

# POLITICAL THOUGHT

YEAR 20, NUMBER 63, JANUARY, SKOPJE 2022

# 63

EUROPEAN IDENTITY  
AND THE FORTRESS  
EUROPE PARADIGM

EUROPEAN  
UNION AND  
IDENTITIES

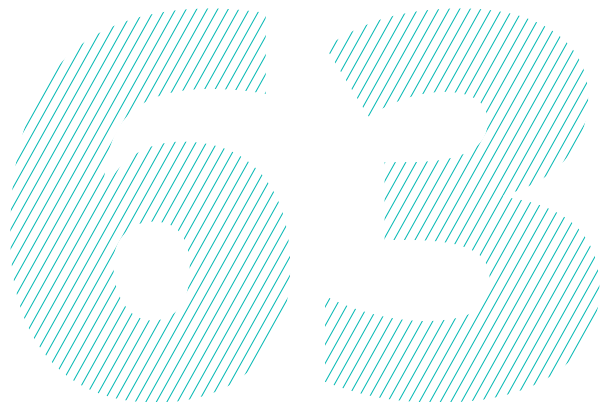
THE PROCESSES OF  
(DE)STABILISATION  
IN THE BALKANS  
THROUGH THE PRISM  
OF THE EUROPEAN  
INTEGRATION

CYBER SECURITY  
MANAGEMENT  
POLICIES



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Tanja Karakamisheva – Jovanovska  
Aleksandar Spasenovski

# EUROPEAN UNION AND IDENTITIES (CONSTITUTIONAL/ NATIONAL VS EUROPEAN DIMENSION)

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POLITICAL THOUGHT

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63

## INTRODUCTION

Issues of national and constitutional importance often cause various dilemmas, situations, interpretations, controversies within the European Union (EU) due to which there is a constant need for their further explanation and refinement within the scientific discourse.

The topicality and vitality of these issues are important not only for the institutions of the Union and the Member States, but also for the EU membership candidate countries. The question of whether and to what extent the constitutional and national identities of the Union's member states can affect the quality of the EU's functioning and to what extent they have the capacity to make substantial shifts in its pillars has been appealing in the past and today as well.

The fact is that no founding treaty of the EU so far mentions the term constitutional identity, but everyone uses the term national identity. On the other hand, the Constitution as the highest legal act in a country, in addition to the legal, political and institutional elements of the system, also contains the elements of the historical continuum in the development of the nation and state, social, economic, political, legal, cultural and other core values which, in turn, are also part of national identity. It is a fact that the constitutional courts of several EU member states, regardless of whether the European institutions like it or not, develop and finalize the concept of constitutional identity in their relations with the Union.

In practice, three models, two legal approaches and one communication channel for detecting the constitutional identity in the Union have been differentiated so far. The three models range from a model of confrontation with EU law, a model of confrontational individual approach, to a model of cooperation with the embedded identity. The two legal approaches are diametrically opposed and range from an EU friendly approach to an EU antagonistic approach, while in terms of the communication channel the most important place is occupied by the EU Court of Justice preliminary ruling procedure.

Constitutional theory is a real treasure trove of different opinions, positions and concepts that determine the essence and meaning of the term constitutional identity. In the EU, but also in some member states of the Union, often in terms of synonymy, constitutional identity is considered as the identity of the Constitution. The connection of these concepts is from the aspect of the position that the constitutional identity of a state basically has, meaning institutionalized and collective political identity of the state with which all citizens living in it identify or connect. Having in mind the different views that exist on the relation of the national and the constitutional identity at the level of EU member states, on the one hand, and at the level of EU institutions and legal acts, on the

other, the need arises for in-depth analysis of lines and elements which connect or divide these categories in the European scientific and practical discourse.

The main hypothesis of the paper is to explore the differences, but also the similarities that exist in the explanation of the categories of constitutional and national identity in the EU member states, mostly through the prism of the work of the constitutional courts and EU institutions, especially anticipating the practice of the EU Court of Justice.

The hypothesis of the paper aims to create a common point from which we should start in resolving the disputed processes at the national-EU level, becoming more and more relevant in recent times. The argumentation of the questions in the paper is presented through an analysis first of all of the general identity notions and issues, moving towards the special and often controversial aspects of the constitutional and national identity within the EU. The paper aims to ascertain that the protection of the constitutional identity of the EU member states should not jeopardize the unity and integrity of EU law, nor of the Union itself, but rather strengthens the core of its current configuration. The differing views of national constitutional courts on constitutional and national identity issues should be considered through open dialogue and positive co-operation between Member States and the Union, especially in cases where there are controversial views and positions on certain segments, in order to find mutually acceptable solutions which would be to the benefit of the Union, but would also further nurture the constitutional values of its member states.

## CONSTITUTIONAL IDENTITY - BEGINNINGS, DEVELOPMENT, ESSENCE, CONTINUITY

From a constitutional-legal point of view the constitutional identity<sup>1</sup> is considered as a self-identifying element of the collective identity as a constitutive factor (of the citizens, the nation, the people) mentioned in the Constitution. In a certain historical period of the development of the state, the people (peoples' sovereignty) and the nation (national sovereignty) were defined as a constitutional power exercised directly, through referendum and other forms of direct democracy or indirectly, through elections. The different definition of the constitutive factor in the country was dependent on other

<sup>1</sup> See: Roberto Toniatti, *Sovereignty Lost, Constitutional Identity Regained*, in *National Constitutional Identity and European Integration*, Alejandro Saiz Arnaiz & Carina Alcobarro Llivinia Eds., 2013.  
The Polish Constitutional Tribunal considers the concept of constitutional identity to be equivalent or very close to the concept of national identity. The concept incorporates the traditions and cultural heritage of the country, drawing its own interpretation not only from Article 4 (2) of the EU Treaty, but also from the Preamble to the Treaty, where one of the Union's stated objectives is to deepen solidarity between the peoples through the respect for their history, culture and traditions. In this context, in the opinion of the Polish Constitutional Tribunal, "the idea of affirming one's national identity through solidarity with other nations, and not against them, constitutes the main axiological basis of the EU".  
See: Case K 32/09, Pol. Const. Trib., Nov. 24, 2010.



identities on an individual or collective level - cultural, social, historical, religious and other identities.

