened from within by the national courts. This demonstrates an analogy with the earlier stages of the process of modern sovereignty displacement as already described. Hence, the dislocation of political power beyond the nation-state towards the supranational level also takes place with the support of judicial bodies, specifically the constitutional courts. More interestingly, this is often done with the accompaniment of declarations affirming the sovereign status of the nation-states. However, while in the literal layer of jurisprudence, the constitutional courts are often very vocal about the constitutional sovereignty of their countries, they do much to ensure that in the factual dimension, the verbally affirmed national sovereignty does not create real difficulties in the informal widening of the Union's competences at the expenses of the member states.[31] Moreover, the loud sovereignist rhetoric used by the constitutional courts is very efficient in calming down the public, who start to be confused when learning about the effects of the postmodern process.

It might be useful to take the example of the Polish constitutional court, which insists on its position as the guardian of Polish constitutional sovereignty. These processes can be particularly seen in one of the speeches by Marek Safjan delivered in 2005 as the president of the Polish constitutional court. He bluntly stated,

> It is impossible today to decide on such rights as freedom of speech, freedom of assembly, respect for privacy, protection of freedoms, economic freedom or the right to a court, without taking into account the European standard formed in this regard, which at the same time sets limits on the interpretative freedom (of the Polish Constitutional Court – note A.S.). Thus, it is not possible to build in modern Europe

30 Hurrell, 2007, pp. 29–32, 247, 294.

31 In relation to Polish law, the process is described by Stępkowski, 2023, pp. 247–251; In relation to the decisions by the French *Conseil Constitutionel,* See: Sulikowski, 2002, pp. 76–88.

> the authority of the constitutional court ... in opposition to the established standards common to all democratic countries.[32]

In this (by no means controversial) statement, the then president of the constitutional court explicitly admitted that the real shape of national constitutional guarantees, which in the field of personal and political rights are already at the level of drafting the Constitution, was formed under the clear influence of the ECHR[33]; also, the process of their interpretation, *de facto* is determined to a great extent by the content of the Strasbourg case law.

A similar situation exists with regard to the impact of the case law of the Court of Justice of the European Union (CJEU). In the same speech, it was emphasised that

> the adoption of a European law-friendly directive of interpretation of the norms of national law, confirmed in the jurisprudence of the Constitutional Court in a series of judgments ..., is justified from the point of view of protecting Polish own interests ... For it is ... vital interest of Poland, as a state participating in the processes of European integration, to respect the norms of European law.[34]

Again, it is not only impossible to deny the substantive legitimacy of the statement, particularly when considered from a shorter perspective. In addition, they help better understand Ulrich Beck's qualification of European cosmopolitan states as 'self-disciplined members of the cosmopolitan European Empire'.[35]

A spectacular example of this approach applied in practice is the P 1/05 ruling presented by M. Safjan as proof of the affirmation of Polish constitutional sovereignty. In this case, the court ruled that European law regarding the European arrest warrant (EAW) is inconsistent with the Polish Constitution. However, in the same judgement, the Court held that the non-implementation of the EAW would be in breach of the constitutional provision requiring Poland to fulfil its

32 Safjan, 2006, p. 9.
33 Garlicki, 1998, p. 106 (§ 91).
34 Safjan, 2006, p. 13.
35 Beck and Grande, 2009, p. 139.

international obligations. Therefore, the Court clearly suggested not only the need to amend the constitution but also the way it could be done.[36]

Thus, the *prima facie* affirmation of the Polish constitutional sovereignty led to conclusions recommending adjusting the Polish constitution to EU law.[37] The Polish constitutional court clearly stated that it is the Polish *raison d'etat* to shape the content of the constitution and ensure that it does not interfere with the content of community law. Moreover, it is worth mentioning that the court considered the need to amend the constitution only to remove the constitutional prohibition of extradition of a Polish citizen abroad, whereas it seems that the conflict with the principle requiring Poland to obey international commitments might also be solved, setting the conformity with the constitution as a limit to this obligation. However, this solution was not considered by the constitutional court.

