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NATIONAL SOVEREIGNTY IN THE CONTEXT OF STATES' INTEGRATION INTO THE EUROPEAN UNION: REDEFINITION, SHARING OR EROSION?

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Abstract
The concept of sovereignty - a constitutive element of the state and thus intrinsically linked to its existence - has constantly been the subject of numerous disputes in both the political and legal spheres, as the content of the term has evolved profoundly over time. This paper is structured in two sections. The first one refers to the provisions on sovereignty and integration reflected in the constitutions of some European states that have joined this supranational structure. The jurisprudence of the Constitutional Courts and other national courts regarding the reception of Union law in domestic legislation, which represents an essential component of the integration process, is also presented and commented on. A separate section addresses the delimitation and analysis of the competences of the Union and the Member States, in accordance with the Treaty of Lisbon. Finally, the aim is to synthesize the concepts of "sovereignty" and "integration" through a series of pertinent observations regarding the topic under discussion. The subject addressed is of great interest not only to specialists in the field, but especially to the member states of the European Union, which have ceded part of the exercise of sovereignty attributes in favor of the Union, whose objectives are binding on them. The challenge of the future for the Union remains finding a balance between the integration necessary for geopolitical survival and respecting the national and constitutional identities of the states that compose it.
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1. INTRODUCTION

The term "sovereignty" derives from two Latin adjectives: *superanus* (above all others) and *supremitas* (above all things).

In classical theory, *sovereignty* or *political power* (Negulescu and Alexianu, 1942, p. 31; Rarincescu, 1940, p. 398) constitutes an element of the state, alongside population and territory. Consequently, when discussing sovereignty, it is necessary to define the concept of the "state" in both its broad and narrow

senses. Thus, in a broad sense, according to Bertrand de Jouvenel (De Jouvenel, 1972, p. 23), the state represents "an organized society possessing an autonomous government". In a narrow sense, the state appears as the organizational system that carries out the political leadership of society, holding, in this sense, the monopoly of creating and applying law (Vrabie, 1999, p. 55). This "apparatus" that exercises leadership over a collectivity is based on very precise legal regulation; hence, Esmein stated that "the state is the legal personification of a nation. It is the subject and bearer of public authority" (Esmein, 1909, p. 1).

In legal doctrine, sovereignty has been defined as a quality or attribute of state power by virtue of which that power enjoys supremacy internally and independence externally (Vrabie, 1999, p. 57). Consequently, the concept under analysis represents an essential characteristic of the state, without which its existence is inconceivable. Being closely linked to political leadership, the term under examination has been the subject of significant political and legal disputes over time. Consequently, the specialized literature has noted that "the concept of sovereignty [...] was forced to adapt more than once to the great changes in the development of political rule. As a result, more than a few characteristics of the concept of sovereignty have changed their meaning over time, so that the continuing use of the term does not necessarily imply that its content remains the same" (Grimm, 2015, p. 4).

In current geopolitical conditions, due to the multiple existing challenges, such as migration, the intensification of drug, arms, and human trafficking, it has become necessary for states to cooperate on multiple levels (economic, political, military, legal, strategic, etc.) within international organizations, to which they have conferred part of the exercise of their sovereignty attributes. The European Union is one such *sui generis* international organization; alongside its pronounced economic and political character, it also possesses a legal dimension. The latter consists of a complex legal order, distinct from that of the member states, which, in certain areas of social relations, takes precedence over the national legislation of the states that comprise it.

The integration of states into the European Union has imposed, among other things, important changes to the constitutions of its member states, as well as the transposition, in national legislation, of the Union legal order.

The transfer by the Union Member States of the exercise of sovereignty to the Union institutions was achieved either by transferring certain powers or by exercising them jointly in precisely delimited areas of social relations.

The division of competences between the Union and the Member States determines the limits within which they may act, based on principles expressly enshrined in the Treaty of Lisbon, such as the principle of the primacy of Union law, the principle of conferral, the principle of subsidiarity, and the principle of proportionality - which are not the subject of this study.

2. SOVEREIGNTY AND EUROPEAN INTEGRATION IN THE CONSTITUTIONS OF SOME MEMBER STATES OF THE EUROPEAN UNION

In this section, we will present the constitutional provisions of certain European Union member states, adopted in the context of their integration into the Union's structures, aspects that have also been examined in legal scholarship (Săraru, 2007, p. 95).

In France, the situation regarding the constitutional enshrining of the transfer of sovereign powers presents certain peculiarities, given that the 1946 Constitution, under which the founding treaties of the European Communities were ratified, is no longer in force. The Preamble to that Constitution stipulated that "subject to reciprocity, France consents to the limitations on sovereignty necessary for the organization and defense of peace". Furthermore, this fundamental law did not provide for any review of the constitutionality of international treaties, and the appeal lodged with the Council of State was declared inadmissible based on the theory of acts of government. This theory was established through the case law of the French Council of State, whereby certain executive acts were exempted from judicial review due to their nature, linked either to relations between constitutional authorities or to the State's international relations (Council of State, Decision no. 46707, 1875; Council of State, Decision no. 350492, 2012).