The notion of constitutional identity is directly related to democracy, i.e. the concept of civic identity.<sup>2</sup>

Constitutional identity attracted much attention even since the ancient period in the works of Aristotle and Plato<sup>3</sup>, but also later in the works of Hobbes, Jean-Jacques Rousseau, Calvin whose works found their reflection in the work of Bruce Ackerman, Ran Hirschl, Gary Jeffrey Jacobsohn, Mark Tush, Heinz Klug, Erik H. Erikson, Michael Rosenfeld, John E. Finn and many other authors.

"Constitutional identity can appear in various forms, it can constantly evolve as a result of the continuous process of substantial social change."<sup>4</sup> Thus, according to the American expert Rosenfeld, "constitutional identity is essentially a competing concept, given that there is no agreement on its meaning, or what it specifically refers to. Concepts of constitutional identity can be found in, for example, the constitutional provisions on systems of government (whether a parliamentary, presidential or mixed system, whether a republic or a federal state has been established), in provisions that explain the relationship between the constitution and the culture in which it operates, as well as in the relationship between the identity of the constitution and other relevant identities, such as national, religious or ideological identity".<sup>5</sup>

Constitutional identity means a constitutionally defined identity. While some authors consider the Constitution to be a reflection of the collective beliefs, positions, attitudes and values formed throughout the history of a nation as a result of the action of its culture and tradition in the country, which means that the Constitution is a recognition of the pre-existence of identities<sup>6</sup>, others considered that the Constitution, culture and identities are in correlation with each other, i.e. they influence each other as a result of the direct connection of their different social aspects. This practically means that the Constitution is recognition and a basis for the creation of new identities. The majority of the authors agree that the constitutional identity is, in fact, composed of elements that create the political identity of the community, such as: civic awareness of the need to

2 See: Clarissa Rile Hayward, Democracy's Identity Problem: Is "Constitutional Patriotism" the Answer?, [http://polisci.wustl.edu/files/polisci/imce/democracys\\_identity\\_problem\\_compact.pdf](http://polisci.wustl.edu/files/polisci/imce/democracys_identity_problem_compact.pdf).

3 In Aristotle's third book, Politics, the author asked: "On what principle can we say that the state retains its identity, or, conversely, that it has lost its identity and become a different state?". His response sought to distinguish between the physical identity of the state and its real identity. Thus, according to Aristotle, "The identity of the polis (city-state) is not constituted by its walls." Instead, the identity of the polis is enshrined in its constitution. See more details in: <http://www.iep.utm.edu/aris-pol/#H9>.

4 See: Michel Rosenfeld, "Modern Constitutionalism as Interplay between Identity and Diversity", in Constitutionalism, Identity, Difference, and Legitimacy, ed. Michel Rosenfeld (Durham: Duke University Press), 1994, (p.8).

5 See: Rosenfeld, M., Constitutional Identity, in: M. Rosenfeld and A. Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, Oxford, 2012, (p. 756).

6 See: Hegel, G.W. Friedrich, in Arato, Andrew, Civil Society, Constitution and Legitimacy, (Maryland: Rowman and Littlefield Publishers), 2000, (p.169).

have a specific identity, a sense of belonging to a specific community, identification with the values of a specific political system, the sense of common interest and well-being of the citizens and so on. Hence, it is said that the constitutional identity can be considered from a formal and informal aspect.<sup>7</sup>

The formal aspect is by definition related to the citizens as direct bearers of sovereignty who are at the same time bearers of the constitutional identity. The informal aspect (cognitive and affective) of the constitutional identity is explained through the values and beliefs of the citizens in the specific state, who share the same identity.

There is an interesting idea found in almost all theories of constitutional identity which believes that the Constitution should not be considered only as a historical-legal document whose purpose of existence is to define the legal-political structure of the state, but the Constitution should be seen as a broader value system, as a particular system composed of a combination of legal relations between citizens and political institutions, and as a continuous political competition of ideas, values and sources.<sup>8</sup>

Or, as Mark Tushnet explicitly stated: “The constitutional order (or regime) is a reasonable and stable set of institutions through which fundamental national decisions are made, as well as the principles on which these decisions are based.”<sup>9</sup>

Of course, the constitutional identity is directly linked to the idea of the constitutional order, as well as to the issues related to the differences and conflicts that can make changes in the system. His idea of the constitutional order is that it is a “dominant set of institutions and principles” to understand constitutional change through the processes of constant constructions and transformations. The key to his concept of constitutional order (as well as constitutional identity) is in “the idea that the constitutional order is a combination of institutions and principles (values)”.<sup>10</sup>

<sup>7</sup> See: Gary Jeffrey Jacobsohn, Constitutional Identity, Michel Rosenfeld, *Constitutional Identity*, in The Oxford Handbook of Comparative Constitutional Law, 2010, p.756-76, as well as in: Michel Rosenfeld, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community, 2010. <https://www.routledge.com/The-Identity-of-the-Constitutional-Subject-Selfhood-Citizenship-Culture/Rosenfeld/p/book/9780415949743>. <http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2760&content=tlr>. Rosenfeld posed simpler questions than those stated above, stating that “constitutional identity must answer the three most important questions: To whom does the Constitution apply, what should the Constitution provide, and finally, how can the Constitution be justified.”

<sup>8</sup> See: Heinz Klug, “Constitutional Identity and Change”, Volume 47, Issue 1 Book Review Issue, *Tulsa Law Review* 41, Article 5, (2011).

<sup>9</sup> See: Mark Tushnet, *New Constitutional Order 1*, Princeton: Princeton University Press, 2003, <http://www.gvpt.umd.edu/lpbr/subpages/reviews/tushnet-mark.htm>.

