Constitutional identity and European Union axiology – perspective of Central European States

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Introduction

One of the key treaty provisions defining the legal formula of the EU's relations with the Member States is the one proclaimed in Article 4(2) TEU, the constitutional identity clause. This clause, introduced for the first time under the 2007 Lisbon Treaty, obliges all EU institutions to respect this identity and must, therefore, be seen as a normative directive limiting the EU's sovereignty. The purpose of this provision is undoubtedly to protect the Member States against unauthorized interference of EU decision-making centers, but also – looking *à rebours* – to guarantee these states constitutional autonomy. Thanks to it, the deepening of the process of European integration, resulting from the nature of the EU as an international organization, is to proceed in a harmonious manner, with the aim of strengthening the systemic and institutional ties linking the EU with the Member States, but, at the same time, with full respect for their constitutional separateness. From this perspective, it can be concluded that Article 4(2) TEU is a regulation that allows seeking a safe balance between the dynamics of development tendencies aimed at building the legal and political subjectivity of the uniting EU and the natural need of the states that form it to maintain the independent structures of their statehood. It is therefore – as it should be assumed – a kind of "shock absorber" of integration processes (hence we can call it a "depreciation clause"), making it possible to avoid or at least mitigate possible conflicts and tensions in relations between EU decision-makers and national authorities. Recognizing this function of the above-mentioned regulation,

which is no doubt of fundamental importance and the main reason for elevating the protection of the the Member States's constitutional identity to the rank of a key principle of the EU system, it is also worth pointing out some more detailed functions. By articulating them, one can certainly better understand the intentions that accompanied the authors of the treaties in shaping the content of their provisions. And so the function of stabilizing the political system of the Member States in the changing legal and political reality of the EU should be pointed out. This function enables the Member States to maintain their constitutional separateness in the EU institutional architecture and, at the same time, precludes the EU authorities from taking any actions aimed at correcting, revising or completely changing their constitutional identity. It also makes it possible to maintain the status of the EU as an interstate organization within which the Member States – while bound by the framework of transnational cooperation – remain independent entities with autonomous competences in shaping their internal system. Further, it is worth distinguishing the function that petrifies European constitutionalism, with its multidimensional character and multilevel normative layers. This function is about preserving the phenomenon of a unifying Europe, where the new political system, created for the purpose of joint actions, "clashes" with the individual political systems of each Member State. Undoubtedly, protecting the historical legacy of the Old Continent, based on the tradition of the existence of nation states and their different constitutional identities, is very important. Europe was created as a conglomerate of independent states in the course of a centuries-long process, which resulted in the creation of various constitutional orders. Indeed, the concepts and ideas prevaling in different epochs clearly influenced the national legislation, generating certain common, generally accepted patterns of solutions, but it was not so far-reaching an influence as to disturb the development of constitutional individualism. Even today, in the era of extremely strong tendencies to develop and promote system standards, referring to the principle of a democratic state of law and human rights, there is no question of a complete unification of constitutional institutions in European countries. Hence, as it may be assumed, the need to protect

this state of affairs, recognized by the authors of the treaties, and the related guarantee function of the analyzed provision. Finally, the function of consensual influence on the constitutional identity of the Member States by the EU, based on the idea of cooperation and partnership of both sides. The performance of this function is subordinated to the assumption that any changes in the constitutional identity of the Member States should be made only as a result of voluntary arrangements, never when coerced by EU institutions. If the EU sees the need to modify some elements of this identity, it only has at its disposal soft means of influencing national decision-makers, which boil down to dialogue, inspiration and promotion of a specific axiology. A Member State may recognize the legitimacy of its arguments and introduce specific solutions, but is not obliged to do so.

It should be noted that the provision of Article 4(2) TEU was the subject of numerous statements by scholars from various European (and not only) academic centers. Particular attention is paid here to the definition of the "principle of constitutional identity" and its significance in the context of the impact of the European integration process on the political system of the Member States. The opinions which prevailed in this respect emphasized the ambiguity of the content of the concept of constitutional identity and indicated different ways of interpreting the said clause of the treaty. More than once has this issue been viewed through the prism of EU axiology. The formulated theses showed that this concept can be assessed in various cognitive planes and extract different content from it. As Michel Rosefeld emphasized, the interpretative discrepancies persisting in the literature point to three different ways to understand this term: constitutional identity is sometimes associated with the fact that the state has a constitution at all, but also results from its content and the context of its application.[1] In Polish doctrine, this assessment was echoed by Anna Śledzińska-Simon, who noted that "the use of this concept in legal theory and judicial practice leaves behind many questions. Constitutional identity is an ideal,

[1] M. Rosenfeld, "Constitutional identity," in M. Rosenfeld and A. Sajó (eds.), *Comparative Constitutional Law*, Oxford 2012, p. 757.

imaginary being, or rather created mainly for the legitimacy of difficult political decisions or decisions of constitutional courts. Regardless of its context of application, constitutional identity is a concept with a strong emotional and axiological load, and it is also subject to changes over time. At the same time, it is possible to interpret constitutional identity as a real being – the actually experienced sense of separateness or community."[2] Of course, it is difficult to deny the observations presented here. There is no doubt that the authors of the Treaty on the European Union, endorsing Article 4(2) in its present form, consciously adopted a solution characterized by a high degree of generality, so as to be able to accommodate the specificity of the system of all countries that make up the EU, with their different constitutional traditions, legal culture often standing at antipodes, and different axiological, historical and social conditions. Thus, they operated with the manner of giving legal norms the features of far-reaching flexibility, typical of EU law-making, which was to create some comfort on the part of those responsible for interpretation in determining what, in the case of a given state, is included in the elements of constitutional identity, and what remains outside its scope. There was a clear intention in this approach that this issue should be resolved by national authorities, primarily parliaments and constitutional courts of the Member States (possibly, if no such courts are available, by bodies exercising competence in the field of constitutional review of the law, *mutatis mutandis*). As it can be assumed, it was about granting the privilege of interpreting and developing the concept of constitutional identity to national institutions on the grounds that only they – having a full knowledge of the local specificity – have the power to effectively decide what meaning the treaty clause has in relation to the constitutional identity of their state, and what, therefore, constitutes its content.[3] It would be irrational to entrust this role to external entities, which are

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[2] A. Śledzińska-Simon, "Koncepcja tożsamości konstytucyjnej: wymiar indywidualny, relatywny oraz zbiorowy," *Przegląd Prawa i Administracji*, 2016, vol. 107, pp. 335–336.

[3] Cf. K. Wójtowicz, *Sądy konstytucyjne wobec prawa Unii Europejskiej*, Warszawa 2012, p. 124.

naturally deprived of the ability to formulate fully reliable assessments in this field, and it seems that, in fact, it would make it impossible to respect the treaty regulation.

The multidimensionality and definitional elusiveness of the concept of constitutional identity does not mean that it is impossible to precisely determine its content in the case of a particular state. On the contrary, the different nature of each constitutional system, defined by the presence of certain, often original elements (solutions, features, principles, institutions, etc.) and their unique combination, commits the category of constitutional identity to the realm of facts and its content may not be the result of subjective feelings and assumptions. Hence, the conclusion that constitutional identity is an objective being, existing on reliable premises, follows from a reliable analysis of reality. There is no room here either for abstract ideas or for any interpretative relativization of what constitutional identity is.

Acceptance of the above thesis raises the question as to what extent the constitutional identity of the states in question should be consistent with the values set out in EU legislation, and to what extent it may be free from them. In this regard, it is particularly interesting where the boundary of the impact of the EU axiology on this identity is, and in particular where this boundary determines the sphere of permitted interference by EU institutions seeking to impose axiological standards on the Member States in the field of the constitutional system of the state. We know from our experience so far that there have been many conflicts in this field, which were based on the EU's growing aspirations to integrate Europe and the pressure it exerted on certain Member States. As a rule, attempts to solve them ended in failure, and the disputed issues remained in the sphere of understatement. The sources of the problem here were – apart from political conditions – complications of legal nature, related to the lack of an interpretative consensus on establishing the interrelationship of Article 2 TEU, proclaiming the fundamental values of the EU and Article 4(2), exposing constitutional identity. Undoubtedly they weighed down on the treaty's concept of constitutional identity, causing doubts as to its significance for the phenomenon of disseminating axiological standards among individual

Member States by the EU. Therefore, it is difficult to ignore them if one strives to show what the constitutional identity of the Member States is in the uniting Europe.