The Preamble to the 1958 Constitution (French Constitution of 1958), as subsequently amended, refers back to the provisions of the earlier preamble; however, regarding the review of the constitutionality of treaties, the authors of the new fundamental law adopted a different approach. In addition to the fact that Articles 5 and 16 attach special importance to national independence, the guarantor of which is the President of the State, Article 54 establishes a prior control of the constitutionality of international commitments, conferred on the Constitutional Council. The latter must be notified by the head of state, the prime minister, the president of one of the two Chambers, or sixty deputies or sixty senators. Also, if a treaty is considered contrary to the Constitution, the fundamental act will be amended accordingly, after which the respective treaty will be ratified. After the revision of the constitution, its approval will be made either by referendum or by a vote of parliament, requiring a three-fifths majority of the total votes cast. This review mechanism cannot have retroactive effect. Thus, following the review it conducted, the Constitutional Council stated in its decision of June 19, 1970, that "the Treaty amending certain budgetary provisions of the Treaties establishing the European Communities and of the Treaty establishing a single Council and a single Commission of the European Communities, as well as the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, do not contain any clause contrary to the Constitution". Consequently, the

treaties subject to constitutional review in 1970 were incorporated into national law. Moreover, pursuant to Article 55, treaties or agreements that have been duly ratified or approved, subject to their application by the other party, take precedence over domestic laws. Thus, the sovereignty of the French state is not conceived as a power absolutely isolated from the international legal order, which is accorded primacy over national legislation.

Important provisions regarding sovereignty are included in Title I of the 1958 Constitution (Articles 2–4), which were amended by two constitutional revision laws in 1995 and 2008 (Constitutional Law No. 95-880, 1995; Constitutional Law No. 2008-724, 2008). Thus, political governance is founded on an essential principle: government of the people, by the people, and for the people (*gouvernement du peuple, par le peuple et pour le peuple*): "national sovereignty belongs to the people, who exercise it through their representatives and by means of a referendum." Accordingly, sovereignty is exercised both through a form of indirect democracy (representatives) and through a mode of semi-direct democracy (the referendum). There is an important provision serving as a safeguard against the usurpation of power: "neither any segment of the people nor any individual may assume the exercise thereof". Article 4 establishes a link between popular sovereignty and political pluralism, which it enshrines: "political parties and groups contributing to the expression of suffrage […] must respect the principles of national sovereignty and democracy". Similarly, the state's territorial integrity and independence - aspects directly concerning the external dimension of sovereignty - are safeguarded through the role assigned to the President: "the President of the Republic […] is the guarantor of national independence, territorial integrity, and respect for treaties" (Art. 5).

Regarding sovereignty, we note that in a 1976 decision (Franck, 1978, p. 43-46), the Constitutional Council resorted to a distinction between limitations of sovereignty authorized and unauthorized by the fundamental law, which leads to the conclusion that important transfers of sovereign powers in favor of an authority with real autonomy from the member states will require a prior revision of the Constitution.

Regarding France's integration into the structures of the Union, the provisions contained in Title XV (Articles 88-1 to 88-7) are of particular importance. Thus, the constitutional basis for integration is expressly enshrined in Article 88-1: „The Republic participates in the European Union, composed of States that have freely chosen to exercise certain competences jointly by virtue of the Treaty on European Union and the Treaty on the Functioning of the European Union...". The Constitutional Council has established that Article 88-1 creates a requirement of constitutional status to apply European Union law and to transpose European directives into the domestic legal order. Furthermore, judicial cooperation in criminal matters and the European arrest warrant were

established: “the law sets out the rules relating to the European arrest warrant in application of the acts adopted by the institutions of the European Union”. This provision enabled judicial decisions from other European Union Member States to be executed directly and swiftly within French territory. Additionally, the right to vote and to stand for election in French municipal elections is granted to Union citizens residing in France, subject to certain restrictions. Under Article 88-4 of the Constitution, the Government is required to transmit all draft European legislative acts to the National Assembly and the Senate as soon as they are submitted to the Council of the European Union. In this way, the two chambers of the French Parliament express their political stance and provide a mandate or guidelines to the Government for negotiations in Brussels. Similarly, the ratification of a treaty regarding a state's accession to the European Union is effected through a bill that may be submitted to a referendum initiated by the French President or adopted by Parliament with a qualified majority of three-fifths of the total number of parliamentarians, in accordance with Article 88-5. Furthermore, the National Assembly or the Senate may issue a reasoned opinion if they consider that a draft legislative act adopted at the Union level violates the principle of subsidiarity. In the same vein, the Chambers of the French Parliament are allowed to bring an action before the Court of Justice of the European Union against a European legislative act, which is considered to be contrary to the above-cited European principle. Through a final provision in Title XV, the two Chambers are granted the right to draft a motion, by which they oppose the modification of the rules for adopting European Union acts in the cases provided for in the simplified revision of the Treaties or civil judicial cooperation, according to the Treaty on the European Union and the Treaty on the Functioning of the European Union.