<sup>10</sup> His conception also includes the idea that the guiding principles of the constitutional order are reflected not only in the legal and philosophical principles articulated in judicial opinions, but also in the laws and policies adopted and promulgated by the legislature and the executive. Thus, he defines the 1944 Franklin D. Roosevelt’s State of the Union Address, the 1964 Civil Rights Act, the 1965 Voting Rights Act, and health care policy as “guiding principles of the prevailing New Deal-Great Society program in the US constitutional order from 1930 to 1980 “. See: Tushnet, *supra* note 4, at 1.

## ABOUT NATIONAL IDENTITY - CONCEPTS AND VISIONS

Within the contemporary political philosophy, national identity is considered through two most pronounced concepts. According to the first, national identity is a set of individual beliefs of people who have common roots, history, culture, tradition, in a word, people of the same ethnicity. This term was originally coined in the works of Max Weber and Walker Connor.<sup>11</sup>

The second concept considers national identity as a broader term anticipated through the principle of national self-determination and self-identification. This concept is analyzed in the works of David Miller, Kai Nielsen, Yael Tamir and others.<sup>12</sup>

Regardless of the applied concepts, it is considered that the national identity is built on the sum of individual feelings of the citizens for their common belonging to a nation. Being a member of a nation is an essential dimension of the broader social-psychological theory of social identity defined as an individual awareness of belonging to a particular group and a psychological sense of group connection.<sup>13</sup>

This means that national identity in a broader sense takes into account the sociological aspects of citizens' individual feelings of belonging to a particular nation, the sense of broader attachment of people to a particular national group in the cultural, historical, linguistic, religious sense of the word.

In the context of the EU, the question of how compatible national identity stories are with European integration and with the hybridization of identity that EU membership entails is still being raised.<sup>14</sup>

The concept of national identity is considered differently from the concept of creating or changing the constitution where the constitutional definition is framed, but also the content of the law of nations. In Western Europe, national identity is built on the principle of demos, while in the tradition of Southeast European countries it is built on cultural identity based on ethnicity. These two principles are part of the constitutions of the countries in Western and Southeastern Europe where the national identity is defined

<sup>11</sup> See: Omar Dahbour, National Identity: An Argument for the Strict Definition, *Public Affairs Quarterly*, Vol. 16, No. 1, January 2002, (p. 17-19).

<sup>12</sup> *Ibid* (p.17).

<sup>13</sup> There are different understandings of the term "identity". See: Huddy, L, Khatib, N, American patriotism, national identity, and political involvement. *American Journal of Political Science* 51(1), 2007, (p. 63-77). The term "national identity" indicates that citizens have an individual and collective sense of belonging to their nation.

<sup>14</sup> The thoughts of Neumann, who participated in the negotiations for the formation of the Norwegian national identity, i.e. in the process of institutionalization of the relationship between Norway and the EU, are interesting. The question of the extent in which the stories of the national "I" are compatible with the institutional integrations and the hybridization of the identity that the EU membership entails was crystalized during the negotiations. Attempts to implement pluralist policy lost the battle against the nationalist policy in Norway. For more see: J.B.Neumann, *Upotrebe drugog. "Istok" u formiranju evropskog identiteta*, Sluzbeni glasnik, Beograd, 2011, (p. 237).

as the collective identity of the constituent entity that assumes values and consensus present at the time of drafting the constitution. Although constitutional and national identities are not synonymous, the fact is that they are causally related to each other.

National identity is enshrined in the Constitution at the time of its writing. Thus, the preamble of the Constitution contains all the historical events, happenings and circumstances important for the constituent, while the content of the Constitution incorporates all the most important connective tissues of the national identity. That is why it is said that national identity is the basis for formulating the constitutional identity.

The constitutional identity due to the integrative function of the constitution should not only be generally accepted, but also the constituent people themselves, i.e. the nation must identify with it regardless of the differences that exist in the society. It is for this reason that constitutional texts in multinational, multiethnic societies use different tools to frame the different identities. The constitutional identity aims to define and strengthen the national identity of the constituent.

Respect for the uniqueness, but at the same time the connection between the national and the constitutional identity of the EU member states, in recent years has become a very important issue for the further development of European constitutionalism.<sup>15</sup>

Many papers by renowned legal theorists and judges have been written on this subject. The approach to studying this issue varies depending on whether the topic is considered from a conceptual or philosophical approach,<sup>16</sup> from an EU law-based approach or from an analysis of the “case law” of several constitutional courts of the EU Member States.

As we have seen, the concepts of constitutional identity are mainly of a competitive nature and there is no generally accepted agreement between them on its meaning. While some concepts emphasize the current features and provisions of the Constitution, for example, what system of organization of government is established in the Constitution, what is the form of internal organization of the state (federal, confederal or republican), how the relationship between the Constitution and the culture in the country is considered, the relationship between the constitutional identity and the identity of

<sup>15</sup> The term “national identity” was introduced for the first time in the Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. (C 191) 1. Article F (1) of the Treaty sets out the obligation for the Union to respect the national identity of the Member States. This Article was later replaced by Article 6 (3) of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997, O.J. (C 340) that then paved the way for the wording of Article 4(2) TEU of the Lisbon Treaty in 2009, now being used (Consolidated Version of the Treaty on European Union art. 4(2), 2010 O.J. (C 83).

“National identity” as a general principle was introduced into EU law in 1992 by the Maastricht Treaty. Article F (1) states: “The Union shall respect the national identities of its Member States whose systems of government are based on the principles of democracy.” This clause was later revised in the 1997 Amsterdam Treaty by removing the second part of the sentence: “The Union will respect the national identities of its member states”. The latest amendment not only re-enumerates the articles of the EU Treaty, but also establishes the existing form of Article 4 (2) which reads: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political, constitutional, inclusive of regional and local self-government. It will respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

<sup>16</sup> See: Appadurai, A., *Modernity at large: Cultural dimensions in globalization*, University of Minnesota Press, 1997.

the creation of the Constitution, other concepts emphasize the identity of the different constitutional models, the identity of the creation of the Constitution, the identity created through the constitutional interpretations and the like.

