MULTILEVEL CONSTITUTIONALISM AND ITS IMPACT ON THE PROTECTION OF NATIONAL SOVEREIGNTY – TRENDS, CHANGES AND RESERVATIONS

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Abstract: *The concept of multilevel constitutionalism represents one of the most remarkable effects of globalisation on constitutional law. The relations between states, regional and global international organisations have reached an era where the interaction between actors at different levels is inevitable. The convergence of constitutional solutions, particularly in the area of the protection of fundamental human rights, is one illustration of this. However, the emergence of international organisations—created to achieve common objectives—does not mean that states have relinquished their sovereignty. Thus, competences transferred to the international level can only be exercised to the extent of the delegation. In recent years, states have developed mechanism to protect their competencies against the potentially expansive exercise of powers by international organisations. In addition, the democratic legitimacy of decision-making at international level can be also questioned. As these decisions are not taken by national parliaments but by international bodies, it is worth examining the emergence of a democratic deficit and how it might be addressed. This contribution seeks to explore all these issues, with a particular focus on the specificities concerning the European Union.*

Keywords: *multilevel constitutionalism, convergence of constitutional solutions, national sovereignty, constitutional identity, democratic deficit*

INTRODUCTION

In our increasingly globalised world, nowadays seems to become more and more difficult for the states to maintain their sovereignty, as a number of decisions–in different fields–are taken by universal (i.e., global), regional or sub-regional international organisations, rather than by national actors. Moreover, according to some scholars one can observe a certain degree of universality and homogeneity among the states, and a shift in international relations from coexistence towards cooperation.[1] This cooperation can be observed not only among states or states and international organisations, but also between different organisations. In this way, one argues that the traditional concept of constitutionalism has in many cases become globalised and increasingly internationalised, thus creating the legal phenomena of multilevel constitutionalism.

The concept of multilevel constitutionalism[2] appeared at the same time as the emergence of the global markets and is intended to describe the constitutional impact of na-

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[1] SCHWÖBEL, C. Organic Global Constitutionalism. *Leiden Journal of International Law*. 2010, Vol. 23, No. 3, pp. 534–535.

[2] The concept itself was first defined in the wake of the Maastrich judgement of the German Federal Constitutional Court. The German equivalent of the term is: *Verfassungsverbund*. For details see SAJÓ, A., UITZ, R. *A szabadság alkotmánya. Bevezetés a jogi alkotmányosságba. [The Constitution of Freedom: An Introduction to Legal Constitutionalism]*. Budapest: HVG-ORAC Lap- és Könyvkiadó, Budapest, 2019, p. 614. The book was originaly published in English in 2017 (SAJÓ, A., UITZ, R. *The Constitution of Freedom. An Introduction to Legal Constitutionalism*. Oxford: Oxford University Press, 2017).

tional and supranational actors on each other. According to some scholars, *"multilevel constitutionalism is the product of the interaction of national and supranational constitutional institutions and mechanism (networks and processes)."*[3] Other scholars believe that, multilevel constitutionalism is essentially based on similar principles as constitutional pluralism, differing only on the question of who holds the final authority.[4] From this point of view, *"[m]ultilevel constitutionalism is often described as being the German equivalent of constitutional pluralism."*[5]

In fact, with the emergence of regional and global international institutions and the ever-closer cooperation between states, decision-making mechanisms have also changed. States are increasingly interdependent, both to achieve common goals (e.g. environmental protection, human rights protection) and to maintain global trade. All these ongoing processes go somewhat beyond the classical monist and dualist theories of international law (without, of course, overwriting them), and give rise to new concepts such as multilevel constitutionalism or global constitutionalism.

However, all these current changes also raise some questions. On the one hand–in contrast to national decision-making mechanisms and procedures–international decision-making has much lower involvement of citizens. It could be said that international standards are emerging and are being adopted by states, but there is a lack of popular control over these international standards.[6] The concept of democratic deficit was developed precisely to describe this absence.

On the other hand, it is a fact that when states accede to international organisations, they transfer certain national powers and competencies (more or less, depending on the organisation) to these. This transfer or delegation of national powers is essential primarily to achieve the common objectives outlined above (e.g., the universal protection of fundamental human rights, and environmental protection). The need to achieve these common objectives is beyond debate. However, in practice, the framework for the delegation of powers is not sufficiently precise. This is why, defense mechanisms (e.g. the three classic control mechanism used in connection to the principle of the primacy of EU law: fundamental rights control, sovereignty control and identity control) have been developed to protect national sovereignty and to ensure that the constitutional identity of the states is respected.