Therefore, the procedure provided for by the French Constitution required the revision of the fundamental law, on several occasions, in order to receive the law of the European Communities and, subsequently, the law of the European Union, as in the situations set out below, but also in other cases:

- Constitutional Law No. 554 of 25 June 1992 ratifying the Maastricht Treaty (Constitutional Law No. 92-554, 1992), which revised Articles 2, 54, and 74 and introduced Title XV, entitled “The European Communities and the European Union”;

- Constitutional Law No. 1256 of 25 November 1993 regarding the conclusion of agreements with European states concerning asylum requests (Constitutional Law No. 93-1256, 1993), which introduced Article 53-1;

- Constitutional Law No. 880 of 8 August 1995 (Constitutional Law No. 95-880, 1995), which amended Articles 1, 5, 11, 12, 26, 28, 48, 49, 51, 70, and 88, introduced Article 63-3, and repealed Titles XIII and XVII concerning the European Communities and transitional provisions, which had become obsolete;

- Constitutional Law No. 49 of 25 January 1999 on the ratification of the Treaty of Amsterdam (Constitutional Law No. 99-49, 1999), which amended Articles 88-2 and 88-4 to allow, in particular, for the transfer of competences regarding the free movement of persons; this law was adopted following a decision of the Constitutional Council from 1997 (Constitutional Council, Decision No. 97-394, 1997), by which the latter decided that two clauses of the treaty were contrary to the Constitution: the clause that allows the Council, acting unanimously, to decide, five years after the entry into force of the text, on the transition to the rule of qualified majority and the procedure of co-decision of measures relating to the movement of persons; the clause that provides for the automatic transition, after five years, of the conditions for issuing short-stay visas;

- Constitutional Law No. 569 of 8 July 1999 (Constitutional Law No. 99-569, 1999), which supplemented Articles 3 and 4 regarding equal access for women and men to electoral mandates and elective offices;

- Constitutional Law No. 2003-267 of 25 March 2003 (Constitutional Law No. 2003-267, 2003), concerning the European arrest warrant;

- Constitutional Law No. 2003-276 of March 28, 2003 relating to the decentralized organization of the Republic (Constitutional Law No. 2003-276, 2003);

- Constitutional Law No. 2005-204 of March 1, 2005 amending Title XV of the Constitution (Constitutional Law No. 2005-204, 2005);

- Constitutional Law No. 2008-724 of 23 July 2008 on the modernization of the institutions of the Fifth Republic (Constitutional Law No. 2008-724 2008).

The Constitutional Council's position regarding the recognition of the primacy of European Community and subsequently European Union legislation has evolved significantly. The starting point was a 1975 decision (Constitutional Council, Decision No. 74-54), in which the constitutional court stated that "a law contrary to a treaty would not, for that reason, be contrary to the Constitution, and it is not for the Constitutional Council … to examine the conformity of a law with the provisions of a treaty or international agreement." Through this decision, the Constitutional Council delegated the task of ensuring the primacy of European law over domestic statutes to the ordinary courts (the Cour of Cassation and the Council of State a task they fulfilled through the well-known *Société Café Jacques Vabre* (1975) and *Nicolo* (1989) decisions. Thus, the French Court of Cassation established, in the Société des cafés Jacques Vabre decision (Court of Cassation, Société des cafés Jacques Vabre Judgment, Appeal No. 73-13.556), that "an international treaty - in this case, the EEC Treaty - takes precedence over domestic laws, even if the national law was enacted after the treaty (pursuant to Article 55 of the 1958 Constitution)". In the same sense, the Council of State stated, in its decision from 1989 (Council of State N° 108243, Nicolo, 1989) that "pursuant to Article 55 of the Constitution, it is the

responsibility of the administrative courts to review the compatibility of international treaties with French statutes, even those enacted subsequently. In the present case, the provisions of Article 4 of Law No. 77-729 of 7 July 1977 - concerning the election of representatives to the Assembly of the European Communities - are not contrary to Article 227-1 of the Treaty of Rome; these provisions stipulate that persons who qualify as voters in the Overseas Departments and Territories (DOM-TOM) under Chapter 1, Title 1, Book 1 of the Electoral Code also possess such status for the election of representatives to the European Parliament". This decision aligns the position of the Council of State with that of the Court of Cassation (Jacques Vabre ruling of 1975) and the Constitutional Council (IVG decision of 1975), consolidating the place of international and European law at the top of the French legal order.

In a 2004 ruling (Constitutional Council, Decision No. 2004-496DC, 2004), the Constitutional Council radically altered the position it had taken in its aforementioned 1975 decision, holding that, pursuant to Article 88-1 of the Constitution, the transposition of a European directive into domestic law constitutes a requirement of constitutional status: "the transposition of a Community directive into domestic law stems from a constitutional requirement (Article 88-1 of the Constitution) which could be obstructed only by an express provision of the Constitution to the contrary". Thus, the French legislature is constitutionally obliged to adopt laws implementing European directives. A law that faithfully transposes a directive cannot be declared unconstitutional by the Constitutional Council, with one exception: if the directive conflicts with France's constitutional identity - that is, with norms inherent to the national constitutional order. Decision No. 2004-496DC (2004) stands as one of the most significant rulings through which the Council affirmed the application of European Union law in France.

By another decision from 2004 (Décision n° 2004-505 DC, 2004), on 29 October 2004, the President of the Republic referred to the Constitutional Council, pursuant to Article 54 of the Constitution, the question of whether the authorization to ratify the Treaty establishing a Constitution for Europe, signed in Rome on the same day, must be preceded by a revision of the Constitution. The Constitutional Council thus recognized that the Union's constituent authority has thus enshrined the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order [...] it is evident from the Treaty's provisions as a whole, and in particular from a comparison of Articles I-5 and I-6, that it alters neither the nature of the European Union nor the scope of the principle of the primacy of Union law as derived … from Article 88-1 of the Constitution; whereas, consequently, Article I-6 of the Treaty submitted for the Council's review does not entail a revision of the Constitution. Thus, the Council recognized that the principle of the primacy of European law is an essential feature of the European integration process,

confirmed by Article 88-1 of the Constitution. The Council emphasized that the primacy of EU law derives from the French Constitution itself, meaning that the Constitution remains the supreme norm within the domestic legal order.