Similar confusion appears in relation to the judgement of 16 November 2011, according to which 'EU regulations, as normative acts, can be subjected to the control of their compliance with the constitution in proceedings initiated by a constitutional complaint'.[38] Despite its courageous sound, the statement could be reduced to mere rhetoric, as it was *obiter* and not the *ratio decidendi* of the judgement. Moreover, closer analysis reveals the true reason for such confusion. Such a review of EU law would require a preliminary referral from the constitutional

36 Judgement of 27 April 2005 r., Sygn. akt P 1/05, OTK ZU 4/A/2005, item 42, section 5, particularly 5.2:
The decision of the Constitutional Court declaring Article 607t § 1 of the Code of Criminal Procedure unconstitutional results in the loss of binding force of this provision. However, in the present case, this direct effect resulting from the judgment is neither equivalent to nor sufficient to ensure the compliance of the legal state with the Constitution. This objective can only be achieved through the intervention of the legislator. Indeed, taking into account Article 9 of the Constitution, which stipulates that 'the Republic of Poland shall observe international law binding upon it', and the obligations arising from Poland's membership of the European Union, it is indispensable to amend the law in force in such a way as to enable not only full, but also constitutional implementation of Council Framework Decision 2002/584/JHA ... Thus, in order for this task to be accomplished, an appropriate amendment of Article 55(1) of the Constitution cannot be ruled out, so that this provision provides for an exception to the prohibition on extradition of Polish citizens allowing their surrender on the basis of the EAW to other Member States of the European Union. If the Constitution is amended, bringing national law into conformity with EU requirements will also require the legislator to reinstate the provisions on the EAW which, as a result of the TK ruling, will be eliminated from the legal order.
See also: Sadurski, 2009, p. 21.

37 Some authors did not hesitate to state '... that in this judgment the Tribunal went further than the existing practice – it implicitly accepted the supremacy of EU law over constitutional norms'. Kowalik-Bańczyk, 2005, p. 1361.

38 Judgement of 16 November 2011, SK 45/09 OTK-A 2011, Nr 9, item. 97. The obiter is very close in its meaning to the statement by Marek Safjan attributing the constitutional court with the 'right to assess whether EU legislative bodies, in issuing a particular law, acted within the framework of the competences delegated to them and whether they exercised them in accordance with the principles of subsidiarity (subsidiarity) and proportionality'. See: Safjan, 2006, p. 16.

court to the CJEU under Article 267 of the TFEU, and such a preliminary ruling would be binding for the constitutional court.[39] Thus, it turns out that the reverse of the strong declarations of the constitutional sovereignty of a member state leads to the constatation of the *de facto* supremacy of the EU legal order over all national law, including the constitution.

For a long time, the confusion has been managed with the narrative based on the thesis about the multicentricity of contemporary law that was popular among Polish scholars.[40] According to this theory, the relationship between national law and community law should not be considered in terms of hierarchy but in a more inclusive manner that would grant precedence in application either to national or European law according to functional need (*quo ad usum*). This might be considered an attractive proposal; however, it will adequately describe only the transitional period, lasting as long as a monocentric legal system will crystallise at the supranational level. The author of the concept of multicentricity herself does not hide the fact that if the application of an EU-friendly interpretation of national law by courts does not provide full harmonisation, the same effect will be imposed upside down by decisions taken by European institutions.[41] Thus, the emphasis placed on the multicentric nature of the relationship between national and European law provides a scheme for self-disciplined gradual subordination rather than an accurate description of a long-lasting real relationship between the national and EU legal systems. It is rather useful conceptualisation of the transitional period preceding the unification of European law into a monocentric system.

In this context, constitutional courts appear to perform an implied but extremely important function of watching over the compatibility of national constitutional orders with law created by the postmodern political super-structures. Interestingly, the Polish constitutional court expressed its readiness to provide this uniformity even before Polish accession to the EU.[42] National constitutional courts are, to a much greater extent than the CJEU, interested in ensuring that

39 Wojtyczek, 2009, p. 188.

40 The concept was proposed and propagated by the (then) judge of the Polish constitutional court, E. Łętowska, 2005b, pp. 3–10. See also Łętowska, 2005a, p. 1127–1146.