The present contribution aims to illustrate the impact of multilevel constitutionalism on sovereignty by looking at these issues. Beyond that, the paper seeks to present some practical examples of the presence of the concepts outlined above.

I. THE VARIOUS LAYERS OF MULTILEVEL CONSTITUTIONALISM

Multilevel constitutionalism, as mentioned above, refers to the interaction between national and international constitutional actors. At the same time, one can observe that the

[3] Ibid., p. 611.
[4] CALLIES, C., SCHNETTGER, A. The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism. In: Christian Callies – Gerhard van der Schyff (eds.). *Constitutional Identity in a Europe of Multilevel Constitutionalism*. Cambridge: Cambridge University Press, 2021, p. 357.
[5] Ibid., p. 356.
[6] SAJÓ, A., UITZ, R. *A szabadság alkotmánya. Bevezetés a jogi alkotmányosságba [The Constitution of Freedom: An Introduction to Legal Constitutionalism]*, p. 617.

division of these actors into purely national and international categories is too restrictive. On the one hand, at the international level, regional and global organisations have emerged, whose regulatory frameworks and institutions are interconnected (see e.g. *Kadi I*[7] and *Kadi II*[8] cases). On the other hand, institutional links and connections have also been established at the regional level between the different regional organisations (see e.g. between the European Union and the Council of Europe, the results of which can be seen for example in the *Bosphorus case)*.[9]

For all these above presented, the concept of multilevel constitutionalism can be considered at least at three different layers. First, there is the national level, with national constitutional actors (the legislative, executive and judicial powers). Second, a regional level has emerged, which includes regional international organisations (e.g. in Europe, the European Union and the Council of Europe). Third, a global or universal international level also exists, which includes global international organisations such as the United Nations, the World Trade Organisation or the International Labour Organisation.

If one looks at the relationship between the global international level and the national level, the most interesting question concerns the concept of global constitutionalism. This concept is usually described in the legal literature from two approaches. From a constitutional law perspective, the concept refers to the convergence of different national constitutional solutions, whilst from the perspective of international law it refers to the constitutionalisation of international organisations and institutions.[10]

Two main elements of convergence can be detected: the so-called institutional convergence and the convergence of the protection of fundamental human rights.[11] Currently, the latter is more apparent. Nowadays, one can identify a wide range of evidence of convergence,[12] such as conventions and standards adopted on fundamental rights; the comments, opinions and case law of certain regional organisations; or the adoption of national rules following the requirements of membership of an international organisation.[13] One of the preconditions for convergence is the creation of a regulatory and

[7] Judgment of the Court of Justice of the European Union in Joined Cases C-402/05 P and C-415/05 P – Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Union.

[8] Judgment of the Court of Justice of the European Union Joined Cases C-584/10 P, C-593/10 P and C-595/10 P – European Commission and Others v. Yassin Abdullah Kadi.

[9] Judgment of the Court of Justice of the European Union in Case C-84/95 – Bosphorus v. Minister of Transport, Energy and Communications and Others, Judgment of the European Court of Human Rights in Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, App. No. 45036/98.

[10] CHRONOWSKI, N. *Alkotmányosság három dimenzióban. [Constitutionalism in Three Dimensions]*. Budapest: TK Jogtudományi Intézet, 2022, p. 15.

[11] TUSHNET, M. The Globalisation of Constitutional Law as a Weakly Neo-Liberal Project. *Global Constitutionalism*. 2019, Vol. 8, No. 1, p. 31.

[12] Somewhat in contrast to convergence is the *"engagement model"*, according to which international standards and solutions should not be followed in all cases and without any reservations, but should not be ignored either. Based on this model *"[t]ransnational sources are seen as interlocutors, offering a way of testing understanding of one's own traditions and possibilities by examining them in the reflection of others."* JACKSON, C. V. Constitutional Comparisons: Convergence, Resistance, Engagement. *Harvard Law Review*. 2005, Vol. 119, No. 1, p. 114.