Compared to previous rulings, Decision No. 2006-540 (Constitutional Council, Decision No. 2006-540, 2006) presents certain distinctive features. Specifically, the Constitutional Council was called upon to review the Law on Copyright and Related Rights in the Information Society, which transposes into national law Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. The Council appreciated that the transposition of a Community directive into domestic law stems from a constitutional requirement […], and the Council ensures compliance with this requirement. The review it conducts to this end is subject to a twofold limitation. Firstly, the transposition of a directive cannot run counter to a rule or principle inherent in France's constitutional identity, unless the constituent authority has consented thereto; secondly, since it must rule prior to the promulgation of the law within the time limit prescribed by Article 61 of the Constitution, the Constitutional Council cannot refer the question for a preliminary ruling provided for in Article 234 of the Treaty establishing the European Community to the Court of Justice of the European Communities. The Council concluded that no provision of the aforementioned directive is contrary to any rule or principle inherent in France's constitutional identity.

In another decision from 2010 (Decision no. 2010-605, 2010), the French constitutional court declined jurisdiction to review the compatibility of a law with the provisions of the Treaty of Lisbon. It acknowledged its jurisdiction to ensure compliance with the transposition of a Community directive into domestic law. In the aforementioned decision, it ruled on the law regarding the opening up to competition and the regulation of the online gambling and games of chance sector. The dispute primarily raised the question of the relationship between constitutional review and respect for the State's international commitments. The central legal issue was whether the Constitutional Council could incorporate a review of compatibility with treaties into its constitutional review. It also had to determine whether state regulation of gambling constituted an inviolable constitutional protection. The Council rejected all the challenges and declared the contested articles to be in conformity with the Constitution. It reaffirmed its lack of jurisdiction to rule on compatibility with international agreements, while strictly circumscribing the liberalization of the gambling sector. The Council determined that the primacy of European law is ensured by ordinary courts, even when a legislative provision has been declared consistent with the Constitution. The Council reiterates that its own review does not limit the courts' authority to give precedence to international obligations over an incompatible law: "in any event, it is for the administrative and judicial courts to

review the compatibility of the law with France's European obligations and, where appropriate, to refer the matter to the Court of Justice of the European Union for a preliminary ruling". The Council concluded that, in the present case, the contested law did not aim to transpose a directive and that, consequently, the complaint based on infringement of Article 88-1 of the Constitution must be rejected. This division of roles makes it possible to preserve the specific nature of constitutional review while respecting the requirements of the European legal order.

In its subsequent case law, the French constitutional judiciary maintains the position expressed in Decision No. 2006-540 DC, namely, the so-called "constitutional identity reservation", which it thus applies to a specific case in its 2021 decision, a ruling that has since become emblematic (Constitutional Council, Decision No. 2021-940, 2021). In this case, Air France contested Article L. 213-4 and paragraph 1 of Article L. 625-7 of the Code on the Entry and Residence of Foreigners and the Right of Asylum, which imposed on air or maritime transport companies the obligation to repatriate "without delay" third-party citizens who were refused entry to France, under penalty of a fine of up to 30,000 euros. This domestic provision directly transposed a European directive (Directive 2001/51/EC). The Council stated that the obligation imposed on air carriers to repatriate, at their own expense, passengers who had been denied boarding would entrust administrative police functions to a private entity, while also raising the issue of the constitutionality of laws transposing unconditional and imprecise European directives. The Constitutional Council reaffirmed that delegating general administrative police powers, inherent to the exercise of "public authority", to private entities is prohibited, and that this prohibition constitutes a principle inherent to France's constitutional identity. The Council upheld the contested provisions subject to a specific interpretation, reasoning that while carriers fulfill a material and logistical obligation regarding boarding, they do not exercise public authority prerogatives comparable to direct police enforcement measures.

In Germany, unlike in the French Constitution, the Basic Law does not employ the term "national" or "popular sovereignty"; however, Article 20 - which establishes constitutional principles - refers to the exercise of state power by the people. Consequently, sovereignty is exercised by the people through representative bodies, thereby establishing representative or indirect democracy alongside other forms of semi-direct democracy: "all state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available" (Basic Law for the Federal Republic of Germany, art. 20).

According to Article 23 of the fundamental law, "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 substantially 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 carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat". Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Article 1 (the inviolability of human dignity, its respect and protection being an obligation of all state authorities; the recognition of human rights, which are inviolable and inalienable) and art. 20 (the democratic and social character of the federal state; the rule of law, popular sovereignty; the right to resist any person seeking to abolish this constitutional order if no other remedy is available) shall be inadmissible. In the same way, the Bundestag and the Bundesrat have the right to bring an action before the Court of Justice of the European Union on the grounds of infringement of the principle of subsidiarity by a legislative act of the European Union. The Bundestag and the Länder, through the Bundesrat, participate in the affairs of the European Union. The Federal Government must inform both Houses of Parliament comprehensively and as early as possible. Before participating in the adoption of European Union legislative acts, the Federal Government gives the Bundestag the opportunity to state its position. The Federal Government takes the Bundestag's position into account during negotiations. Insofar as, in an area within the exclusive competence of the Federation, interests of the Länder are affected and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required. When legislative powers exclusive to the Länder concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the Länder designated by the Bundesrat. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.