Difficulties with indicating the normative content of constitutional identity and the role that EU axiology plays in its perception prompted the authors featured in this monograph to consider this problem in the context of Central European countries (both the existing EU Members and those just aspiring to join the EU). In the adopted research perspective, it was assumed that the subject of the considerations would be the phenomenon of the constitutional identity of these countries as seen in the process of European integration. Particular emphasis was placed on the issue of the possibility of the EU influencing constitutional identity by imposing a system of values that create its axiological order.

The reasons for picking this topic stem from the fact that the Central European countries (both the EU Members and the states aspiring only to accession) share, on the one hand, common historical experiences related to the past communist era and the need to build, after the Iron Curtain was pulled down, the democratic system, and on the other hand, in many cases, common problems characteristic of post-communist reality. These conditions make the constitutional identity of the indicated states somewhat similar (which can be seen in the preambles to the constitutions of the said states), which is expressed in the fact that the systemic solutions functioning in their legal orders constitute a kind of mixture of regulations being the legacy of the past (from the communist and interwar period), regulations based on Western European patterns and used as part of the political transformation, or newly baked regulations, created with the intention of meeting the problems that arise in practice, but also the modernization and reform challenges of the country. This circumstance, it can be assumed, creates a good starting point for carrying out multidimensional research aimed at determining what the constitutional identity of individual Central European countries is and which of its elements may be considered compatible with EU values, and which are in contradiction to them. What is more, it also makes it possible to explain how deep the EU's influence is when it comes to shaping the legal institutions that

make up their constitutional structure, and what in this context the contemporary idea of the European integration process means.

The direction of the research carried out as part of this monograph is determined by a series of questions asked by the authors. They concern various aspects of the issue of constitutional identity, and thus enable a multidimensional presentation of the issues raised. The following questions come to the fore:

1. How to reconcile the constitutional pluralism of the Member States with the axiological universalism underlying the functioning of the EU (including, among others, how to avoid the problem of applying "double standards" in relation to different countries)?
2. As a normative category, constitutional pluarlism may be a factor contributing to the disintegration of the EU, or, on the contrary, it may become a stimulus to strengthen EU structures.
3. What threats and opportunities are connected with the absorption of EU values for the sovereign functioning of the national state?
4. What are the perspectives of the constitutional identity of states in the era of accelerated processes of integration and globalization?
5. Can the functioning of the EU and other supranational organizations (e.g. the Council of Europe) deform the constitutional identity of nation states;
6. Do EU axiological standards threaten the constitutional identity of nation states?
7. The axiological influence of the EU may have a destructive influence on the creation of effective and necessary political institutions and mechanisms from the point of view of the interests of a given state.

Based on these assumptions, the studies concern various issues that are part of the constitutional identity of selected Central European countries. The wealth of issues raised here allows us to look at the title matter from a broader perspective, and, at the same time, provides an opportunity to gain knowledge in relation to many important and

current issues. Also, (very importantly) it is an intellectual contribution to the exchange of views on key issues related to the protection of the constitutional identity of the EU Member States and, in this context, to understanding the legal and systemic phenomena of the European integration process. Importantly, the opinions presented here are formulated by researchers who express their opinions from the position of people who know the history, political tradition, legal culture and the realities of their countries. In principle, they are free from publications typical of many existing today.

The book opens with a chapter entitled "The Principle of Constitutionalism as an Expression of the Constitutional Identity of the Member States of the European Union" by Marcin Romanowski and Jarosław Szymanek. It offers arguments in favor of the thesis of the superiority of the Polish constitution over EU law. The authors argue that EU law, despite its implementation, does not become national law and the assessment of its relationship with the Polish Constitution should be made on the basis of the principle of supremacy of the latter. With this assumption, they further deduce that the constitutional courts of the Member States and the CJEU do not have a superiority and subordination relationship to each other, as they operate under different legal orders. These tribunals base their activities on the constitutional law, which obliges them to examine the constitutionality of all legal acts in force in the territory of the state, irrespective of their origin. Finally, they also expressly argue that the European Union is not a federation and sovereign Member States are not its constituent parts, so that their legal orders, insofar as this is not regulated in the Treaties, are independent of each other.

Chapter two, "Judiciary as an Element of Constitutional Identity: The Case of Slovakia after the Murder of Ján Kiciak", by Marek Káčer, which is a strong, critical voice against the legal solutions used in many Central and Eastern European countries, adhering to the concept of far-reaching separation of the judiciary from other authorities and, at the same time, providing judicial circles with broad decision-making autonomy in administrative matters. Referring to the example of Slovakia, the author notes that these solutions are conducive to the

development of various types of pathological phenomena, such as corruption, nepotism and cronyism. In his opinion, the source of the problem are the habits of a significant part of the judiciary from the communist period, when there were no judges, but "a caste of safe and servile state officials". Against the background of these observations important conclusions emerge. First, the author states that in such a social environment the increased part of judicial autonomy, expressed in the dominance of judges by the Slovak National Council of the Judiciary, may be used to preserve the status privileges of judges rather than to increase their efficiency and ethical standards of conduct. Secondly, it also notes that in an environment where judges do not have a proper sense of social responsibility, certain guarantees of judicial independence may weaken rather than improve the functioning of the judiciary. Third, and finally, it points out that, under certain circumstances, the independence of the judiciary may be jeopardized by the judiciary itself and the judiciary-based administrative apparatus.

Chapter three, "National Identity and European Solidarity from a Bulgarian Perspective" analyzes the relationship between two basic principles of EU law – solidarity and respect for national identity. Jivko Draganov refers to the problem of the migration crisis in the EU, its impact on the Bulgarian society and other current events for the country and the EU. The author looks for an answer to the question whether solidarity and national identity can complement each other, or does solidarity end where national identity begins? Bearing in mind this research goal, the article analyzes some cases of the application of the principle of solidarity by the CJEU and its impact on the operation of the principle of respect for national identity. Some judgments of the Bulgarian Constitutional Court that take into account the issues of respecting national identity, such as the position on the Convention on preventing and combating violence against women and domestic violence, criticizing the provision of this document as contradicting Bulgarian national identity (in the context of the definition of "gender"). In the conclusions, the author emphasizes that solidarity as a value and principle can support the building of the identity of the European Union by purposefully building an understanding of the political and

cultural belonging of the citizens of the Member States to the EU. This goal, he claims, is (or can if it is just a possibility) to be achieved through the imposition of an obligation of solidarity, but through the development of self-awareness of a common European identity.

Chapter four, "The Family and Sexuality in European Axiological Conflict and the Rule of Law – Perspectives from Central Europe", by Stephen Baskerville, deals with the issue of the impact of EU values regarding the functioning of the family on the internal legislation of the Member States. The author notes that family and sexuality have dominated political agendas around the world and, thus, have a strong influence on EU policy. He rightly observes that, in fact, in no area of life has the tension between the traditional religious values of many Member States and what is presented as "European values" been more acute or marked. This observation leads him to the conclusion that the issues of the sexual family are on the verge of an axiological conflict. Especially valuable here are the considerations showing how the legal innovations introduced with family and sexuality policies translate into what we mean when we use an expression such as "rule of law" in the context of the EU.

Chapter five, "The Constitution and Constitutional Identity of the Czech Republic vs. the Law of the European Union", by Zdeněk Koudelka, presents the issue of mutual relations between the law of the European Union and the law of the Czech Republic. The author, referring to this issue, unequivocally supports the principle of supremacy of the Constitution, emphasizing that such an opinion is additionally determined by the principle of state sovereignty. Hence follow his further theses, i.e. the following assertions:

- the European treaties do not deal with the relationship between EU law and the constitutional law of a Member State;
- all constitutional laws of the Czech Republic apply without exception and must be applied first, even if they are contrary to European Union law; – a sovereign state cannot be subject to any external authority, and its constitution cannot be subject to any other foreign legal system.

Observations on conflict situations between constitutional and European norms are extremely valuable. As the author notes, in such a case we are dealing not only with a legal contradiction, but usually also with a political contradiction. In his opinion, its solution is not and will never be a purely legal problem, but will always be associated with a political struggle and a duel over the meaning of the values contained in conflicting legal systems.