Third conceptions examine constitutional identity through the identity contained in the supranational constitutions. Despite the different approaches in the analysis, the approach of legal conceptualization based on regional European jurisprudence and doctrine seems to be dominant.

Constitutional identity in the legal sense of the word is considered as “identity of the Constitution”. These two terms are considered synonymous. Although there are dilemmas as to why the identity of the Constitution is needed at all and how the Constitution can have an identity, the answer to this question lies in the socio-psychological significance of identity and in the essence and role of the Constitution as the highest legal act in constitutional democracy. Given the fact that the term “identity” itself has cultural, sociological, psychological, political significance, the term “constitutional identity” is also considered through a multidimensional prism.

We can draw an appropriate conclusion that the constitutional identity in a country is a result not only of the content of the existing constitutional provisions, but also of the judicial jurisprudence dominant at the time of writing the Constitution, but also later, in the eventual drafting of constitutional amendments. It should be noted that constitutional identity and national identity are analyzed in the national context differently than in the context of EU and European integration.

While constitutional identity in national terms is viewed through the prism of the three mentioned concepts, constitutional identity in the EU context takes into account only those articles of the national constitution that are in the context of EU law.<sup>17</sup> Thus, according to the jurisprudence of the Hungarian Constitutional Court, it is an identity that “confronts the EU legal model”. On the other hand, according to the jurisprudence of the Italian Constitutional Court, it is a “cooperative model”, a model of cooperation that has previously defined a built-in constitutional identity.

## **EU AND THE NATIONAL/CONSTITUTIONAL IDENTITY OF THE MEMBER COUNTRIES - LEGAL FACTS VS LEGAL INTERPRETATIONS**

Today, the content of the “identity of the Constitution” of a particular EU member state is often protected through the model of active and cooperative dialogue between supranational courts and national constitutional courts.

<sup>17</sup> See: Nick W. Barber, “Legal Pluralism and the European Union”, *European Law Journal* 12, 2006, (p.306).

Another more unacceptable way is by demonstrating a pronounced uniqueness of the national constitutional identity content of one versus the other member states. The issue of constitutional identity is a topic of great importance for modern constitutional democracy. Its legal conceptualization from the perspective of European integration is still insufficiently analyzed. There is an identification of constitutional and/or national identity through different interpretations of Article 4 (2) of the EU Treaty.

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

As already mentioned, formally, constitutional identity is not part of Article 4 (2) of the EU Treaty. On the other hand, the national constitutions of the EU member states do not contain a strict constitutional provision that defines the constitutional identity.<sup>18</sup> This notion is often the product of the constitutional interpretation of national constitutional courts in order to establish precise boundaries between the national constitution, on the one hand, and the application of EU law in domestic legal systems, on the other.

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

<sup>18</sup> However, in the constitutional practice of four EU member states, arisen as a result of the constitutional courts' activism, the term “constitutional identity” is mentioned. The concept of Germany's constitutional identity was first mentioned in 1928 in the theories of Carl Schmitt and Carl Belfinger to justify the limits of the constitutional amendments to the Weimar Constitution. Under the German regime, the legal doctrine of constitutional identity was restored, which was used by the Constitutional Court versus EU law.

We will first briefly address the position of the Constitutional Courts of Germany, Hungary, Italy and Poland<sup>19</sup> on constitutional identity, and then move on to the case law of the EU Court of Justice.<sup>20</sup>

The term “identity of the Constitution” was first mentioned by the Federal Constitutional Court of Germany in its decision on the Lisbon Treaty, although the Court did not give a specific description.<sup>21</sup>

The “identity of the Constitution” as a term differs from the “identity of the Federal Republic of Germany”, which, in turn, is practically equated with the sovereignty of the state. The German Constitutional Court (“BVerfG”) has ruled that the content of Germany’s constitutional identity is in Article 23 (1)<sup>22</sup>, in the third sentence - the EU clause - and in Article 79 (3), the article on “eternity clauses” of the German Constitution. With the creation of the EU, apart from the apparent abolition of sovereign German statehood, the German Constitutional Court has reaffirmed only a few specific powers that belong to the national sovereign government and the sovereign people. These competencies are related to the “eternity clauses” where the “identity of the Constitution of FR of Germany” is visible.

It is interesting to note that in the preliminary reference decision of 2014 related to Outright Monetary Transactions (“OMT”), the German Constitutional Court confirmed that despite the need for its compliance with EU law, the Court has the right to assess it from aspect of respecting the identity of the Constitution. According to the Court democracy as a constituent element of the identity of the Constitution and the national

<sup>19</sup> The term “constitutional identity” is not defined in the Constitution of Poland, but was developed and upgraded by the Constitutional Court. Constitutional identity has grown normatively and descriptively into a concept of the Polish constitutional jurisprudence. The tribunal used the concept of constitutional identity to define the boundaries of competencies shared with the EU as well as to mark axiological similarities, equivalents, or convergences between the EU and the Polish legal order.

<sup>20</sup> “According to the three countries that have already developed and applied the legal term ‘constitutional identity’ in the EU, there are three models (the German model of confrontation with the model of EU law (Lisbon decision, BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08), OMT reference decision, BVerfG, 14 January 2014, 2 BvR 2728/137), the Italian model of cooperation with the embedded model of identity (decision n 24/2017 of the ICC8 ), and the Hungarian confrontational individualist model (22/2016 (XII.5) Decision of the HCC, Dissenting Opinion to 23/2015 (VII.7) Decision of the HCC9 ), two positions (EU-friendly and antagonistic), three legal procedures (against EU and international human rights law and constitutional amendments), and a communication channel (preliminary procedure) where one can identify which “constitutional identity” has legal significance. The term constitutional identity refers to the “identity of the Constitution”. (BVerfG, 2009, Judgment of the Second Senate, paragraphs 208)”. Quoted according to: Tímea Drinoczi, “The identity of the constitution and constitutional identity Opening up a discourse between the Global South and Global North”, [https://www.usfq.edu.ec/publicaciones/iurisDictio/archivo\\_de\\_contenidos/Documents/iurisDictio\\_21/iu21\\_05.p](https://www.usfq.edu.ec/publicaciones/iurisDictio/archivo_de_contenidos/Documents/iurisDictio_21/iu21_05.p).