The relationship between the German Constitution (Basic Law – *Grundgesetz*) and European Union law is defined by the principle of "open yet

limited integration", under which the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) acts as the ultimate guarantor of national sovereignty and democratic principles.

The *Solange I judgment*, delivered on May 29, 1974, by the German Federal Constitutional Court (German Federal Constitutional Court, Judgment of 29 May 1974), is a major early decision concerning the relationship between Community law and national constitutional law. In this case, the BverfG decided that it would control the conformity of Community law with the fundamental rights in the Constitution, as long as the European Communities did not offer similar protection: "As long as the integration process of the European Communities has not progressed so far that Community law also contains an operative catalogue of fundamental rights that has been adopted by a parliament and is congruent with the fundamental rights catalogue of the Basic Law, a court of the Federal Republic of Germany, after obtaining a decision from the Court of Justice of the European Communities as required under art. 177 of the Treaty, is permitted - and required - to refer the matter to the Federal Constitutional Court in judicial review proceedings if the court in question considers the Court of Justice's interpretation of the relevant provision of Community law to be inapplicable on the grounds that or to the extent that it conflicts with one of the fundamental rights enshrined in the Basic Law". Consequently, the German Constitutional Court rejected the absolute primacy of European law as long as the European Economic Community (EEC) lacked its own equivalent catalogue of fundamental rights, protected in a manner similar to that found in the German Constitution (Grundgesetz). This ruling temporarily challenged the principle of the primacy of Community law, established by the Court of Justice of the European Communities in the 1964 Costa v. ENEL case (Court of Justice of the European Communities, Judgment of the Court of 15 July 1964).

In the *Solange II judgment of 1986* (German Federal Constitutional Court, Judgment of 22 October 1986), the German Constitutional Court changed its position, finding that the ECJ had come to effectively protect fundamental rights at an equivalent level, thereby relinquishing its own review of Community legislation: "When compared to the fundamental rights protection enshrined in the Basic Law, the guarantee of fundamental rights protection achieved at Community level through the case-law of the Court of Justice of the European Communities may, due to its development on a case-by-case basis, still have gaps, in that certain fundamental rights principles recognised in the Basic Law as well as the type, content and scope of certain fundamental rights have not yet come before the Court of Justice. What is decisive, however, is the general attitude that the Court of Justice has adopted with regard to the binding effect of fundamental rights on the Community, the normative anchoring of fundamental rights in Community law and its normative link (in this respect) with the Member State constitutions and the European Convention on Human Rights, as

well as the actual significance accorded by the Court of Justice to the protection of fundamental rights […] Community law in its substance also satisfies the requirement of a fundamental rights catalogue". Therefore, when fundamental rights protection had become sufficiently strong within the EC/EU, the BVerfG declared to refrain from such a control activity "as long as the European Communities ensure effective protection of fundamental rights" (Hilpold, 2016, p. 170).

In another relevant 2009 ruling concerning the approval of the Treaty of Lisbon (German Constitutional Court, Judgment of the Second Senate of 30 June 2009), the Court defined the legal nature of the European Union as an association of states in which the states retain their sovereignty, acting as the exponents of the popular will. In this regard, the Court held that, through Article 23, the Basic Law grants powers to participate in and develop a European Union designed as a *Staatenverbund* (union of states).The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order is, however, subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the states, remain the subjects of democratic legitimisation. The European Union must comply with democratic principles as regards its nature and extent and also as regards its own organisational and procedural elaboration. This means firstly that European integration may not result in the system of democratic rule in Germany being undermined. This does not mean that a number of sovereign powers which can be determined from the outset or specific types of sovereign powers must remain in the hands of the state. The Karlsruhe court thus determined the areas of social relations falling within the exclusive competence of the states: the administration of criminal law, the police monopoly, and that of the military, on the use of force, fundamental fiscal decisions on revenue and expenditure, the shaping of the circumstances of life by social policy and important decisions on cultural issues, such as the school and education system, the provisions governing the media, and dealing with religious communities. This decision established the concept of *Integrationsverantwortung* (responsibility for integration), which entails an obligation on the part of the German Parliament to actively exercise this responsibility by expressly approving any expansion of the European Union's competences. While the Treaty of Lisbon was approved by this decision, in revanche, the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law insofar as rights of participation of the German Bundestag and the Bundesrat have not been elaborated to the constitutionally required extent. If the Member States elaborate the European law laid down in the Treaties on the basis of the principle of conferral in such a way that an amendment of the Treaty law can be brought about solely or

decisively by the institutions of the European Union, albeit under the requirement of unanimity in the Council, a special responsibility is incumbent on the national constitutional bodies in the context of participation. Therefore, the Court ruled that integration cannot transform Germany into a mere federated state. To protect popular sovereignty, certain essential areas of social relations - listed above - must remain under national control.