Chapter six, "Does National and Constitutional Identity Matter in the EU Context – Who's the *Herren der Verträge*? EU vs Western Balkan Axiology", by Tanya Karakamisheva-Jovanovska, refers to the issue of the constitutional identity of the Western Balkan countries after the fall of the communist regime. The author draws our attention to two things: first, the necessity for the Tribunal in Luxembourg to consider, when explaining this concept, the judgements passed by constitutional tribunals of the Member States; second, threats resulting from the application of unclear and arbitrary interpretation of treaty provisions using a teleological interpretation. Karamiseva also makes an interesting suggestion to create a European group of experts, which would propose one systematic theory to standardize the methods of interpreting the provisions of the TFEU.

Chapter seven, "European Versus National Constitutional Identity in the Republic of Serbia: A Concurrence or Unity?", by Vladan Petrov, analyzes the relations that exist between the constitutional identities of the EU and its Member States. The author rejects the view of the competitiveness or conflict of these two identities and puts forward a thesis about their unity, referring to the old principle of "unity in diversity". In the first part of the chapter, he analyzes the main elements of the vague conception of constitutional identity. In the second and third parts, he develops the thesis about the unity of European and national identity. In the fourth part, he deals with the most important sources and key factors in shaping constitutional identity: constitutional doctrine, the interpretation of the Constitution by the Constitutional Tribunal, constitutional history (heritage) and the role of the Venice Commission, explained with the example of the internationalization

of constitutional law. Finally, he analyzes the elements of identity in the Serbian Constitution of 2006 in the context of European identity.

Chapter eight, "Amending the Constitution of Serbia: Searching for Balance Between National Constitutional Identity and European Identity", by Maja Nastić, seeks to identify the main elements of Serbia's constitutional identity. When analyzing in this respect, the author comes to the conclusion that this identity is not sufficiently developed and requires further modification. It sees a chance for its improvement in Serbia's accession to the EU, although this view is accompanied by the claim that the protection and further development of the concept of constitutional identity will rest with the national Constitutional Tribunal. It is this court,according to the author, that will play a key role in shaping the "core" of the Serbian Constitution and will set the boundaries for EU institutions that are insurmountable in this context. So it will be the guardian and interpreter of the constitutional identity of the Serb state.

Chapter nine, "European Union Law and Legal Norms Governing the Constitutional Identity: The Protection of Freedom of Religion and Freedom of Conscience in International Treaties Concluded Between the Slovak Republic and the Holy See", by Marek Šmid, discusses the issue of the legal position and religious associations in the light of bilateral international agreements concluded by the Republic of Slovakia with the Holy See and regulations of EU law. The text makes an important statement that the indicated acts are one of the key factors shaping Slovakia's constitutional identity, and their presence is a significant guarantee of respect for religious freedom in that country. At the same time, the view that the said agreements are in line with EU law, which binds the Slovak Republic, is strongly articulated. In this context, however, there are some concerns about the report on sexual and reproductive health and women's health rights in the EU adopted by the European Parliament. The author notes that the constitutional identity of Slovakia, confirmed by treaties with churches and religious associations, may be violated by changes in EU law, if the latter were to be based on the recommendations contained in the above-mentioned report.

Chapter ten, "The Rule of Law, National Constitutional Identity and Constitutional Reform in Bulgaria", by Emiliya Siderova, deals with selected aspects of Bulgaria's constitutional identity, in particular issues related to the rule of law. The text includes reflections on the Istanbul Convention, showing the critical attitude of the Bulgarian authorities (and the author himself) towards the provisions of this act (especially with regard to attempts to redefine the concept of gender), as well as reflections on the changes made by this state in the national justice system and the functioning of the prosecutor's office. Both of these issues were presented against the background of the legal standards that are in force in the Bulgarian constitutional order and the EU legal system.

Chapter eleven, "Constitutional Identity of EU Member States in the Context of Slovak Jurisprudence", by Peter Varga and Martin Bulla, aims at analyzing the concept of national identity of EU Member States from the perspective of Slovak jurisprudence. First, it provides an overview of the CJEU jurisprudence on the national/constitutional identity of the Member States, and then goes on to examine the Slovak context, in which case the main emphasis is placed on the jurisprudence of the Constitutional Tribunal of the Slovak Republic, which refers to the issue of native constitutional identity in the context of the concept of "constitutional core" and the so-called non-changeable clauses. According to the authors, both these categories, although constituting separate legal categories, fit into the content of constitutional identity, creating its permanent component. They also show that Slovakia must be perceived within the community structures as an independent state. It is important to note here that Article 4(2) TEU, which proclaims respect for constitutional identity, results in the EU having to accept the legitimacy of the Member States as independent entities protected against the demands of increasing European integration.

Chapter twelve, "The Janus Face of the EU: European Integration and the Constitutional Identity of North Macedonia", by Goran Ilik, analyzes the changes in the constitutional identity of the Republic of Macedonia in the context of challenges and limitations related to the country's aspirations for accession to the EU. In this text, the author exposes the EU's hypocrisy towards the integration process of North

Macedonia and the lack of political will to finalize it, despite the efforts that the Macedonian authorities have made over the last 30 years to adapt their systemic legislation to the requirements (including axiology) of the EU.

Chapter thirteen, "The European Union's Core Value of the Rule of Law: Constants and New Developing Standards", by Carmen Moldovan. The author shows the content of the established changes and the political context of their application. At the same time, she formulates an assessment of the new regulations from the point of view of the Cooperation and Verification Mechanism adopted in 2007 as a condition for Romania's accession to the European Union. In this context, the author cites the thesis of the Romanian Constitutional Court, important for the entire study, which questions the legal significance of this mechanism, and recognizes the primacy of the national Constitution over EU law.

Chapter fourteen, "The Constitutional Legacy of the Ex-Yugoslav Countries and Their Potential Implications Towards the Common EU Values, Constitutional Features and the Rule of Law", by Mladen Karadjoski, attempts to answer the question what constitutional legacy will be brought by Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia after joining the European Union. At the same time, it aims to determine whether the values characteristic of the Balkan countries are consistent with the values resent in other Member States of the European Union, such as, *inter alia*, rule of law, democracy, individual human rights and freedoms, minority rights, etc. In order to make arrangements in this regard, the author analyzes the constitutional systems, systems of values and features important from the point of view of the EU axiology, possessed by the countries of the former Yugoslavia. Against this background, he formulates three main theses of the article. Firstly, that the constitutional heritage of the Western Balkan countries has a certain, but still limited, influence on the common values of the European Union. Secondly, the process of Europeanization initiated by the European Union has a very subtle, sophisticated, but quite beneficial influence on the processes of democratization of the Western Balkan countries, which had a communist

past. Thirdly, the notion of the rule of law is understood and applied differently in different countries, depending on democratic tradition, institutional capacity and political will.

Chapter fifteen, "*Raison d'Être* and Application of the Principle of Respect for National Constitutional Identity in the EU", was written by Atanas Semov, who puts forward, *inter alia*, the thesis that respecting the constitutional identity, as mentioned in the TEU, has the status of an EU principle and should be seen as a counterbalance to the principles of integration and sincere cooperation. Moreover, according to the author, the Member States need protection of their constitutional identities due to their specificity as an international organization and the EU legal system, as these identities are the key to understanding the status of an "integrated state". An important view is the controversial claim that the CJEU has the right to examine constitutional identity, although in exercising these powers it should be guided by the decisions of the domestic constitutional court.

Grzegorz Pastuszko

Marcin Romanowski, Jarosław Szymanek

The Principle of Constitutionalism as an Expression of the Constitutional Identity of the Member States of the European Union

The special legal force of the constitution, expressed in its supreme derogative capacity with regard to all other norms, is the defining feature of the constitution as a fundamental law.[1] It is unanimously accepted in the doctrine that the so-called special legal force is a *conditio sine qua non for* treating any regulation as *lex fundamentali*.[2] This means that if an act which formally or materially is a constitution does not have effective mechanisms in place to guarantee respect for its supreme legal force, it loses, both de *facto* and *de jure*, the characteristics of a constitution and becomes an act subordinate to some other act. Such subordination means nothing other than that the constitution loses the attribute of a fundamental law, which attribute is replaced by another regulation with the characteristic of a law that affects other legal acts with the derogative effect. Therefore, to be a constitution, a constitution must be characterised by an effective, special, i.e. supreme legal force.[3] Any challenge to it *mutatis mutandi* calls the constitution into question. This view is so well established that it does not even always need to find its normative confirmation in the constitutional text.

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[1] Cf. M. Kruk, "Konstytucja jako ustawa zasadnicza państwa," in W. Sokolewicz (ed.), *Zasady podstawowe polskiej konstytucji*, Warszawa 1998, pp. 14ff.