[13] SAJÓ, A., UITZ, R. *A szabadság alkotmánya. Bevezetés a jogi alkotmányosságba [The Constitution of Freedom: An Introduction to Legal Constitutionalism]*, p. 626.

institutional framework at global, regional and national levels that are in constant cooperation and dialogue with each other.[14] It is also pivotal to distinguish convergence from the mere transposition of constitutional solutions, as convergence occurs when the same solutions are widely applied in many states, rather than just scattered.[15] The proliferation of the constitutional protection of fundamental rights enshrined in the Universal Declaration of Human Rights,[16] or the incorporation of the principles stated by the European Court of Human Rights into the case law of national constitutional courts,[17] are excellent examples of convergence.

The other approach to global constitutionalism–i.e., the constitutionalisation of international organisations–is based on the observance that *"some international treaty-based organisations treat their founding documents, or certain […] provisions thereof […] as quasi constitutional."*[18] Whilst the European Union is the most striking example of constitutionalisation, many global international organisations have also followed this path. According to some scholars *"the developments that have taken place in the EU are in no way sui generis."*[19] This process of constitutionalisation can be traced in the institutional structures of the different international organisations, in their procedures and even, to some extent, in their review mechanisms (e.g. reports). An important reservation concerning this approach is that the *de facto* constitutionalisation of the founding documents of certain international organisations is not always based on an explicit decision of the member states.

As regards the regional level of multilevel constitutionalism, the most salient issues arise in the case of Europe. Within this region, one can observe the specificities of the relations between the various regional international organisations and the relationship between the regional and national levels. As regards the relationship between European regional organisations, it is worth briefly mentioning the one between the Council of Europe and the European Union.

The roles and competencies of the two organisations are linked in relation to the protection of fundamental human rights. Both the Council of Europe (through the European Convention on Human Rights and the European Court of Human Rights) and the European Union (through the Charter of Fundamental Rights of the European Union and the Court of Justice of the European Union) have created the necessary legal and institutional framework for the protection of fundamental human rights. Although the Charter of Fundamental Rights is only applicable by the EU institutions, bodies and by

[14] SANDHOLTZ, W. The ECtHR, Transregional Dialogues and Global Constitutionalism. *Global Constitutionalism*. 2020, Vol. 9, No. 3, p. 544; SANDHOLTZ, W. Human Rights Courts and Global Constitutionalism: Coordination through Judicial Dialogue. *Global Constitutionalism*. 2021, Vol. 10, No. 3, p. 440.

[15] DIXON, R., POSNER, E. A. The Limits of Constitutional Convergence. *Chicago Journal of International Law*. 2011, Vol. 11, No. 2, p. 408.

[16] ELKINS, Z., GINSBURG, T., SIMMONS, B. Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice. *Harvard International Law Journal*. 2013, Vol. 54, No. 1, pp. 76–80.

[17] TÓTH, J. Z. Interpretation of Fundamental Rights in Central and Eastern Europe: Methodology and Summary. In: Zoltán J. Tóth (ed.). *Constitutional Reasoning and Constitutional Interpretation. Analysis on Certain Central European Countries*. Budapest–Miskolc: CEA Publishing, 2021, pp. 87–91.

[18] CHRONOWSKI, N. *Alkotmányosság három dimenzióban. [Constitutionalism in Three Dimensions]*, p. 21.

[19] FABBRINI, F. The Constitutionalization of International Law: A Comparative Federal Perspective. *European Journal of Legal Studies*. 2013, Vol. 6, No. 2, p. 7.

the Member States in cases where they are implementing EU law provisions, one can observe many areas where the two regional levels of protection are interconnected (e.g. the connection between the refusal of a national court to address the Court of Justice of the European Union for a preliminary ruling and the right to a fair trial enshrined in the European Convention on Human Rights).[20] This relation between the two organisation was further nuanced by the somewhat contradictory rulings in the Bosphorus case, at the end of which the European Court of Human Rights ruled that where the European Union provides the same level of protection, it must be presumed that Member States have not derogated from the provisions of the European Convention on Human Rights when they have fulfilled the obligations deriving from the membership.[21] One possible way to clarify the relationship between the two organisations would be for the European Union to accede to the European Convention on Human Rights. However, since Opinion 2/13 of the Court of Justice of the European Union we have departed from this solution.