<sup>21</sup> See: Lisbon decision, BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE, 5. „In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area”. [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114\\_2bvr272813en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html). See also: Hector Lopez Boffill, What is not Constitutional Pluralism in the EU: National Constitutional Identity in the German Lisbon Decision, in National Constitutional Identity and European Integration, (crp.221–242), bo: Alejandro Saiz Arnaiz & Carina Alcoberto Livina eds., 2013.

<sup>22</sup> Article 23: [European Union - Protection of basic rights - Principle of subsidiarity] • Regional group(s) 1. With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79. [https://www.constituteproject.org/constitution/German\\_Federal\\_Republic\\_2014.pdf?lang=en](https://www.constituteproject.org/constitution/German_Federal_Republic_2014.pdf?lang=en).

identity of Germany would be violated if Parliament renounced budgetary autonomy. The Constitutional Court recalled that the EU Court of Justice (CJEU) is obliged to ensure proportionate protection of national identity.

In the context of judicial consistency towards this position is its decision regarding the application of the European Arrest Warrant ("EAW"). It should be reminded that it was the German Constitutional Court that did not allow the application of the order with the explanation that it means a violation of human dignity.<sup>23</sup> A detailed analysis of the importance of the "identity of the German Constitution" was made by the Constitutional Court in 2016 when it examined whether the constitutional principles contained in Article 79 (3), together with those of Articles 1 and 20 of the German Constitution could be violated by the transfer of the sovereign power of the German parliament in the EU institutions.

A similar analysis was made by the Hungarian Constitutional Court in 2016, in the context of the government's policy to disapprove the refugee quota, arrived from official Brussels as a legal obligation.<sup>24</sup> A referendum on this issue was held in Hungary and the results were politically interpreted as the will of the majority of citizens in Hungary who oppose the admission of migrants in their country. The Hungarian authorities appropriately addressed this will in a constitutional amendment which did not get the approval of the required 2/3 majority in the Hungarian Parliament.

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

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

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

<sup>23</sup> See: <https://www.cambridge.org/core/journals/german-law-journal/article/constitutional-identity-in-europe-the-identity-of-the-constitution-a-regional-approach/83D8D1737788756FEF098CF9485D7B1C%20-%20fn26>.

<sup>24</sup> Council Decision 2015/1601 of September 22, 2015, [eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1523&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1523&from=EN).



The Constitutional Court of Hungary has declared the constitutional identity as a fundamental value identical to the constitutional identity of Hungary, which means a deeper concept than that of the German Constitutional Court. It is interesting to note that in Hungary an exhaustive list of values that are included in the constitutional identity of the country has not been established, but the following are mentioned as general values: the rights and freedoms of citizens, division of powers, republican character of the state, respect for the autonomy of public law, freedom of religion, principle of legality, parliamentarism, equality of all before the law, respect for the independence of the judiciary and respect for the rights of national minorities living in Hungary. These values are in fact universally accepted constitutional values.<sup>25</sup>

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

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

The Constitutional Court has held that the rule laid down in Article 325 of the Treaty on European Union (TFEU) is applicable only where it is in accordance with the constitutional identity of the Member State where the assessment of such compliance falls within the jurisdiction of the national authority.<sup>26</sup>

Apart from the case of Lithuania for the protection of its official language, the case of Austria for the abolition of nobility<sup>27</sup>, in the context of the protection of the republican identity, the EU Court of Justice is known for other examples of cases where it defended the national identity of Member States. These are the case of Spain for the defense of the system of organization of government at central, regional and local level<sup>28</sup>, the case of Italy for establishing rules for access to specific professions, as well as the case of Slovakia for the protection of statehood and sovereignty.

<sup>25</sup> See: Tímea Drinóczi, Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach, *German Law Journal*, Vol. 21, Issue 2, Published online by Cambridge University Press: 10 February, 2020, <https://www.cambridge.org/core/journals/german-law-journal/article/constitutional-identity-in-europe-the-identity-of-the-constitution-a-regional-approach/83D8D1737788756FEF-098CF9485D7B1C>.

<sup>26</sup> In the *Taricco* II judgment, the EU Court of Justice did not use the term "identity", but in accordance with EU law the more friendly language and approach of the Italian Constitutional Court which recognized that the principle *nullum crimen et nulla poena* is part of the common constitutional tradition of member states.

<sup>27</sup> In the *Sayn-Wittgenstein* case, the EU Court of Justice upheld the Austrian Constitutional Court's assertion that the right to abolish the nobility was intended to protect the constitutional republican identity. The EU Court of Justice has agreed that the law on the abolition of nobility is a fundamental decision in favor of the formal equality of all citizens before the law.

<sup>28</sup> Declaration of the Spanish Constitutional Court 1/2004, 13 December 2004, paras 37, 47, 50 и 58.

In 2004, in connection with the EU Constitutional Treaty, the Spanish Constitutional Court emphasized that the Spanish state, more specifically the Spanish nation, reserves the right to sovereignty, and that state sovereign power can be limited only if EU law is compatible with its fundamental national foundations, that being the identity of the Spanish constitution. This doctrine was later confirmed in the *Melloni* case.<sup>29</sup>

An analogous line of reasoning is also followed in the practice of other Eastern European constitutional courts. Thus, emphasizing the sovereignty of the Czech Republic and portraying the EU member states as “masters of the Treaties”, the Czech Constitutional Court concluded that the “material substance” of the Constitution takes precedence over EU law.<sup>30</sup> This finding empowers constitutional courts to assess the compatibility of EU law with national/constitutional identity.