[2] It is also the same condition for organizing a political community. In every such community (state), regardless of the proper name, there are acts to which the value of *iussupremmum* is attributed. Cf. A. Ławniczak, *Geneza konstytucji*, Wrocław 2015, p. 89ff.

[3] Cf. B. Banaszak, *Porównawcze prawo konstytucyjne współczesnych państw demokratycznych*, Kraków 2004, p. 141ff.

This means that even the absence of an explicit affirmation of the supreme legal power of the constitution does not deprive it of that power, as long as we assume that it has all the features that determine the concept of a constitution.[4] However, since the advent of so-called democratic modern constitutionalism, the supreme legal force of the constitution is also sometimes reflected in provisions of constitutional rank. The starting point for such a solution was the regulation of Article VI, paragraph 2 of the US Constitution and the supremacy clause contained therein, which *expressis verbis* stipulates that "the constitution shall be the supreme national law." The above provision was interpreted quite quickly[5] in a way that to this day marks the basic sense of understanding the constitution as the supreme law. According to it: 1) the supreme legal force of the constitution is not merely a general phrase or a constitutional rhetorical figure, but a legal norm with a specific normative meaning and the orders and prohibitions derived from it; 2) it follows that all other normative acts constituting the conduct of legal transactions of the state are below the constitution and are subordinate to it; 3) there is a prohibition to enact legal norms that would violate the provisions of the constitution (the so-called negative obligation of the legislator[6]); 4) at the same time, the obligation is also formulated to enact laws that would detail the provisions of the constitution and the general clauses contained therein, as well as other expressions that are necessarily undefined, in such a way as to make the provisions of the constitution as complete and enforceable as possible (the so-called positive obligation of the legislator[7]);

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[4] That is, specific – highest legal force, specific form, and specific content. Cf. L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2011, p. 32ff.

[5] This happened in the famous US Supreme Court decision in the *Marbury vs. Madison* case of 1803. For a more extensive discussion of this issue, see D. Lis-Staranowicz, *Legitymizacja sądowej kontroli prawa w stanach Zjednoczonych Armatki*, Olsztyn 2012, passim.

[6] Also referred to as the derogative aspect of the supreme legal force of the constitution. Cf. S. Wronkowska, "W sprawie bezpośredniego stosowani Konstytucji," *Państwo i Prawo*, 2001, no. 9, p. 4.

[7] Also referred to as the creative aspect of the supreme legal force of the constitution. Cf. ibid.

5) institutional and procedural mechanisms should be established that would ensure the respect of the supreme legal force of the constitution (control of constitutionality of the law[8]). The above five consequences of the introduction of the supremacy clause into the text of the US Constitution are today an undisputed component of the so-called constitutional principle of constitutionalism. This principle is a normative reflection of the doctrinal assumption of the special legal force of the constitution, which honours the constitution as the crowning act of a hierarchically-structured legal order.

Under the influence of, *inter alia*, the American Supremacy Clause and increasingly detailed views of the doctrine, the principle of constitutionalism has become a solution often introduced into the texts of modern constitutions in order to confirm the constitution's status as a fundamental law. This status is confirmed in various ways. This can be either by stating that "all laws must be in conformity with the Constitution" (Article 5 sentence 1 of the Constitution of Croatia), or that an amendment to the constitution can only be effectively made by means of an equivalent act (Article 9(1) of the Constitution of the Czech Republic), or that all unconstitutional acts are by operation of law invalid (Article 7 of the Constitution of Lithuania),[9] or finally that the constitution is the supreme law (Article 5(1) of the Constitution of Bulgaria), or that it is the duty of all to respect the supremacy of the constitution (Article 1(5) of the Constitution of Romania). Irrespective of its verbal form, each of the provisions whose *ratio legis* is a confirmation of the principle of constitutional supremacy either expresses that principle in the most general way (the constitution as the supreme law) or emphasises its obligatory specific features (the prohibition on enacting acts that are inconsistent with the constitution, the requirement to amend the constitution only by means of an equivalent act

[8] Which, read in this way, is the obligatory element of the constitution and the confirmation of its legal force. Cf. R.M. Małajny, "Trybunał Konstytucyjny jako strażnik Konstytucji," *Państwo i Prawo*, 2016, no. 10, p. 5ff.

[9] The Constitution of Portugal contains a similar provision, stipulating that "all norms that contravene the provisions of the Constitution or the principles enshrined therein shall be unconstitutional" (Article 277(1)).

or the injunction to create the law in a manner that corresponds to the constitution). The above manners of juridisation of the principle of constitutionalism correspond to the so-called narrow meaning of this principle. Constitutionalism, conceived *sensu stricto*, therefore, means affirming the supreme legal force of the constitution with all its consequences. Thus, constitutionalism understood in this way is not, for example, an umbrella term expressing many other minor constitutional principles and values, but a principle that exclusively states the supremacy of the constitution as a fundamental law (following the example of the American clause in Article VI, paragraph 2).[10] This way of understanding the principle of constitutionalism is fundamental and also the most important. This is because it is a condition for treating the constitution as a constitution. However, alongside this is a second, much broader meaning of the principle of constitutionalism. Today, it is used more and more frequently and constitutes the so-called democratic constitutional order, and by constitutionalism it means the general principles, values and solutions that make up the concept of constitutional democracy. Understood in this way, the principle of constitutionalism includes, inter alia, the sovereignty of the people, the rule of law and human rights, the separation of powers, political pluralism, representative government or, for example, accountability of power, etc. It can be seen from the above that the broad meaning of constitutionalism corresponds to the historical view of the development of the constitution as a process of limiting power[11] by establishing solutions, values, and procedures whose *telos* was determined by the desire to restrain the authorities and subject them to social control. It is, therefore, only appropriate for the doctrine and theory of constitutional law, whereas in the case of the letter of constitutional law, the principle of constitutionalism means (should mean) the affirmation of the special, i.e. supreme legal force of the constitution.

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[10] Cf. D. Minich, "Konstytucjonalizm a rozumienie prawa," *Roczniki Administracji i Prawa*, 2019, no. 2, p. 35ff.

[11] Cf. A. Tarnowska, "Koncepcja nowoczesnego konstytucjonalizmu w historii prawa," *Studia Iuridica Toruniensia*, 2009, vol. 5, p. 62ff.

The principle of constitutionalism enshrined in the constitution is the normative expression of the primacy of the constitution, i.e. the prohibition to legislate (introduce into legal circulation) a law that is contrary to the constitution and the concomitant injunction to legislate (introduce into circulation) a law that is consistent with the constitution.[12] However, one should be aware that nowadays this elementary meaning of the principle of constitutionalism is being challenged on the charge of its alleged abusiveness. On the basis of integration processes, there are views in the doctrine of both constitutional law and European law which, in the name of globalization and integration, propose to reject the principle of constitutionalism when understood literally. According to these views, this principle is supposed to be an expression of an excessively patriotic or sovereigntist view of the constitution, which is supposed to hinder integration processes.[13] For the proponents of this approach, the traditional understanding of the principle of constitutionalism, i.e. as an expression of the primacy of the constitution, is an anachronism, a failure to recognise the processes of modernisation and progress, and above all, it is an advocacy of so-called populist constitutionalism, which pays homage to the idea of the sovereign state and the constitution, instead of taking the form of a supposedly open European constitutionalism, which is an aggregate expression of many other principles and values (democracy, separation of powers, the rule of law, pluralism, etc.).[14] Proponents of this way of thinking, therefore, propose to reject the narrow meaning of constitutionalism and to recognise that the only acceptable way of reading the principle of constitutionalism is to consider that it is a set of all the other principles and values that make up

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[12] Cf. J. Boć, "Art. 8," in J. Boć (ed.), *Konstytucje Rzeczypospolitej Polskiej oraz komentarz do Konstytucji RP z 1997 roku*, Wrocław 1998, p. 28.

[13] Cf. W. Sadurski, "How Democracy Dies (in Poland). A Case Study of Anti-Constitutional Backslide," *Sydney Law School Research Paper*, 2018, no. 18, p. 1ff.