The relationship between the European Union and the Member States is the one in which the concerns with the concept of multilevel constitutionalism can be best observed. By acceding to the European Union, Member States have transferred certain powers and national competencies to the Union in order to achieve the objectives set out in the Founding Treaties. However, this transfer of competencies should not mean that EU law (based on this delegation) can overrule in all respects the ability of Member States to exercise their competencies independently. In fact, national legislation in certain areas reflects the specific characteristics, cultural or social needs of the Member State concerned, which it is not advisable to overrule by an act of the European Union, as this would jeopardise the sovereignty and identity of the Member State concerned. In connection to this transfer of competences, some scholars expressed that it *"is neither a full transfer of sovereignty, nor can it be, as it would lead to the dissolution of the statehood of those who compose the Union, and the latter would turn into a federal state, which is not the reality, nor an explicit wish of the (majority) of the states."*[22] One of the major challenges of multilevel constitutionalism for the EU and its Member States is, therefore to find a balance between ensuring the unity and development of the Union and respecting the sovereignty of the Member States.

The given issue can be best understood through the case law of national constitutional courts of the Member States. These courts have established a number of control mechanisms in order to defend the supremacy of the Constitution and to maintain certain nationally significant powers and competences. Such control mechanism was the fundamental rights control, that emerged as a result of the *Solange I*[23] and *Solange II*[24] deci-

[20] See Case of Sanofi Pasteur v. France, App. No. 25137/16, Case of Ullens de Schooten and Rezabek v. Belgium, App. No. 3989/07 and 38353/07.

[21] Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, App. No. 45036/98, para. 156.

[22] VARGA, A. Identitatea constituțională națională – sursă de conflicte sau de soluții? Unele aspect doctrinaire și jurisprudențiale. [National Constitutional Identity – Source of Conflict or Solution? Some Doctrinal and Jurisprudential Aspects]. In: Ștefan Deaconu – Elena Simina Tănăsescu (eds.). *In honorem Ioan Muraru.* București: Editura Hamangiu, 2019, p. 453.

[23] BVerfGE 37, 271 Decision of the Federal Constitutional Court of Germany.

[24] BVerfGE 73, 339 Decision of the Federal Constitutional Court of Germany.

sions of the Federal Constitutional Court of Germany, and later the sovereignty control. Nowadays, a third control mechanism, identity control is the most widespread.[25] Identity control is about protecting the constitutional identity of each Member State. It is based on the observance that each state has some constitutional features and characteristics by which it can identify itself, which distinguish it–to some extent–from other Member States, and which are of paramount importance to protect even in the process of European integration.[26]

The application of identity control has been fostered by the fact that, following the Treaty of Lisbon, Article 4(2) of the Treaty on European Union explicitly states that the Union shall respect the national identities of the Member States *"inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."*[27] Based on this provision, some scholars believe that Article 4(2) has a significant role in the functioning of the European Union, as it means *"that the process of constitutional integration within the EU is limited precisely by the fundamental political and constitutional structures of the Member States."*[28]

However, one has to consider that identity control does not violate the general primacy of EU law, but merely limits its uniform application.[29] Thus, in all cases where EU law possibly infringes the constitutional identity of a Member State, this has to be examined by the Court of Justice of the European Union and the constitutional courts of the Member States in close and loyal cooperation. It goes without saying that the Court of Justice is the only and sole authority which can interpret the provisions of EU law. At the same time, *"[c]onstitutional courts are best placed to be familiar with national evolutions when analysing complex issues arising in the relationship between national and EU law."*[30] Therefore, on the one hand, whenever the Court of Justice of the European Union examines whether a provision of EU law infringes the constitutional identity of a Member State, it must do so in relation to the constitutional identity of that State as defined by its Constitutional Court. On the other hand, in cases where a national constitutional court rules that an EU law provision does not apply in the given Member State as it infringes its constitutional identity, it would be appropriate for the constitutional court to refer the matter to the Court of Justice of the European Union

[25] BLUTMAN, L. Szürkületi zóna: az Alaptörvény és az uniós jog viszonya. *Közjogi Szemle*. 2017, Vol. 10, No. 1, pp. 7–9.

[26] For example, based on the case law of the Constitutional Court of Hungary [Decision 22/2016. (XII. 5.) AB and Decision 32/2021. (XII. 20.) AB] one can deduce that the achievements of the historical constitution – as elements of Hungarian constitutional identity – represent a feature by which Hungary identifies itself.

[27] Article 4(2) of the Treaty on European Union.

[28] VERESS, E. Reform of the Romanian Judiciary and the Cooperation and Verification Mechanism - Considering the Practice of the Romanian Constitutional Court. *Central European Journal of Comparative Law*. 2023, Vol. 4, No. 2, p. 345.