In this sense, the Polish Constitutional Tribunal, in its 2010 decision on the European Arrest Warrant, portrayed the EU as an international organization of sovereign states, emphasizing that the power deriving from the Polish constitutional identity could not be delegated, transferred or alienated to the Union.<sup>31</sup>

It is worth mentioning that the British Supreme Court also spoke openly about the value of the United Kingdom’s constitutional identity. The position of this court was based on the concept that national sovereignty remains with the state, i.e. the British Parliament.

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

Despite the relatively small case law on this issue, the EU Court of Justice seems to accept the view that constitutional identity is part of the test of proportionality, or as Werner Vandenberghe puts it, “the closer the question is to the essence of the “constitutional identity” of the member states the greater the margin of discretion.”<sup>32</sup>

<sup>29</sup> The EU Court of Justice has ruled that Spain will not be able to extradite Mr Maloni if his conviction is open to review, as this would compromise the principle of the primacy and effectiveness of EU law.  
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=134203&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=234017>.

<sup>30</sup> The position of the Czech Constitutional Court is more open to EU law, but still has some similarities with the German interpretation. The Court has recognized the principle of the EU conformist interpretation of constitutional law, but only in the event of a conflict between EU law and the Czech Constitution - especially in the area of its material core, when it should prevail. The identification of the “material core” of the Czech Constitution comes to the fore not only in terms of respect for EU law, but also in the part of the internal forum in declaring unconstitutionality with constitutional amendments.  
See: <https://europeanlawblog.eu/2012/03/04/primacy-and-the-czech-constitutional-court/>

<sup>31</sup> See: <http://www.europeanrights.eu/public/sentenze/Polonia-24novembre2010.pdf> (p.22-23).

<sup>32</sup> See: W Vandenberghe, François-Xavier Millet. L'Union européenne et l'identité constitutionnelle des États membres. [The EU and the constitutional identity of the Member States], 12 ICON (2014), (p. 503).

We would like to emphasize that both terms “constitutional identity” and “national identity” refer to the same obligation to the EU institutions, which is an obligation to respect the core of the constitutional values of each member state separately. On the other hand, it is a fact that the approach of the EU Court of Justice and of the national courts on this issue is different.

The term “national identity” in Article 4 (2) of the EU Treaty is used in order to determine whether the actions taken by the EU institutions are legitimate, while the term “constitutional identity” as defined in the jurisprudence of the highest national or constitutional courts aims at defending the national constitution and national constitutionality. In the constitutional theory there are attempts<sup>33</sup> to connect the two concepts in one - national constitutional identity.

In addition to the above, in other EU member states the issue of constitutional identity retains attention in theory and case law, and this must not be neglected or denied. In this regard, we would like to emphasize the thinking of François-Xavier Millet<sup>34</sup> according to whom the French constitutional identity is not based only on the principles contained in the text of the Constitution, but contains elements related to the cultural and historical circumstances that are part of the country. Hence, national identity is considered part of the constitutional identity, and vice versa.

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

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**33** It refers to an analysis made in 2013 in which several authors, and even the editors of the text themselves, use the symbiotic concept of “national constitutional identity”. According to Toniatti, constitutional identity is a “transformed use of sovereignty”. According to Claes, however, the term is “closely related to the concepts of sovereignty, independence and national democracy,” while according to Bofill, the term is the primary source of political legitimacy. Retrieved from the publication: National Constitutional Identity and European Integration, Alejandro Saiz Arnaiz & Carina Alcobero Livina eds., 2013, [intersentia.com/en/national-constitutional-identity-and-european-integration.html](https://intersentia.com/en/national-constitutional-identity-and-european-integration.html), (p. 75).

**34** See, also, W Vandenbruwaene, François-Xavier Millet.

## 4. THE COURT OF JUSTICE OF THE EU AND THE IDENTITIES OF THE MEMBER STATES OF THE UNION

In European constitutional practice and theory it is common for the use of the terms national identity<sup>35</sup> and constitutional identity to be considered interrelated.

On the one hand, several General Advocates<sup>36</sup> of the EU Court of Justice have applied the concept of constitutional identity in order to draw on what is protected by Article 4 (2) of the EU Treaty, although to be precise, that article refers to the national identity of the EU member states, inherent in their fundamental structures.

Although the identification, the connection between these two concepts is not based on any theory of legal interpretation, it should be noted that the obligation arising from the EU Treaty to respect the national identities of the Member States is based on certain normative assumptions.

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

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

<sup>35</sup> Some legal authors explain "national identity" as a general principle of EU law that derives from the jurisprudence of the EU Court of Justice and is based on a clear legal position. Article 4 (2) of the EU Treaty states that the Union shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. The list of values covered by the principle of national identity is open and it is up to the member states to decide which values will be protected through their national identity. The EU Court of Justice assesses only the significance of national identity under EU law. See: Marek Rzotkiewicz, "National Identity as a General Principle of EU Law and Its Impact on the Obligation to Recover State Aid," [https://www.researchgate.net/publication/323972802\\_National\\_Identity\\_as\\_a\\_General\\_Principle\\_of\\_EU\\_Law\\_and\\_Its\\_Impact\\_on\\_the\\_Obligation\\_to\\_Recover\\_State\\_Aid](https://www.researchgate.net/publication/323972802_National_Identity_as_a_General_Principle_of_EU_Law_and_Its_Impact_on_the_Obligation_to_Recover_State_Aid).