[14] Often labile and poorly defined under EU law. Cf. e.g. J. Szymanek, "Zamiast zakończenia: Rule of Law jako wspólna wartość w prawie Unii Europejskiej," in M. Romanowski (ed.), *Wartości Unii Europejskiej a praworządność*, Warszawa 2020, p. 353ff.

the democratic constitutional order.[15] Acolytes of the view that the principle of constitutionalism as the primacy of the constitution is a manifestation of abusiveness of the constitution argue that it ignores the international order and, in particular, the legal space of the European Union. Meanwhile, in their opinion, the principle of openness to international (EU) law, also known as the principle of favouritism, should be given priority status in the clash of national and international or supranational orders. In their view, if there are two norms at the level of the national constitution that either directly conflict with each other or come into tension with each other, then the principle of favour should either modify the principle of constitutionalism or be given outright conclusive status. This is what appealing to a broad understanding of the principle of constitutionalism is for, which, as it were, dissolves the essentialist understanding of constitutionalism into a number of other principles and values. Such an approach, however, must be judged as hyperbole of a pro-EU interpretation of the constitution and, above all, a failure to recognise four key considerations. Firstly, that the principle of constitutionalism, narrowly construed, is merely an affirmation of the ontological status of the constitution as a fundamental law, which means that a change in the understanding of that principle *mutatis mutandi* must lead to a questioning of the constitutional status of the constitution. Secondly, that the principle of constitutionalism and the principle of favouring international law are usually two parallel constitutional principles and it is difficult to speak of a relationship of subordination or dependence in their case. Thirdly, the fact that within the framework of European integration, the processes of transferring competences are regulated at the level of the constitution and treated, despite everything, as an exception rather than the rule (as demonstrated by the so-called integration clauses[16]). Fourthly, the fact that legislators, aware of the ongoing

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[15] Cf. M. Ziółkowski, "Mozaika tożsamości konstytucyjnych," in A. Wróbel, M. Ziółkowski (ed.), *Tożsamość konstytucyjna w wybranych państwach członkowskich Unii Europejskiej*, Warszawa 2021, p. 11ff.

[16] For more on this, see A. Kustra, *Przepisy i normy integracyjne w konstytucjach wybranych państw członkowskich UE*, Toruń 2009, passim.

processes of internationalization of law, often supplement the principle of constitutionalism with the requirement of compliance with the constitution of the introduced international (EU) law. Thus, for example, there is an explicit provision in the Romanian Constitution under which the ratification of an international agreement that is not compliant with the constitution can only take place after the constitution has been amended accordingly (Article 11(3)). An analogous provision is also found in the text of the Spanish Constitution (Article 95(2)). In turn, the Constitution of the Republic of Estonia has an even more far-reaching provision, according to which Estonia "shall not conclude international agreements that are contrary to the Constitution" (§ 12). In contrast, the Swedish Act on the Form of Government explicitly provides that no international agreement may delegate the right to enact, amend or repeal constitutional acts and other constitutional laws specified *explicite* (§ 7). It can be seen from the above that openness to international law or – in the conditions of membership of the European Union – the application of the so-called pro-EU interpretation[17] does not come into contradiction with the principle of constitutionalism, confirming the primacy of the Constitution as the fundamental law.[18] A delicate balance has emerged in the relationship between these two principles, which reconciles the basic paradigm of constitutional law (the principle of the supremacy of the constitution) with the paradigm

[17] Which, in principle, is a normal instrument in the process of applying the law. For more on this, see: K. Działocha, "Podstawy prounijnej wykładni RP," *Państwo i Prawo*, 2004, no. 11, p. 28ff.; M. Koszowski, "Wykładnia prowspólnotowa w ujęciu teoretycznoprawnym," *Przegląd Legislacyjny*, 2009, no. 3, p. 70ff.; C. Mik, "Wykładnia zgodna prawa krajowego z prawem Unii Europejskiej," in S. Wronkowska (ed.), *Polska kultura prawna a proces integracji europejskiej*, Kraków 2005, p. 124ff.; W. Rowiński, "Dyskusja nad modelem wykładni prounijnej w polskiej nauce prawa," *Adam Mickiewicz University Law Review*, 2012, vol. 1, p. 9ff.

[18] From the point of view of international law, it can be argued that it is the international agreement that generates the need to amend the constitution and to bring the provisions of the constitution into line with those of the agreement. However, even if one accepts this view, the agreement will only be a material source of the constitutional amendment made. The formal source of the change will always be the decision of the constitution-maker taken according to the procedural regime set out in the constitutional provisions.

of international law (the effectiveness of the enforcement of contractual norms in the contracting states).[19]

The translation of a doctrinal, and, therefore, in some sense only hypothetical assumption into the language of constitutional norms has momentous legal consequences. Doctrinal findings, even if supported by the position of the courts, do not carry as much weight as an unambiguous provision and the legal norm that follows from it, especially if it is anchored in the constitution. The constitutional principle of constitutionalism is, therefore, not just a *superfluum*, but entails concrete legal (systemic) consequences. However, in a material sense it does not constitute a fundamental *novum*. Its rudimentary content is well established and generally accepted in doctrine, and it is the assumption that the constitution has the highest legal force, which should be understood in such a way that, firstly, it has the greatest derogative power; secondly, that it crowns the hierarchical legal system; thirdly, that it excludes the possibility of a norm functioning in this system that would be contrary to it.[20]

This understanding of the constitutional principle of constitutionalism is also firmly anchored in the case law of the European constitutional courts. Thus, for example, the German Federal Constitutional Court has already made it clear in its ruling of 29 May 1974, in the

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[19] On this occasion, it should also be noted that, precisely because of the principle of favouring international law, the constitutions, insofar as they regulate the relationship between national law and international (EU) law, expressly indicate that, in the event of a conflict between the content of contracts and laws, international agreements (European law) take precedence. An expression of this approach can be found in Article 7(2) of the Constitution of the Slovak Republic, which provides that "[t]he legally binding acts of the European Communities and the European Union take precedence over the laws of the Slovak Republic." Such solutions are found in many Member States precisely because of the integration processes and the constitutions' favouritism towards them. However, the precedence refers not to the constitution but to sub-constitutional legal regulations (mainly laws). This is because the principle of constitutionalism is protected everywhere, which does not allow an international agreement (EU law) to take precedence over the constitution.

[20] Cf. R.M. Małajny, "Konstytucja," in R.M. Małajny (ed.), *Polskie prawo konstytucyjne na tle porównawczym*, Warszawa 2013, p. 89ff.

Internazionale Handellgeselschaft case (so-called Solange I[21]) that integration processes do not open the way for a change in the basic structure of the German constitutional order. The latter cannot be done through the normative activity of international institutions, i.e. without amending the text of the constitution, carried out in accordance with the procedures set out therein and, above all, reserving a decision on the matter for bodies expressing German sovereignty. The FCC, thus, confirmed that European law can in no way touch the constitutional level and that its effectiveness is limited to the sub-constitutional level only. Moreover, in that case the FCC ruled that no European court can authoritatively determine whether a given provision of Community law is consistent with the German constitution, since the exclusive competence in this matter within Germany lies with the local Constitutional Court, which is not only a *stricte* competent norm, but also a material norm lying *implicite* in the principle of constitutionalism, in both its internal aspect (defining the constitutional authority competent to review the constitutionality of the law), as well as in its external aspect (ruling out interference by a non-German authority in this respect). The FCC is, therefore, competent to declare that a provision of Community (EU) law, to the extent that it conflicts with the German fundamental law, may not be applied by the administrative authorities and courts of Germany. The threads of the ruling from Solange I returned in another important FCC ruling called "Solange II".[22] In the theses of this ruling, the FCC stated two key issues for the relationship between constitutional law and EU law. Firstly, that the transfer of competences to international institutions must not violate Germany's constitutional order and undermine its basic structure and constitutive principles. Secondly, and most importantly, so long as the European Communities (today the EU) provide, in particular through the case-law of the Court of Justice, effective protection of fundamental rights, in essence equal to the unshakeable protection of fundamental rights under the German Constitution, the FCC will not exercise

[21] Judgment of the Second FCC Senate of 29 May 1974, BvL 52/7 I.
[22] Judgment of the Second FCC Senate of 22 October 1986, 2 BvR 197/83.

its competence in relation to the question of the admissibility of the application of derived Community law functioning as a legal basis for the actions of German courts or administrative bodies in the area of German supreme power, and, thus, will not examine the compatibility of derived Community law with the guarantees of fundamental rights contained in the German fundamental law. Both Solange rulings showed that the German Constitutional Court held that the integration process is conditional, determined by the treaties, and that the limit of integration is the German fundamental law, which sets the framework for the communitarization process. As a result, all actions of international institutions, including those of the EU, encroaching on this scope must be considered as actions beyond their permissible competences and consequently as being incompatible with the German Constitution, which is the supreme law in the German legal order.[23]

Theses concerning the protection of the principle of constitutionalism, which has in no way been undermined by the processes of European integration, were reiterated and developed by the German Constitutional Court in a judgment delivered on the occasion of the assessment of the Maastricht Treaty (in 1993).[24] In this ruling, the FCC explicitly stated that the Member States are sovereign "masters of the treaties" and base their bindingness with the decisions of EU bodies, including the CJEU, on the will for long-term membership, which could, however, ultimately be abolished by an appropriate legal act. This means that each Member State retains the character of a sovereign state by virtue of its own law and the status of sovereign equality with other states, the best expression of which is the constitution that enjoys the status of supreme law. Since the Member States are "masters of the treaties", they determine themselves the extent of their commitment to international institutions such as the EU, as an international organization cannot go beyond the authority conferred on it by the

[23] Cf. R. Arnold, "Orzecznictwo niemieckiego Federalnego Trybunału Konstytucyjnego a proces integracji europejskiej," *Studia Europejskie* 1999, no. 1, p. 100.