[29] SCHNETTGER, A. Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System. In: Christian Callies - Gerhard van der Schyff (eds.). *Constitutional Identity in a Europe of Multilevel Constitutionalism*. Cambridge: Cambridge University Press, 2021, p. 34.

[30] TEODOROIU, S. M., ENACHE, M., SAFTA, M. Identitatea constituțională națională și dialog judiciar. [National Constitutional Identity and Judicial Dialogue]. In: Valer Dorneanu – Claudia-Margareta Krupenschi (eds.). *Identitatea constituțională națională în contextual dreptului European. [National Constitutional Identity in the Context of European Law]*. București: Editura Hamangiu , 2019, pp. 45–46.

for a preliminary ruling.[31] In light of these, some scholars argue that the whole concept of constitutional identity has evolved as a result of the constitutional dialogue between the constitutional courts and the Court of Justice of the European Union, that is inherent in multilevel constitutionalism.[32]

In this complex context of multilevel constitutionalism, a number of issues arise with regard to the protection of national sovereignty, the division of national and supranational competencies and the participation of citizens in decision-making. In the following, this contribution aims to explore these issues.

II. PROTECTING NATIONAL SOVEREIGNTY IN THE CONTEXT OF MULTILEVEL CONSTITUTIONALISM

Sovereignty became one of the main principles in international relations after the Peace of Westphalia, and as such essentially expresses that *"the world is made up of sovereign states which do not recognise any power above them; the process of legislation, the resolution of disputes between them and enforcement is for the most part in the hands of the states."*[33] According to the classical concept of sovereignty, expressed by Jean Bodin, *"the principle mark of sovereign majesty and absolute power is the right to impose laws generally on all subjects*".[34] Sovereignty has two aspects: the internal aspect embodies the supreme power, while the external aspect the independence of the state.[35] On this basis, sovereignty simultaneously implies the right of a state to adopt binding legislation in any field of regulation within its territory and its independence and equality with other states. However, this conception of sovereignty is now difficult to sustain in a globalised world, where states are so interdependent (especially in economic, environmental and military issues) that inter-state cooperation is essential.[36]

An important question is how the national competencies delegated to international organisations relate to sovereignty. States have created international organisations to which they transferred national competencies in order to achieve a certain level of economic or political integration.[37] However, these international organisations do not have their own sovereignty. States can withdraw from these organisations at any time, or they can modify them. According to some scholars, *"[t]he ultimate impossibility of management of its own existence certainly makes such an entity as a supranational organization non-sovereign."*[38]

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[31] CALLIES, C., SCHNETTGER, A. *The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism,* p. 363.

[32] TEODOROIU, S. M., ENACHE, M., SAFTA, M. *Identitatea constituțională națională și dialog judiciar. [Nationa Constitutional Identity and Judicial Dialogue],* p. 37.

[33] JAKAB, A. *Az európai alkotmányjog nyelve. [The Language of European Constitutional Law].* Budapest: Nemzeti Közszolgálati Egyetem, 2016, p. 107. The book was published also in English (JAKAB, A. *European Constitutional Language.* Cambridge: Cambridge University Press, 2016).

[34] BODIN, J. The *Six Bookes of the Commonwealth.* Oxford: The Alden Press, p. 32. In: *yorku.ca* [online]. [2024-07-15]. Available at: <https://www.yorku.ca/comninel/courses/3020pdf/six_books.pdf>.

[35] JAKAB, A. *Az európai alkotmányjog nyelve. [The Language of European Constitutional Law],* p. 98.

[36] Ibid., p. 108.

[37] CZUBIK, P. Sovereignty in International Law. In: Anikó Raisz (ed.). *International Law from a Central European Perspective.* Miskolc–Budapest: CEA Publishing, 2022, p. 108.

[38] Ibid., p. 109.