41 Łętowska, 2005a, pp. 1140–1141.

42 The Polish constitutional court declared its readiness in this regard even before the final accession decision in its judgment of 28 January 2003, OTK ZU 1/2003, item. 4, Section 4.5: The postulate of using European law in the pre-accession period as an interpretative inspiration for the Constitutional Tribunal implies first and foremost the use of that law for the reconstruction of the constitutional standard when exercising control. (...) Therefore, when reconstructing the standard (norm) in accordance with which the evaluation of constitutionality is carried out, one should make use not only of the text of the Constitution itself, but - to the extent to which that text refers to terms, concepts and principles known to European law - to those very meanings.
Łętowska, 2005a, p. 1143. It must be admitted that Judge Łętowska was the judge rapporteur in this case.

there are no conflicts between constitutional norms and community law.[43] Therefore, they interpret the national constitution in accordance with European law, and if it turns out to be impossible due to the explicit wording of the constitutional provisions, the constitutional courts inspire the amendment of the constitutional text itself.[44]

Not much difference is provided in the famous judgments P 7/20[45] and K 3/21[46] of 2021, in which the Polish Constitutional Tribunal – in the context of unprecedented tension between Poland and the EU – decided on the unconstitutionality of several Treaty provisions, as construed by the CJEU in order to impose on Poland obligations relating to the organisation of the judicial system and the judicial procedure; thus, the constitutional matters where no competences were attributed to EU.[47] It is unclear what will be the exact final effect of this judgement, which appeared to be more a political issue than a legal one.[48] One consequence was clear: the unprecedented conflict between Poland and the EU resulted in extreme political and economic pressure, which provoked profound political destabilisation and the change of the government. However, the ongoing process of the Treaties revision demonstrates that the judgements did not result in any lowering-down of the process; they may even have increased its dynamism.

7. Conclusion

The paper attempted to demonstrate, that the current processes of the convergence of national legal systems within the EU have their source beyond contemporary political integration of Europe. Contemporary European integration should be considered as postmodern stage of the longer process of modernisation that started in the Enlightment. The process was launched over a longer period and developed in a way that is not accidental. Notwithstanding incidental actions taken by the

43 Ewa Łętowska openly admitted that some 20 years ago ' ... so far there has not been an open conflict between the Court of Justice and the constitutional courts, but this has been because this conflict has been carefully and skillfully avoided, rather by the efforts of the national authorities (in particular the public law courts as well as the legislature)'. Łętowska, 2005a, p. 1141.

44 Stępkowski, 2010, pp. 408–417.

45 Judgement of 14 July 2021, P 7/20, OTK ZU A/2021, item 49.

46 Judgement of 7 October 2021, K 3/21 OTK ZU A/2022, item 65.

47 Judgement P 7/20, section 6.10 (no. 229–230)
From Article 8(1) of the Constitution, stating that it is the supreme law of the Republic of Poland, derives 'the supremacy and consequently the precedence of the Constitution over the law of the European Union, especially in exceptional situations connected with the need to protect the sovereignty of the state (U 2/20). The incompatibility with Article 90(1) in conjunction with Article 4(1) of the Constitution arises from the CJEU adjudicating in the area of the system and jurisdiction of judicial authorities, i.e. in areas which the Republic of Poland has not and cannot delegate to the EU.

48 For a more detailed account on this issue see: Stępkowski, 2023, pp. 255–257.

national courts (as demonstrated by the Polish Constitutional Tribunal) or by the governments, it is still legitimate to speak of a clear tendency in contemporary European legal culture to make national legal orders actually dependent on the content of decisions made at the level of the European postmodern cosmopolitan empire. The process has been carried out in a very flexible way that presupposes a transitional period of multicentricity; however, finally, it will result in a unified and centralised legal and political system. The postmodern supranational state has been emerging in Europe.

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