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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 Wallace, 1999.

3 Kreuder-Sonnen and Zangl, 2015.

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

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

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

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

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

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

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

Put differently, in the words of Neil MacCormick

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 Nicolaidis, 2013.

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

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

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

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

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

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

15 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

21 Drinóczi, 2020.

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

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

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

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

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

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

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

23 Varga, 2020.

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

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

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

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

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

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

24 Drinóczi, 2020.

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

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

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

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

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

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

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

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

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

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

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

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

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

31 Vandenbruwaene and Millet, 2014, p. 503.

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

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

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

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

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

33 Ibid.; Vandenbruwaene and Millet, 2014.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 Cloots, 2015, pp. 127–134.

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

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

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

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

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

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

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

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

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

44 Blagojević, 2017.

45 Ibid., p. 22.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Conclusion

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

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

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

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

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

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

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

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

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

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

51 Besselink, 2010.

52 Paris, 2017; Krajewski, 2017.

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

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

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

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

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

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

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

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

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