It is therefore the state themselves, not the international organisation, that determine the powers delegated to international organisations.[39] Thus, *"[t]he sovereignty of a state is not reduced by powers conferred on other entities of international law, as long as this conferral is reversible. On the other hand, the acquisition of these competences by another entity, either by coercion or by judicial lawlessness (appropriation of competences), can be perceived as a threat to sovereignty."*[40]

All these aspects are worth considering in the context of the European Union. Accession to the European Union concerns sovereignty in several dimensions: on the one hand, Member States give up some of their legislative powers, and on the other hand, internal legal relations may be also shaped by EU law provisions.[41] The protection of sovereignty is particularly salient in East-Central European countries, which regained their full sovereignty shortly before the accession.[42] At the same time, as the failed attempt to adopt a European Constitution illustrates, the protection of sovereignty is of great importance for the older Member States as well.[43]

Although the transfer of certain national competences (or as the Federal Constitutional Court of Germany calls them: sovereign powers)[44] does not imply an abdication or transfer of sovereignty,[45] there are nevertheless some concerns about the relationship between the protection of the sovereignty of Member States and European Integration. In order to adequately protect their sovereignty, Constitutional Courts have started to use the sovereignty control. As indicated above, this has recently been somewhat replaced by identity control. However, one can observe some links between identity control and sovereignty, although the two concepts need to be distinguished.

It is pivotal to note that the Constitutional Court of Hungary explicitly commented on the relationship between sovereignty and constitutional identity in a Decision held in 2021. According to the Constitutional Court *"constitutional identity and sovereignty are not complementary concepts, but are interrelated in several aspects."*[46] Firstly, the possibility of protecting constitutional identity is made possible by sovereignty. Secondly, the Constitution–as a sovereign act–is the main expression of constitutional identity. Thirdly, the power of the State to take sovereign decisions is part of its identity. Fourthly, the

[39] Ibid.
[40] Ibid., p. 112.
[41] BALOGH-BÉKÉSI, N. Szuverenitásféltés és alkotmány. [The Protection of Sovereignty and the Constitution]. *MTA Law Working Papers.* 2014, No. 57, p. 7.
[42] Ibid., p. 1; JAKAB, A. *Az európai alkotmányjog nyelve [The Language of European Constitutional Law]*, p. 113.
[43] BALOGH-BÉKÉSI, N. *Szuverenitásféltés és alkotmány. [The Protection of Sovereignty and the Constitution]*, p. 1.
[44] JAKAB, A. *Az európai alkotmányjog nyelve. [The Language of European Constitutional Law]*, p. 111.
[45] CZUBIK, P. *Sovereignty in International Law,* p. 106. According to some other views, also widely known, sovereignty is shared between the Member States and the European Union (i.e. the concept of shared sovereignty), for example, by creating a legislative body with its own powers at both levels. This approach goes beyond the concept of multilevel constitutionalism, as it envisages a European Union *"characterised by mutual connectivity and interdependence."* CALLIES, C., SCHNETTGER, A. *The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism,* pp. 351–356. However, this approach is somehow contrary to the classical concept of sovereignty, based on which sovereignty is exclusive, inalienable, and indivisible. According to some scholars, the approaches that divide sovereignty are "*artificial and incompatible with the nature of sovereignty.*" FLOREA, D. *Implicarea statelor în procesul de formare a normelor juridice internaționale. Răspundere și sancțiuni internaționale.* București: Editura Universul Juridic, 2023, p. 171.
[46] Decision 32/2021. (XII. 20.) AB. [99].

internationally recognised elements of state sovereignty are closely linked to the constitutional identity of Hungary.[47] The legal literature reached a similar conclusion concerning the relationship between the two terms. Accordingly, *"national constitutional identity and sovereignty are two connected concepts located on different levels of abstraction and discussion."*[48]

The wider use of identity control illustrates the relevance of creating a new conceptual framework for all the emerging constitutional issues in our globalised world. States, sensing the impact of globalisation and internationalisation on their sovereignty, have already begun to operate with new concepts and mechanism.[49] Yet, it would be pivotal that these new mechanisms are preceded by a wider debate, in which the arguments of all sides can be heard. Within the European Union, this could be based on the principle of loyal cooperation, according to which *"the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."*[50]

III. SHORTCOMINGS IN INTERNATIONAL DECISION-MAKING: THE DEMOCRATIC DEFICIT

One can frequently hear the issue of democratic deficit both in the legal literature and in public debates about globalisation. However, in order to properly understand the concept, it is necessary to take a closer look on the notion of democratic empowerment or democratic legitimacy. According to one definition given by the legal literature *"[p]ower in a democracy is legitimate only if it is empowered 'from below', if it is based on the emancipation of the will of the people, and more specifically: if and when it is based on free consent."*[51] The basis for the exercise of power must therefore be the will of the people, which can be exercised both indirectly (through the principle of representative democracy based on periodically elected legislatures) and directly (through referendums). Several sources of democratic deficit are distinguished in the legal literature, such as *"concerns about thresholds of representation, party fragmentation, increasing presidentialism and semipresidentialism, and the displacement of parliamentary authority by international accords or, in the case of Europe, the overreach of Brussels."*[52]

It goes without saying that international organisations, and especially the European Union, *"are taking over the role of the democratically legitimised state legislator, the na-*

[47] Ibid.