[24] Judgment of the Second FCC Senate of 12 December, 1993, 2 BvR 2134, 2159/92.

treaty that defines its competences. The existence of any international organization, including the European Union, is always an expression of the will of the states constituting the organization and is determined by the scope of the constitutional agreement which, although it has a constitutive nature for the organization, is secondary and derivative in relation to the particular constitutions of the states constituting the organization. The FCC further stated that all EU institutions, as well as the EU itself, are based on the principle of a limited, specific mandate, which can in no way diminish the constitutional authority of the Member States, as it determines the sovereignty of these States as subjects of international law. The diminishing of this sovereignty, *ergo* the undermining of the primacy of the national constitution, would have to lead to the undermining and – consequently – the invalidation of the international organization itself, which, as a contractual structure, can only function if there is a sovereign state as an entity with treaty capacity. The FCC thus introduced a formula known in the literature as *Kompetenz-Kompetenz*, according to which, since the EU is not a sovereign state, it has no competence to determine its own competences. It prohibits Union bodies from acting outside the competences entrusted to them, i.e. *ultra vires*. It should be noted that in the Maastricht case the German Constitutional Court also stressed that the consent of the German legislature to the ratification of the EU Treaties is not and can never be a "blind" consent, which means, above all, that such consent does not cover possible subsequent changes to the integration programme or to the mandates for action adopted in the Treaty. In doing so, the Court explicitly confirmed the so-called *ultra vires* doctrine, which consists in verifying whether the EU and its bodies, in adopting an act, acted within the scope of the powers conferred on them, stating that "[i]f, for example, the European institutions or bodies applied the Treaty or interpreted it in a creative manner which did not correspond to the content of the Treaty on which the German ratification law was based, legal acts adopted as a result of such a practice would not have binding force within the area of German sovereignty; German state bodies could not apply such acts for constitutional reasons. Accordingly, the FCC examines whether acts

issued by European institutions and bodies are within or exceed the limits of the supreme rights conferred on them."[25]

Also on the occasion of the review of the constitutionality of the Treaty of Lisbon, the German FCC had the opportunity to comment on the principle of constitutionalism, including the relationship between the constitution and EU law.[26] In this case, the FCC explicitly stated that the German constitutional jurisprudence body can review the compatibility of any European treaty with the German Constitution, including in particular its so-called immutable principles. Like any treaty, the Treaty of Lisbon is an international agreement which in no way calls into question the constitutions of the signatory states. It is the states, it reiterated in the wake of the Maastricht ruling, that are "masters of the treaties," and it is they who decide the extent of the transfer of competences. This scale is always subject to the assessment of the constitutional court, which must first assess whether the transfer of competences, *ergo* the determination of the content of the international agreement, has not inadvertently led to a diminution of constitutional rights. In doing so, the FCC pointed out that "[i]f the Court finds them incompatible with the said standards of national constitutional law, it will declare them inapplicable in Germany, disregarding the primacy of EU law over national law."[27] As can be seen, the compass of the German FCC's activity is always the German fundamental law, to which the attribute of supreme legal force is ascribed. In effect, it is pointed out, the FCC reaffirmed the conditionality of the principle of primacy of EU law, both from the perspective of *ultra vires* actions and the protection of constitutional identity, indicating that it has the final word on the interpretation of treaty principles. This judgment also gave rise to a line of jurisprudence allowing for the review of a breach

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[25] B. Banaszkiewicz, P. Bogdanowicz (eds.), *Relacje między prawem konstytucyjnym a prawem wspólnotowym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej*, Warszawa 2006, 81, 82.

[26] Judgment of the Second FCC Senate of 30 June 2009, 2 BvE 2/08, nb. 233.

[27] T. Giegerich, "Ostatnie słowo Niemiec w sprawie zjednoczonej Europy – wyrok Federalnego Trybunału Konstytucyjnego w sprawie Traktatu z Lizbony," *Europejski Przegląd Sądowy*, 2011, no. 3, p. 9.

of constitutional identity by acts of EU law, leading, *inter alia*, to the assertion that an element of this identity is, *inter alia*, the guarantee of respect for the secrecy of communications and the relative freedom of the budgetary legislator to decide on revenue and expenditure.[28] The concept of constitutional identity is the best, it seems, affirmation of the primacy of the constitution, which corresponds to the principle of constitutionalism. According to this, any form of closer integration must be within the limits of the delegation of powers and must be compatible with national constitutional regulations.[29]

The Constitutional Court of Italy has also consistently upheld the principle of constitutionalism. In one of the first cases of this type,[30] it explicitly stated that an agreement within the framework of European integration is a kind of transfer of competences to the extent that the parties to such an agreement have agreed, but that the limit of any such agreement is the national constitution. For this reason, the Constitutional Court stated that an international agreement is subject to the cognition of the court, which must assess whether it violates the constitution and the limits of integration set therein. Moreover, the Constitutional Court of Italy has not only opted for a preventive mode of control of international agreements, but has also allowed and even considered repressive control advisable, considering that it is a body that guards the Constitution of the Italian Republic also against aberrant interpretations of such agreements while it is in force. The Court pointed out that "[i]f an aberrant interpretation of an agreement were attempted in practice, the Constitutional Court could assess whether the compatibility of the Treaty itself with the principles and fundamental rights expressed in the Constitution is upheld."[31] This aberrant interpretation would entail, according to the Constitutional

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[28] For more on this, see J. Barcz, "Stabilizacja sytuacji finansowej w strefie euro a uprawnienia parlamentów narodowych – wyrok niemieckiego Federalnego Trybunału Konstytucyjnego z 12 września 2012 r.," *Europejski Przegląd Sądowy*, 2012, no. 2, p. 4ff.

[29] For more on this, see M. Bainczyk, *Polski i niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej*, Wrocław 2017, pp. 139ff.

[30] Judgment of the Constitutional Court of 18 Dec. 1973, 183/1973.

[31] Banaszkiewicz, Bogdanowicz, *Relacje między prawem*, p. 114.

Court of Italy, the violation of the highest values of the national legal order, such as the inalienable rights of the human person. Thus, the Constitutional Court of Italy has introduced not only the possibility of reviewing the constitutionality of the primary law, but also – *ex post* – different types of interpretation of it that could prove to be incompatible with the Italian constitutional order. Moreover, by taking an extremely cautious approach to the Treaties and with full respect for the principle of constitutionalism, the Constitutional Court of Italy has significantly restricted the possibility for judges in national courts to apply Community law. It stated that, in the event of a conflict between Community law and Italian law, judges cannot decide on their own not to apply a national norm, since in such a case it is for the Constitutional Court of Italy to declare such a norm unconstitutional beforehand.[32] In another case, the so-called Granital case of 1984,[33] the Court formulated the general thesis that directly effective Community law enjoys primacy over national laws, while primary law enjoys a general presumption of conformity with the Italian Constitution, which can, however, be rebutted.[34] For it is always in the Italian legal order that the constitution is the supreme law, and integration processes cannot override the special, i.e. supreme, legal force of the constitution. Moreover, in the case in question, the Constitutional Court of Italy also considered itself to have exclusive jurisdiction to finally decide on the division of competences between the European Communities (the Union) and Italy. The basis for this recognition was precisely the principle of constitutionalism, of which the national constitutional court is the exclusive guardian. In the Granital case, the Constitutional Court also confirmed that the supreme legal force of the Italian Constitution has in no way been repealed or restricted by the integration processes, which means that, precisely for reasons of constitutional protection, it has an exclusive competence to assess the

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[32] H. Dovhań, "Tożsamość konstytucyjna w acquis constitutionnel Sądu Konstytucyjnego Republiki Włoskiej: sprawa Taricco," *Europejski Przegląd Sądowy*, 2018, no. 7, p. 13.