The *"Right to be Forgotten I"* ruling (Order of the First Senate of 6 November 2019), read in conjunction with the second ruling issued on the same day, the "Right to be Forgotten II", concerns a dispute falling within the scope of European Union law, yet in an area where Member States retain a certain degree of autonomy. Consequently, the Constitutional Court chose to apply the fundamental rights enshrined in the Constitution and upheld the constitutional complaint lodged against a decision of the Federal Court of Justice. The latter had dismissed the appeal of a claimant who challenged the unrestricted public access to press articles - dating back more than 30 years and stored in online archives - that reported on his conviction for homicide while mentioning his name. In the decision under discussion, the Federal Constitutional Court examined provisions of domestic law - which are not entirely determined by EU law - primarily in light of the fundamental rights enshrined in the Basic Law, even when the domestic law in question implements EU law. This primary application of the fundamental rights of the Basic Law is based, first and foremost, on the premise that EU law, when granting Member States a degree of autonomy in a given area of law, does not generally aim for uniform protection of fundamental rights but rather allows for diverse regimes of fundamental rights protection. Secondly, the starting point was the presumption that the level of fundamental rights protection required by EU law provides merely a framework and is ensured through the application of German fundamental rights. In this case, the Constitutional Court ruled that the scope of the right to protection against the dissemination of old press articles held in online archives must be determined by balancing various conflicting fundamental rights. Thus, these rights to protection are constitutionally grounded in the general right of personality - specifically in that dimension of the individual right which limits freedom of expression, a dimension that must be distinguished from the right to informational self-determination.

The *"Right to be Forgotten II*" ruling (German Federal Constitutional Court, Order of the First Senate of 6 November 2019 – 1 BvR 276/17) concerns a dispute regarding a matter fully harmonized by European Union law. Consequently, the First Senate of the Federal Constitutional Court applied the Charter of Fundamental Rights of the European Union with fundamental rights under German law being superseded by those under EU law and dismissed the constitutional complaint filed against a decision of the Higher Regional Court of Celle. The latter rejected a complaint filed by the claimant against the operator

of a search engine. The claimant objected to the fact that, when her name was entered into a search engine, one of the displayed results linked to the transcript of a television program that had been archived online in 2010. In that program, the claimant, whose name was explicitly mentioned, was accused of unfair treatment towards a dismissed employee. In this case, according to the Court, regarding the application of legal provisions that are fully harmonised under EU law, the relevant standard of review does not derive from the fundamental rights of the Basic Law, but solely from EU fundamental rights; this follows from the precedence of application of EU law. This precedence of application is subject, *inter alia*, to the reservation that the fundamental right in question be given sufficiently effective protection through the EU fundamental rights that are applicable instead. Where the Court applies the EU Charter in exercising its review regarding a fundamental right, it carries out that review jointly with the Court of Justice of the EU, requesting a preliminary ruling in accordance with Article 267(3) of the Treaty on the Functioning of the European Union where necessary. The Court further stated that, in such disputes, the parties' conflicting fundamental rights must be reconciled on the basis of the applicable ordinary legislation. When conducting its review, the Federal Constitutional Court does not review the application and interpretation of ordinary legislation but only whether the ordinary (non-constitutional) courts gave sufficient effect to the fundamental rights of the Charter and struck a tenable balance. The Court also decided that where affected persons request that search engine operators refrain from referencing and displaying links to certain online contents in the list of search results, the necessary balancing must take into account not only the right of personality of affected persons (Articles 7 and 8 of the Charter), but must also consider, in the context of search engine operators' freedom to conduct a business (Article 16 of the Charter), the fundamental rights of the respective content provider as well as Internet users' interest in obtaining information. At the same time, insofar as a prohibition of the display of certain search results is ordered on the basis of an examination of the specific contents of an online publication, and the content provider is thus deprived of an important platform for disseminating these contents that would otherwise be available to it, this also constitutes a restriction of the content provider's freedom of expression.

In another very important case from May 2020 (German Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15), the BVerfG was notified regarding the European Central Bank's (ECB) Public Sector Purchase Programme (PSPP), which the appellants claimed exceeded the monetary policy mandate and violated the prohibition on monetary financing of states. The BVerfG stayed the domestic proceedings and referred the matter to the CJEU. In 2018, in the *Weiss* judgment (C-493/17), the CJEU ruled that the ECB programme was valid and fell within the scope of its European powers. The German court ruled that the judgment of the Court of

Justice of the European Union (CJEU) of 11 December 2018 (CJEU, Judgment of the Court, 2018) does not preclude this finding by the Federal Constitutional Court, given that - regarding the review of compliance with the principle of proportionality in the decisions taken to implement the PSPP, it is simply no longer comprehensible and must itself be considered *ultra vires*: "where an *ultra vires* review or a review of compliance with Germany's constitutional identity raises questions regarding the validity or the interpretation of a measure taken by institutions, bodies, offices and agencies of the European Union, the Federal Constitutional Court, in principle, bases its review on the understanding and the assessment of such a measure as put forward by the Court of Justice of the European Union. […] The mandate of the Court of Justice of the European Union to interpret the law - derived from the function assigned by Article 19(1), second sentence, of the Treaty on European Union (TEU) - reaches its limits when the interpretation of the Treaties adopted by the Court of Justice is no longer comprehensible and is, therefore, objectively arbitrary [...] the decision of the Court of Justice lacks the "minimum level of democratic legitimacy" required by several articles of the Basic Law. The Court considered that " for safeguarding the principle of democracy, it is imperative that the bases for the division of competences in the European Union be respected. The finality of the European integration agenda (*Integrationsprogramm*) must not undermine the principle of conferral, one of the fundamental principles of the European Union. In the context of delimiting the competences between the European Union and the Member States, the principle of proportionality and the overall assessment and appraisal it entails are of great importance with regard to the principles of democracy and the sovereignty of the people. Disregarding these requirements potentially shifts the bases for the division of competences in the European Union, undermining the principle of conferral". The Court ruled that the PSPP violates the principle of proportionality: "a programme for the purchase of government bonds only satisfies the principle of proportionality if it constitutes a suitable and necessary means for achieving the aim pursued; the principle of proportionality requires that the programme's monetary policy objective and the economic policy effects be identified, weighed and balanced against one another. Where a programme's monetary policy objective is pursued unconditionally and its economic policy effects are ignored, it manifestly disregards the principle of proportionality enshrined in Article 5(1) second sentence and Article 5(4) of the Treaty on European Union". The Court also ruled that the Federal Government and the German Bundestag violated the complainants' rights prevăzute de actul fundamental by failing to take action against the ECB's omission; in its decisions regarding the adoption and implementation of the PSPP, the ECB neither verified nor demonstrated that the measures adopted complied with the principle of proportionality. At the same time, the decision under consideration also specifies its effects on the German