[48] SCHNETTGER, A. *Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System,* p. 24.

[49] One example is the "Brückenhaus theory" of the Federal Constitutional Court of Germany, which *"regards the Act of Accession as a bridge from whose house the individual state bodies – in particular the Constitutional Court – check whether the act of the Community remains within the limits of the powers transferred."* BALOGH-BÉKÉSI, N. *Szuverenitásféltés és alkotmány. [The Protection of Sovereignty and the Constitution],* p. 1. The author also cites Judgment of 12 October 1993 of the Federal Constitutional Court of Germany.

[50] Article 4(3) Treaty on European Union.

[51] VINCZE, A., CHRONOWKSI, N. *Magyar alkotmányosság az európai integrációban. [Hungarian Constitutionalism in European Integration].* Budapest: HVG-ORAC Lap- és Könyvkiadó, 2018, p. 325.

[52] ISSACHAROFF, S. Democracy's Deficits. *The University of Chicago Law Review*. 2018, Vol. 85, No. 2, p. 505.

tional parliaments, without the control mechanisms known and established in the constitutions of the Member States."[53] While national authorities *"are embedded in political communities and equipped with some democratic mechanisms make them capable of generating feelings like trust, solidarity, and loyalty*", regional and global international actors "*are neither equally embedded in a political community, nor checked by democratic accountability mechanisms."*[54] As a consequence, democratic deficit arises in relation to the decisions adopted by these international organisations.

International decision-making has certain positive features, such as the fact that actors at this level are free from local bias and the influence of local powers, but it is also true that decision-makers at this level have little knowledge and insight into local specifics.[55] This can lead to the marginalisation of local social, cultural, historical and economic specificities, which can significantly impact states.[56] Moreover, the decision-making of international actors circumvents national control mechanisms, thus eliminating these constitutional safeguards.[57] It is also noteworthy that the executive (the Government) plays the most salient role in the conclusion of international agreements and in the negotiation of accessions to international organisations, hence–although the actual ratification is carried out by the Parliament–the role of the elected representative body is more limited.[58]

If one looks at all of these aspects in the context of the European Union, several sources of democratic deficit can be identified in the functioning of the organisation. Thus, from a point of view of democratic legitimacy, it is problematic that the executive (the Commission and the Council) have been given greater roles than the national parliaments, i.e. they have been *"overweighted*".[59] In addition, it is also a source of concern that the European Parliament, both in terms of its composition and its roles and powers, shows certain legitimacy gaps.[60] According to another classification, the

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[53] VINCZE, A., CHRONOWKSI, N. *Magyar alkotmányosság az európai integrációban. [Hungarian Constitutionalism in European Integration]*, p. 326.

[54] CAPAR, G. *Global Constitutionalism and Legitimate International Authority.*

[55] SAJÓ, A., UITZ, R. *A szabadság alkotmánya. Bevezetés a jogi alkotmányosságba. [The Constitution of Freedom: An Introduction to Legal Constitutionalism]*, p. 611. Yet in many cases these local specificities have their own particular value. That is why some scholars consider that *"[t]he existence of diverse yet equally valuable ways of realizing the moral principles of constitutionalism reflects a form of value pluralism."* CAPAR, G. *Global Constitutionalism and Legitimate International Authority.*

[56] That is why some national constitutions contain provisions that distinguish the state from global standrards. For example, when they contain provisions to limit the expansion of global economy in order to protect the control of nationally owned resources. For details see JACKSON, C. V. *Constitutional Comparisons: Convergence, Resistance, Engagement,* p. 113. In the relationship between the European Union and its Member States these provisions are often associated with the constitutional identity of the given Member State, which it seeks to protect against the possible expansive exercise of EU competences.

[57] SAJÓ, A., UITZ, R. *A szabadság alkotmánya. Bevezetés a jogi alkotmányosságba. [The Constitution of Freedom: An Introduction to Legal Constitutionalism]*, p. 611.