[33] Judgment of the Constitutional Court of 5 June 1984, 170/1984.

[34] Banaszkiewicz, Bogdanowicz, *Relacje między prawem*, p. 117.

constitutionality of integration agreements, in particular as regards their compliance with the fundamental principles of the constitutional system and the rights of the individual, in the event that the Treaties have been interpreted in such a way as to empower the Union's institutions to adopt acts in breach of those principles. The prerogative of the Constitutional Court of Italy, as the guardian of the principle of constitutionalism, is, therefore, not limited to the control of the treaty (agreement) itself, but also includes the day-to-day control of the way in which this treaty is interpreted and ensuring that it has an acceptable course from the point of view of the Italian constitutional order. In doing so, the point of reference for this assessment by the Constitutional Court of Italy is the concept of constitutional identity protected by the principle of constitutionalism, which consists of the key principles of the Italian Constitution of 1949. The notion of constitutional identity is in this case an operationalized principle of the primacy of the constitution, interpreted as the primacy of fundamental constitutional norms, principles, and values.[35]

The French Constitutional Council has also repeatedly expressed its views on the protection of the principle of constitutionalism in the context of European integration processes. For this circumstance, it has constructed a test of the constitutionality of the state's international obligations in the form of the question whether these obligations do not violate the basic conditions for the exercise of national sovereignty.[36] If, as a result of applying this test, it would appear that France's ratification of an international agreement would lead to a violation of the constitution, a prior constitutional amendment is a necessary condition for effective ratification. The Constitutional Council has made it clear that, in view of the principle of the primacy of the Constitution in the French legal order, it is not possible to introduce unconstitutional provisions

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[35] For more on this, see K. Doktór-Bindas, "Tożsamość konstytucyjna jako controlimite w Republice Włoskiej," in Wróbel, Ziółkowski, *Tożsamość konstytucyjna*, p. 87ff.

[36] Cf. W. Heusel, "Zmiany konstytucyjne związane z członkostwem w Unii Europejskiej: przykład Francji," in K. Wójtowicz (ed.), *Zmiany konstytucyjne związane z członkostwem w Unii Europejskiej*, Łódź 1998, p. 105ff.

into that order. States are free to bind themselves to the content of an international agreement, but as long as the agreement conflicts with the constitution it is not possible to introduce it into French law. As a result of this clear position of the French Constitutional Council, a solution was adopted whereby subsequent treaties amending the primary law of the European Union are introduced into the text of the Constitution in the form of a consent to their ratification.[37] The process of alignment is, thus, the process of incorporating the treaty in question into the constitution, thereby ensuring its constitutionality. This *modus operandi* was adopted by the Constitutional Council when it assessed the constitutionality of the Maastricht Treaty, when it considered that the Treaty was incompatible with the French Constitution and that as long as its compatibility was not ensured, the Treaty could not effectively affect French law. Likewise, the Council has consistently expressed itself on the occasion of the ratification of the Schengen Agreement, the Treaty of Amsterdam, the Treaty of Lisbon, the Agreement on the European Arrest Warrant or, the ultimately unsuccessful Treaty establishing a Constitution for Europe.[38] At the same time, it should be pointed out that the motive for the decisions of the French Constitutional Council is usually the principle of sovereignty correlated with the principle of priority of the constitution. As a result, the Constitutional Council tends to recognize that the primacy of the constitution requires that a given solution be introduced into the constitution by a sovereign systemic decision, because only this will reconcile the principle of constitutionalism (the supreme legal force of the constitution) with the principle of national sovereignty (which presupposes that the constitution is an act expressing the sovereignty of France and the French people).[39] In addition to the Constitutional Council,

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[37] More on this topic K. Kubuj, *Implementacja prawa wspólnotowego na tle doświadczeń Francji*, Warszawa 2006, passim.

[38] Cf. K. Kubuj, "Europeanisation of the Constitution in the Light of Amendments to the Constitution of the Fifth Republic of France," in K. Kubuj, J. Wawrzyniak (ed.), *Europeizacja konstytucji państw Unii Europejskiej*, Warszawa 2011, p. 99ff.

[39] Cf. Heusel, "Zmiany konstytucyjne," p. 108.

the Council of State is a body that has recently made the special legal force of the Constitution explicit. In its decision of 21 April 2021,[40] the Council explicitly recognized that the French Constitution remains the most important act in the hierarchy of sources of law. It follows from the decision of the Council of State that the national judge is required to verify that the application of European law, in particular as interpreted by the CJEU, will not undermine the level of protection ensured by the French Constitution, in the absence of other provisions of European law guaranteeing an equivalent level of protection. In the opinion of the Council of State, it is still the constitution that is paramount in the French legal order, and France's participation in the EU requires loyal cooperation, but not infringement of the constitution. European integration, as indicated by the Council of State, leads to the integration of the EU legal order with the internal legal order, but in France the most important legal norm of the internal order is still the Constitution. In doing so, the Council of State pointed out that this is the essential meaning of the constitutional identity referred to in the text of Article 4 TEU.

A strong component of the protection of the principle of constitutionalism in its narrow sense, i.e. as an emphasis on the special, i.e. supreme legal power of the Constitution, can be found in the judgments of the Constitutional Court of the Czech Republic. Already in one of its first rulings on EU law, the Constitutional Court of the Czech Republic advocated the protection of the principle of constitutionalism.[41] In a 2006 ruling, the Constitutional Court of the Czech Republic admitted the primacy of EU law, but indicated that this primacy is conditional. The Czech Republic, whose sovereignty is based on Article 1(1) of the Constitution, is still the proper subject of sovereignty and the competences deriving therefrom. The conditional nature of the delegation of competences manifests itself, according to the Constitutional Court,

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[40] Conseil d'État, Assemblée, 21/04/2021, 393099, ECLI:FR:CEASS:2021:393099.20210421, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000043411127?init=true&page=1&query=393099&searchField=ALL&tab_selection=all (accessed 27 Aug. 2021).

[41] Judgment of the Constitutional Court of 8 March 2006, Pl. US 50/0453.

on two levels, i.e. formal and material. The first concerns the particular sovereign attributes of state sovereignty, while the second concerns the substantive aspects of the exercise of state power. The effects of the delegation of part of the competences of state bodies can last as long as these competences are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic and in a manner that does not threaten the very essence of the legal state in the material sense. Both conditions are laid down in the Czech Constitution and it is this Constitution that sets the limit for Union actions and the transfer of competences. Therefore, if one of these conditions is no longer fulfilled, i.e. if the development of the EU endangers the essence of sovereignty of the Republic or the implementation of the essential requirements of a democratic legal state, the essence of which is enshrined in the Czech constitutional regulation, it would be necessary to ensure that the Czech state bodies can once again exercise the competences transferred to the Community bodies; the Constitutional Court of the Czech Republic remains the body appointed to protect constitutionality in this sense. This judgment clearly confirmed that "in the jurisprudence of the Constitutional Court of the Czech Republic, there is no unconditional agreement on the most far-reaching consequences of membership of the European Communities in a situation where those basic conditions highlighted by the Court are no longer fulfilled."[42] It is worth pointing out that it is also clear from the above position that the Constitutional Court of the Czech Republic, despite the accession of this country to the EU, is not abandoning its constitutional position of guardian of the Constitution, which has the task of protecting the state and its sovereignty from possible threats arising from EU law.[43] The Czech body of constitutional jurisprudence has also made a statement on the relationship between the constitution and EU law twice, on the occasion of the Treaty of

[42] K. Witkowska-Chrzczonowicz, "Konstytucyjnoprawne aspekty członkostwa Republiki Czeskiej w Unii Europejskiej w *świetle* orzecznictwa czeskiego Sądu Konstytucyjnego," *Przegląd Sejmowy*, 2008, no. 5, p. 119.

[43] Cf. W. Sadurski, "'Solange, Chapter 3': Constitutional Courts in Central Europe- Democracy – European Union," *European Law Journal*, 2008, no. 14, p. 3.