public authorities: based on their responsibility with regard to European integration (*Integrationsverantwortung*), the Federal Government and the *Bundestag* are required to take steps seeking to ensure that the European Central Bank conducts a proportionality assessment. They must clearly communicate their legal view to the European Central Bank or take other steps to ensure that conformity with the Treaties is restored […] German constitutional organs, administrative bodies and courts may participate neither in the development nor in the implementation, execution or operationalisation of *ultra vires* acts. This generally also applies to the *Bundesbank.* However, the German Court did not find a violation of the prohibition on monetary financing of states. Following this ruling, the BVerfG ruled that both the ECB decision and the CJEU ruling were taken ultra vires. Consequently, the German Central Bank (Bundesbank) was prohibited from participating in the implementation of the PSPP program after a three-month transition period, unless the ECB demonstrated that it had conducted a rigorous proportionality analysis. To avoid the Bundesbank's withdrawal, the ECB submitted internal documentation to the German Parliament attesting to the proportionality analysis. The Bundestag officially confirmed that the BVerfG's requirements had been met. In the doctrine (Beltrame de Moura and Thomé da Cruz Bunn, 2024, p. 316) it was stated that, through this decision, "the German Court deprived a CJEU judgment of its legal effect in Germany, which would violate the Principle of the Primacy of EU law; the case involving the German Constitutional Court is a dangerous precedent for the Primacy of EU law, as it has been able to threaten the stability and legal certainty of the EU legal order, necessary preconditions for the functioning of regional integration itself". As a consequence, on 9th of June 2021, the European Commission has decided to send a letter of formal notice to Germany for violation of fundamental principles of EU law, in particular the principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the respect of the jurisdiction of the European Court of Justice under Article 267 TFEU, officially launching the infringement procedure. This procedure was closed at the end of 2021, following firm commitments by the German Government to respect the autonomy, primacy, and uniform application of EU law, and to uphold the authority of the Court of Justice of the European Union (European Commission, Case INFR(2021)2114, 2021).

3. THE DIVISION OF COMPETENCES BETWEEN THE EUROPEAN UNION ANS ITS MEMBER STATES

The European Union derives its legitimacy from the normative legal acts that established it, as well as from the democratic values and principles it enshrines. Within the framework of the European Union, a supranational entity founded on the principle of integration, a series of powers typically belonging to states fall outside their jurisdiction and are vested in Community institutions. Thus, by

transferring some powers or delegating the exercise of some competences to the Union, the latter acquires union sovereignty, created by integrating national sovereignties, having a derivative character in relation to them (Popescu, 2002, p. 329).

The allocation and delimitation of competences between the European Union and the Member States are expressly regulated by the Treaty on European Union (TEU, consolidated version, 2025) and the Treaty on the Functioning of the European Union (TFEU, consolidated version, 2025).

The legal basis for the exercise of the Union's competences is found in Article 1 of the TEU, according to which: "The HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, [...] to which the Member States confer competences to attain objectives they have in common". Consequently, this provision is of particular significance, as it reflects the derived nature of the Union's power; the Union does not possess competences by virtue of its own general sovereignty, but rather by virtue of the competences conferred upon it by the States through the treaties.

According to Article 5 TEU, the delimitation of the Union's competences is governed by the principle of conferral, according to which "the Union shall act only within the limits of the competences conferred on it by the Member States in the Treaties to achieve the objectives set out in those Treaties. Any competence not conferred on the Union by the Treaties remains with the Member States". Consequently, the Union's competence is one of conferral, not an original or general competence. This rule is expressly reaffirmed by Article 4(1) of the TEU: "competences not conferred upon the Union in the Treaties remain with the Member States". Thus, general or residual competence belongs to the States. Article 4(2) of the TEU guarantees the equality of the States regarding the Treaties, as well as certain fundamental aspects thereof: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

Cooperation between the Union and the Member States is governed by the *principle of sincere cooperation*, under which "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties" (art. 4 paragr. 3 TEU). According to Article 5 of the TEU, the exercise of Union competences "is governed by the principles of subsidiarity and proportionality. 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". Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The Union institutions and the Member States apply the two principles in accordance with Protocol No. 2 on the application of the principles of subsidiarity and proportionality, which is annexed to the TFEU.

The expansion or reduction of the competences conferred upon the Union may only take place through the amendment of the treaties in force, in accordance with an ordinary or simplified revision procedure (Article 48 TEU). Consequently, the Union cannot, by its own volition, create new competences of a primary nature; such competences can always be established only with the participation of the Member States and in compliance with strictly defined procedures.