<sup>36</sup> For example, Miguel Maduro. <http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/12/Maduro-JUDICIAL-ADJUDICATION-IN-A-CONTEXT-of-constitutional-Pluralism.pdf>

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

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

Giving a deliberate focus on EU sovereignty, the EU Treaty puts the focus on national identity as an attractive alternative. In fact, Article 4 (2) of the EU Treaty prevents the attempt of the constitutional courts or the EU Court of Justice to rely on their own sovereignty, but also on firm positions on supremacy. In other words, this article should have prevented the dominance of the losers' strategy and the development of a "zero-sum-game" which would facilitate the work of judicial bodies at both levels to accept this provision of the Treaty, and even to turn the identity clause as an instrument of judicial dialogue.

A third reason for favoring the approach of national identity over the approach of state sovereignty in treaties, as in the United States, is the emergence of considerations that the exclusive spheres of sovereign power that coexist at the national and state levels are gradually declining. According to Robert Schütze, the model of dual federalism was abandoned in the 20th century and replaced by the model of cooperative federalism.

In Schütze's view, cooperative federalism is also an appropriate constitutional theory for Europe. In the EU, the state's exclusive sphere of power is progressively shrinking, with the two levels of government cooperating intensively in the spheres of shared power. The principle of subsidiarity enshrined in Article 5 (3) of the EU Treaty can be considered a constitutional solution to reduce tensions and strengthen the spirit of cooperation between the Union and the Member States.<sup>37</sup>

<sup>37</sup> Article 5, paragraph 3 of the Treaty reads: „ Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.“

It is a legal fact that the principle of “national identity” is not defined in any founding treaty of the EU, in any regulation or other legal act of the Union. That is why it is considered to be the result of EU jurisprudence. The Court of Justice has developed a relatively autonomous opinion on its essence.<sup>38</sup>

Article 4 paragraph 2 of the EU Treaty is cited for the first time in the *Sayn-Wittgenstein case*<sup>39</sup> in the context of the relationship between primary law (in the case of Article 21 of the Treaty) and national law (in the case of the Austrian Law on the Abolition of Nobility). The key question in this case was whether the decision of the Austrian authorities to change the surnames of Austrian citizens living in Germany under the Law on the Abolition of Nobility from “Fürstin von Sayn-Wittgenstein” (“Princess of Sayn-Wittgenstein”) to “Sayn-Wittgenstein” is contrary to Article 21 of the EU Treaty, given that, according to the Austrian Government, these legal provisions were aimed at protecting the constitutional identity of the Republic of Austria. According to the EU Court of Justice, measures restricting fundamental freedom can be justified at the level of public policy only if they are necessary to protect the interests and only in cases where these objectives cannot be achieved by less restrictive measures. According to the Court, in the context of Austrian constitutional history, the Law on the Abolition of Nobility, as an element of national identity, can be taken into account when striking a balance between the legitimate interests of the country and the right of free movement of people recognized by EU law. In this regard, the EU Court of Justice has interpreted the constitutional basis of the law as an element of Austrian public policy, emphasizing that “the concept of public policy as a justification for the deviation from fundamental freedom must be interpreted strictly so that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions”.<sup>40</sup>

The Court of Justice has emphasized the importance of national identity in several other cases<sup>41</sup> although without success for the parties invoking the principle. Despite case law, national identity remains insufficiently clear, at least in the EU context.<sup>42</sup>

- <sup>38</sup> C-473/93 *Commission v. Luxembourg*, ECLI:EU:C:1996:263, para. 36. In this case, the Court of Justice of the EU rejected the arguments based on the principle due to the disproportion of the national measures in question.
- <sup>39</sup> *Maduro in Michaniki*, C-213/07, ECLI:EU:C:2008:544, para. 31; C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, para. 83 and 92; C-391/09 *Runevič-Vardyn*, ECLI:EU:C:2011:291, para. 86; C-51/08 *Commission v. Luxembourg*, ECLI:EU:C:2011:336, para. 124; C-393/10 *O'Brien*, ECLI:EU:C:2012:110, para. 49; C-202/11 *Las*, ECLI:EU:C:2013:239, para. 26; C-58/13 and C-59/13 *Torresi*, ECLI:EU:C:2014:2088, para. 56-59. In the *Torresi* case, the Court of Justice of the EU considered that Article 3 of Directive 98/543 refers only to the right to establish a legal practice in the Member States of the Union in order to practice the profession of lawyer as a professional title acquired in the national system of the Member State. This provision does not regulate either access to the legal profession or the practice of that profession, which is why it cannot affect the national identity of the Member States.
- <sup>39</sup> See: Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806, available at: <http://curia.europa.eu/juris/celex.jsf?celex=62009C-0208&lang1=en&type=TEXT&ancre=>
- <sup>40</sup> See: Von Bogdandy, S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, *Common Market Law Review*, Vol. 48, 2011, (p. 1425).
- <sup>41</sup> C-208/09 *Sayn-Wittgenstein*, para. 83 and 92; C-391/09 *Runevič-Vardyn*, para. 86; C-51/08 *Commission v. Luxembourg*, para. 124; C-393/10 *O'Brien*, para. 49; C-202/11 *Las*, para. 26; C-58/13 and C-59/13 *Torresi*, para. 56-59.
- <sup>42</sup> See: Elke Cloots, *National Identity in EU Law*, Oxford: Oxford University Press, 2015, (p. 127-134).