[58] VINCZE, A., CHRONOWKSI, N. *Magyar alkotmányosság az európai integrációban. [Hungarian Constitutionalism in European Integration]*, pp. 330–331.

[59] Ibid., p. 335.

[60] Ibid., pp. 335–338. The authors point out, for example, that the complex and complicated legislative mechanisms make it difficult for citizens to understand how the European Parliament participates in the legislative process. Moreover, the present electoral system – i.e. based on contingent–distorts the democratic legitimacy of the European Parliament. Ibid., pp. 328–329.

democratic deficit in the European Union can be traced back to two main sources. On the one hand, *"poor representative mechanisms*", as EU citizens have direct influence only on the composition of the European Parliament, and on the other hand, *"poor deliberative mechanisms*", which is undermined for example, by the exclusive power of initiative of the Commission or the secret nature of the discussions within the Council.[61] At the same time, the main reason for the democratic deficit is the absence of real choice and influence of EU citizens in the shaping of the policies of the European Union.[62]

One can observe a number of proposals in the legal literature for amendments to the functioning of the European Union that could strengthen the democratic legitimacy of the organisation.[63] However, since there is no common European *"demos*", we cannot speak about complete legitimacy.[64] Therefore it is crucial to find mechanisms that take into account both the fulfilling of the common European objectives (such as peace, security, common market, human rights protection) and the protection of national specificities.

CONCLUDING THOUGHTS

The increasingly globalised world and the growing cooperation between states has an impact also on the exercise of state powers. Achieving certain regional or global common objectives is beyond discussion. One example is the protection of fundamental human rights, where the convergence of constitutional solutions is already showing the positive effects of multilevel constitutionalism. In order to achieve these common goals, objectives states transfer certain powers and national competencies to international organisations.

At the same time, it is pivotal to underline that this transfer of national competencies does not mean that states relinquish their sovereignty. International organisations can only act in the areas of their delegated powers and cannot extend their competencies to areas not delegated to them. In recent years, states have developed mechanisms to protect their cultural, historical, social and economic specificities in the context of multilevel constitutionalism. The most vivid example of this can be observed at the level of the European Union, where the constitutional courts of the Member States are seeking

[61] PARRY, P. The Democratic Deficit of the EU. *North East Law Review*. 2016, Vol. 4, p. 99.

[62] Ibid., pp. 100–101.

[63] See for example MATHIEU, B. Redefining the Relationship Between National Law and European Law. *Central European Journal of Comparative Law*. 2021, Vol. 2, No. 1, pp. 142–144. Moreover, the European Parliament itself made a number of proposals for amendments to the European Parliament elections, which would also have an impact on increasing the democratic legitimacy of the institution. See for example: European Parliament resolution of 26 November 2020 on stocktaking of European election. In: *European Parliament* [online]. [2024-08-22]. Available at: <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0327_EN.html>.

[64] VINCZE, A., CHRONOWKSI, N. *Magyar alkotmányosság az európai integrációban [Hungarian Constitutionalism in European Integration]*, pp. 324–325. For more on the lack of a common European *"demos*" see SAJÓ, A., UITZ, R. *A szabadság alkotmánya. Bevezetés a jogi alkotmányosságba [The Constitution of Freedom: An Introduction to Legal Constitutionalism]*, p. 615.

to protect the specificities of their statehood by applying sovereignty control or identity control[65].

A loyal and respectful dialogue between the different national, regional and global actors, a cooperation in which the different parties respect the interests and values of the others, would be key to solving the challenges of multilevel constitutionalism. However, there is also a need to develop an appropriate conceptual framework, as it is clear that the current one has shortcomings. Once this conceptual framework has been developed, it should also make it easier to manage the relationship between the different levels.

[65] See for example Judgment of 5 May 2020 of the Federal Constitutional Court of Germany; Decision 22/2016. (XII. 5.) AB and Decision 32/2021. (XII. 20.) AB of the Constitutional Court of Hungary; Judgment of 21 April 2020 – Ref. No. Kpt 1/20 and Judgment of 14 July 2021 – P 7/20 of the Polish Constitutional Tribunal; Decision No 390 of 2021 of the Constitutional Court of Romania; PL. ÚS 5/12: Slovak Pensions Judgment of the Constitutional Court of the Czech Republic.