The powers conferred upon the Union may be extended when action is required to attain an objective enshrined in the Treaties (Article 352(1) TFEU): "if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament". Two exceptions are also provided for, under which measures conferring new competences on the Union cannot be adopted. Thus, the amendments may not entail the harmonization of the laws and administrative regulations of the Member States where the Treaties exclude such harmonization. Furthermore, changes cannot be made to achieve objectives in the field of the Common Foreign and Security Policy.

The Union also possesses external competences, with agreements between the Union and third countries or international organizations being negotiated and concluded in accordance with the detailed rules set out in Articles 216–218 TFEU: "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is either necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act, or is likely to affect common rules or alter their scope" (Article 216 TFEU).

It is also worth noting that the TFEU stipulates, in its very first article, that the treaty "organizes the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences". While the

TEU defined the fundamental principles governing the delimitation and exercise of the Union's powers, the TFEU details, in Articles 2 through 6, the categories of competence and the areas of social relations in which the Union may act. In this regard, a distinction is drawn between: exclusive competences; shared competences; competences for the coordination of economic policies; the common foreign and security policy; and competences to support, coordinate, or supplement action.

The Union's exclusive competence in a specific area means that only the Union may legislate and adopt legally binding acts, with Member States being able to do so only if empowered by the Union or for the implementation of Union acts. The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

In the areas of shared competence, the Union and the Member States may legislate and adopt legally binding acts. Member States exercise their competence to the extent that the Union has not exercised its competence or has decided to cease exercising it. The shared competences between the Union and the Member States apply in the following principal areas: (a) the internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) the environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) the area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty. In the areas of research, technological development, and space, the Union has competence to carry out activities and, in particular, to define and implement programmes, without the exercise of this competence resulting in Member States being prevented from exercising their own competence. In the areas of development cooperation and humanitarian aid, the Union has competence to carry out activities and conduct a common policy, without the exercise of this competence resulting in Member States being deprived of the possibility of exercising their own competence (Art. 4 TFEU).

The Union has the competence to define economic and employment policies, which are coordinated by the Member States in accordance with the conditions laid down in the TFEU. To this end, the Council adopts measures and, in particular, the broad guidelines for these policies. Special provisions apply to Member States whose currency is the euro (Article 5 TFEU).

The Union is competent, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

The Union also possesses complementary competences (Robert Schütze, 2012, p. 167), which may take the form of actions to support, coordinate, or supplement the action of the Member States, without, however, replacing their competence in these areas. Legally binding Union acts adopted on the basis of the Treaty provisions relating to these areas may not entail the harmonization of the laws and administrative regulations of the Member States. Driven by their European objective, these Union actions cover the following areas: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth, and sport; (f) civil protection; (g) administrative cooperation (Art. 6 TFEU).

The provisions cited above must be read in conjunction with Protocol No 2 on the application of the principles of subsidiarity and proportionality, which is essential for examining the allocation of competences. It introduces the mechanism by which national parliaments verify compliance with the principle of subsidiarity in Union legislative proposals, a constitutional mechanism for safeguarding Member State competences. Thus, if one-third of national parliaments consider that a legislative proposal infringes the principle of subsidiarity, the Commission must review it, with the option to maintain, amend, or withdraw it. If a simple majority of national parliaments objects, the Commission must justify its decision, and the European Parliament and the Council can directly block the initiative before the first reading. The European Commission has continued to produce annual reports on the application of the principles of subsidiarity and proportionality; at the time of writing, the latest such report was adopted on 8 September 2025. (European Commission, Annual Report 2024 on the application of the principles of subsidiarity and proportionality and on relations with national Parliaments, 2025).

4. CONCLUSIONS

Integration into the European Union does not entail the disappearance of national sovereignty, but rather a profound metamorphosis of it. Member states cede a portion of the exercise of sovereignty, while the people remain its ultimate holder, in order to gain the genuine capacity to influence decisions at the European and even global levels, to ensure their economic prosperity and security, and to uphold and defend the democratic values and principles enshrined at the Union level for their citizens.

With regard to the division of powers between the Union and the Member States, as I have presented in a previous section, a distinction must be made between the provisions that directly establish the distribution of powers between the Union and the Member States and the provisions that complement this

system, either by establishing the manner of exercising powers, or by regulating implicit, external powers or the procedure for amending powers.

The French Constitutional Council has played a fundamental role in defining how European Union law integrates into the French legal order. Its jurisprudence has evolved from an initial stage of abstention (in which it refused to control the conformity of laws with European law), to a stage of firm consecration of the constitutional obligation to apply and transpose Union law, currently reaching the establishment of a supreme limit: the constitutional identity of France.

It follows from the above that the German Constitutional Court has established three mechanisms for reviewing European law. The first of these concerns the conformity of Community law with the fundamental rights enshrined in the Basic Law, applicable as long as the EU does not provide equivalent protection. The Court has suspended the direct exercise of this review, having found that the EU has attained an adequate level of legal protection, while reserving for itself only a residual supervisory role. The second form of review exercised by the Court concerns acts adopted by Union institutions that exceed the competences provided for in Union legislation (*ultra vires acts*) or violate the principle of proportionality. A final mechanism for controlling the Union's legal order referred to its compliance with the values, principles and areas that are an integral part of the content of the concept of Germany's constitutional identity, expressly listing the areas of social relations in which the state retains its exclusive regulatory competence.

The challenge of the future for the European Union remains finding a balance between the integration necessary for geopolitical survival, economic prosperity, and respect for the national and constitutional identities of the states that compose it.

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