There is an explicit mention of Article 4 paragraph 2 of the EU Treaty by the Court of Justice in the case of *Malgožata Runevič-Vardyn*,<sup>43</sup> related to a Lithuanian citizen as the first applicant belonging to the Polish minority (with the Polish name “Małgorzata” and surname “Runiewicz”), married to a Polish citizen (as second applicant) who appealed to a Lithuanian court after the Vilnius Civil Registry Office refused to change her name according to the name written on her birth certificate, i.e. the name and surname “Malgožata Runevič” to be changed to “Małgorzata Runiewicz”, finding that she had been discriminated on the grounds of race, citing Article 21 of the Treaty for the functioning of the EU and Directive 2000/43.<sup>44</sup>

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

The position of the Lithuanian Government was also evaluated, as it considered that the Lithuanian language is a constitutional treasure of the country that protects the national identity, strengthens the integration of citizens and ensures the expression of national sovereignty, indivisibility of the state, and proper functioning of state services of local authorities.<sup>45</sup>

The Court of Justice in this case invoked respect for Article 4, paragraph 2 of the EU Treaty, reaffirming that the EU should respect the national identity of its member states, which of course includes the protection of Lithuania's official language. The Court also emphasized that, under national law, this was a “legitimate aim capable of justifying restrictions on the rights related to the freedom of movement and residence of citizens set out in Article 21 of the Treaty on the Functioning of the EU and could take into account when legitimate interests are “measured” against the rights set out in EU law. Measures restricting fundamental freedom, in accordance with Article 21 of the TFEU, can be justified only if they are necessary to protect the interests with which security is to be ensured and only if those objectives cannot be secured by the application of less restrictive measures.<sup>46</sup>

<sup>43</sup> See: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0391\\_SUM&from=CS](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0391_SUM&from=CS).

<sup>44</sup> See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0043>

<sup>45</sup> See: Anita Blagojević, Procedures Regarding National Identity Clause in the National Constitutional Court's and the CJEU's Case-Law, EU and Comparative Law Issues and Challenges, file:///C:/Users/%D0%A2%D0%B0%D1%9A%D0%B0%20%D0%9A%D0%B0%D1%80%D0%B0%D0%BA%D0%B0%D0%BC%D0%B8%D1%88%D0%B5%D0%B2%D0%B0/Downloads/6529-Article%20Text-20619-1-10-20180315.pdf

<sup>46</sup> See, also, (p. 22).

Another interesting case concerning Article 4 paragraph 2 of the TEU is the *O'Brien case*<sup>47</sup> in which the British Ministry of Justice refused to pay Mr. O'Brien (a former royal adviser and interim judge at the Royal Court) a pension in which the pro rata temporis, paid to all permanent judges over 65 years of age, would be calculated. In this case, too, several important questions were raised, such as, who defines the concept of employees with concluded employment contracts or other types of employment, and who determines whether judges fall under this concept.

The Court of Justice of the EU has emphasized that Member States define the concept of employees having employment contracts or having established another type of employment and each Member State decides whether or not judges should be included in such a concept. The second question raised by the Court was whether under national law judges fall under the category of workers entitled to conclude employment contract or other type of employment set out in Clause 2.1 of the Part-time Framework Agreement.

According to the Court of Justice, the Part-Time Framework Agreement must be interpreted in a way that would mean that in order to achieve the goal of securing access to the pension scheme, national law should preclude the distinction between full-time and part-time judges paid on a daily basis, unless this difference in treatment is justified by objective reasons determined by a particular national court.<sup>48</sup>

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

The interpretation of the identity clause is essentially the most promising path the Court is taking. When the content of the identity clause cannot be determined, the Court should read it in accordance with the principles and values contained in it. These values vary from country to country and depend on both normative assumptions based on the doctrine of constitutional identity and on their articulation by national constitutional

<sup>47</sup> <https://www.supremecourt.uk/cases/docs/uksc-2009-0123-judgment.pdf>.

<sup>48</sup> *Ibid*, <https://www.supremecourt.uk/cases/docs/uksc-2009-0123-judgment.pdf>



courts. Although Article 4 paragraph 2 of the TEU does not define the national identity of the EU Member States, from the above it can be concluded that its content is set out in the relevant national constitutional provisions, the relevant case law of the national constitutional courts and the relevant case law of the EU Court of Justice.

Seen from a national perspective, the constitutional identity of the member states always has as its starting point the constitution, or more specifically, the specific principles, values and rules contained in the constitutions. Special emphasis is placed on the principles of state organization, state sovereignty and the principle of democracy, state symbols, state goals, protection of human dignity, fundamental rights and the rule of law.<sup>49</sup>

## CONCLUSION

The protection of national identity is an impossible mission without insisting on protecting its constitutional specifics, or in other words national identity is the second face of constitutional identity. Without a protected constitutional identity, there is no complete national identity of the country and vice versa. Although no founding treaty of the EU mentions the constitutional identity, it is found and confirmed in a broader axiological meaning in the national identity of each member state of the Union. And again the same question posed above in the analysis: what is national identity if not part of the constitutional identity, and can we talk about the national identity of a country without it being partially or completely perceived through the prism of the continuity of the constitutional identity development of the country if it is known that exactly that constitutional development contains the contours and values of the national identity of the country?

From the analysis we can conclude that the connection of the national with the constitutional identity is part of the practice of the EU member states' constitutional courts that favor that relation as a natural course of society's development.

The question of constitutional identity becomes more complicated when viewed through the lens of the functioning of the EU and, in that sense, the position of the EU Court of Justice. Although Article 4 (2) of the EU Treaty does not contain the values that make up national identity, the fact is that the range of values is not limited with each EU member state having the right to decide which values are important to enter into the content of this principle.

<sup>49</sup> See: [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI\\_ET%282014%29493046\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET%282014%29493046_EN.pdf).

The fact is that the views of national courts formulate the doctrine of constitutional identity based on the principle of state sovereignty. On the other hand, as a contrast the national identity contained in Article 4 (2) of the Treaty should be seen as a gradation of the basic principles that the multinational political community must respect.

Here, of course, the identity of its constitutional national group is crucial. Despite the relatively small case law on this issue, the EU Court of Justice seems to accept the view that constitutional identity is part of the principle of subsidiarity and proportionality test, whereas the closer the question is to the essence of the constitutional identity of the member states the greater the margin of discretion.

It seems that the practice of the EU Court of Justice, which must take into account the views of the constitutional courts of the member states, is crucial for understanding the relations of constitutional-national identity for both the members of the Union and the EU membership candidate countries. Both the terms “constitutional identity” and “national identity” refer to the same obligation to the EU institutions, which is an obligation to respect the core of the constitutional values of each member state individually. On the other hand, it is a fact that the approach of the EU Court of Justice and of the national courts on this issue is different.

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