Lisbon. In the first of these rulings,[44] the Court held that the principle of the primacy of the Czech Constitution, which integration processes in no way violate or undermine, remains valid. What is more, following the example of the Constitutional Court of Italy, the Czech Court considered that, in making such an assessment, it is not only the text and content of the Treaty of Lisbon itself that is important, but also all of its future interpretation and concrete application, which, after all, may depart from the letter of the Treaty. The Constitutional Court of the Czech Republic, thus, upheld its role as guardian of the constitution in terms of EU law and considered that *ultima ratio* it could, and indeed should, examine whether an act of the bodies of the European Union exceeded the competences that the Czech Republic had transferred to the European Union on the basis of the constitution. Indeed, participation in the Union must never undermine the primacy of the constitution in the Czech legal order. What is more, in this ruling, the Constitutional Court opposed the primacy of EU law, also in terms of its application. Namely, it considered that there is no superiority of the CJEU over national constitutional courts. Following the entry into force of the Treaty of Lisbon, the relationship between the European Court of Justice and the constitutional courts of the Member States will not take on a hierarchical form; it will continue to be a dialogue of equal partners who, in the exercise of their competences, respect and complement each other, rather than compete with each other. Mutual respect has a limit, however, and that limit is the primacy of national constitutions as the supreme right of Member States whose free will has shaped the European Union. The Court, thus, confirmed that from the point of view of Czech constitutional law, the constitution (and the Czech legal order in general) remains the most important law in the state.[45] The basic contents of the first Lisbon judgment were repeated by the Constitutional Court of the Czech Republic in its second judgment

[44] Judgment of the Constitutional Court of November 28, 2008, Pl.US 19/08.

[45] Cf. K. Witkowska-Chrzczonowicz, "Wyrok Sądu Konstytucyjnego z dnia 26 listopada 2008 r. w prawie zgodności z porządkiem konstytucyjnym Republiki Czeskiej Traktatu z Lizbony, sygn. akt Pl. US 19108," *Przegląd Sejmowy*, 2009, no. 2, p. 271ff.

in this case.[46] It, thus, reaffirmed the primacy of the Constitution (the principle of constitutionalism), the conditional and limited nature of European integration, the essence of the delegated competences, the delegation of which entitles the Constitutional Court of the Czech Republic to be the guardian of the conditions of this delegation and, finally, the inclusion of the entire problem of participation of the State in the Union in the concept of constitutional identity, which, according to the Czech Court, has received additional protection in the Treaty of Lisbon (Article 4) and which *nolens volens* confirms the special, i.e. supreme, legal force of the constitutions of the Member States.[47]

It can be seen from the above that the courts of the EU Member States uniformly acknowledge the primacy of national constitutions. For them, the constitution is still an act having the status of *suprema lex*, and the ongoing processes of European integration do not deplete the legal power of the constitution, but only fit it into the multicentric system of sources of law, maintaining a separate, parallel status of the EU (European) law and national constitutional law.[48] From this point of view, EU (European) law is still a *sui generis* law, which is distinct in nature both from national law and from classical international law.[49] This makes it necessary to adopt several basic theses when conceptualizing the principle of the supreme legal force of the constitution in the conditions of a state's participation in the European Union.

Firstly, EU law, despite implementation efforts, does not become national law. It is given priority in application, it is made enforceable, but at the same time, from the point of view of the ontology of law, it still has the form of a law external to national law, the determinant

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[46] Judgment of the Constitutional Court of 3 Nov. 2009, Pl.US 29/09.

[47] Cf. K. Witkowska-Chrzczonowicz, "Wyrok Sądu Konstytucyjnego z dnia 3 listopada 2009 r. w sprawie zgodności z konstytucją Traktatu z Lizbony zmieniającego Traktat o Unii Europejskiej oraz Traktat ustanawiający Wspólnotę Europejską," *Przegląd Sejmowy*, 2011, no. 1, p. 209ff.

[48] Cf. J. Szymanek, "Europejska przestrzeń konstytucyjna," in P. Mikuli et al., *Ustroje. Tradycje i porównania. Księga dedykowana prof. Marianowi Grzybowskiemu w siedemdziesiątą rocznicę urodzin*, Kraków 2015, p. 95ff.

[49] Cf. M. Safjan, "Konstytucja a członkostwo Polski w Unii Europejskiej," *Państwo i Prawo*, 2001, no. 3, p. 10.

of which is the constitution and the legal order built upon it (the best proof of which is the fact that it is the constitution that allows for European integration, defines its conditions and, at the same time, formulates the concept of constitutional identity, as the inalienable core of constitutional sovereignty of each Member State).

Secondly, it is important to be aware that the European Union is not a federation and that the sovereign Member States are not members of it, and, therefore, their legal orders are independent. Integration processes have a natural effect of legal diffusion "with the exclusion, however, of basic laws as being completely independent of European law."[50]

Thirdly, the power to assess the constitutionality of EU law from the point of view of the constitution of a Member State is just as legitimate as the power of the CJEU to assess the compatibility of national legal acts with European law. The constitutional courts of the Member States and the CJEU do not have a superior and subordinate relationship to each other, as they operate within different legal orders. These courts base their activity on the fundamental law, which obliges them to examine the constitutionality of all legal acts in force on the territory of the state, regardless of their origin. This is how the principle of the supremacy of the constitution is respected. In fact, therefore, the true nature of the relationship between national law and Union law supports the thesis of their duality, which best reconciles the conditions for integration with respect for the principle of constitutionalism.[51]

Fourthly, in the event of a conflict between EU law and a Member State's constitution, the latter should take precedence. This is confirmed not only by the judgments of the European constitutional courts and their thesis that the Member States are the "masters of the treaties" and determine the pace, direction, and scope of integration (including the

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[50] R.M. Małajny, "Constitutio suprema lex? Unia Europejska a ustawy zasadnicze państw członkowskich," in I. Bogucka (eds.), Z. Tabor, *Prawo a wartości. Księga jubileuszowa profesora Józefa Nowackiego*, Kraków 2003, p. 215.

[51] Cf. R. Kwiecień, "Suwerenność państwa w Unii Europejskiej: aspekty prawnomiędzynarodowe," *Państwo i Prawo*, 2003, no. 2, p. 38.

transfer of competences[52]), but also by the provisions *expressis verbis* stipulating the principle of the supremacy of the constitution. In the Republic of Poland, in accordance with Article 8(1) of the Polish Constitution, the Constitution is the supreme law of the Republic of Poland. As noted in the doctrine, this is an "absolute" primacy.[53] Thus, in the event of a conflict between a European provision and the Constitution, the Constitution always takes precedence, whereas in the case of sub-constitutional acts – as a result of the clause in Article 91(2) – European law takes precedence, which, in turn, corresponds to the principle of favouring international law (Article 9 of the Constitution of the Republic of Poland). By the way, such a solution only confirms that the principle of constitutionalism can be fully reconciled with the principle of openness to international law. State participation in contractual obligations does not, after all, come into conflict with the primacy of the constitution. The latter concerns respect for the constitution and its values among which sovereignty, understood both externally and internally, is the guiding principle.[54] A manifestation of the latter is the constitution, which sets the framework for the state's participation in international organizations, including the European Union. The law of the latter organization, in relation to the national law of the Member States, has an independent status and, precisely for this reason, it is not possible to recognize its supremacy over these constitutions.[55]

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[52] For example, the Constitutional Court of Spain states that a pro-EU interpretation should be used when evaluating EU law, but also states that an insurmountable conflict cannot be ruled out, in which case, however, the Spanish Constitution should take precedence over European law. Cf. R. Hofmann, "Zmiany konstytucyjne związane z członkostwem w Unii Europejskiej – przykład Hiszpanii," in Wójtowicz, *Zmiany konstytucyjne*, p. 83ff. Also in Portugal, the doctrine of constitutional law is rather unambiguously in favor of the view that the Constitution is the supreme act over all acts of European law. Cf. A. Łabno, "Europeizacja konstytucji Portugalii z 1976 roku," in Kubuj, Wawrzyniak, *Europeizacja konstytucji*, p. 238.

[53] K. Complak, "Art. 8," in M. Haczkowska (ed.), *Komentarz. Konstytucja Rzeczypospolitej Polskiej*, Warszawa 2014, p. 21.

[54] For more on this, see J. Szymanek, "Suwerenność jako przedmiot regulacji prawa międzynarodowego," in J. Szymanek (ed.), *W obronie suwerenności*, Warszawa 2017, p. 86ff.

[55] Cf. Safjan, *Konstytucja a członkowstwo*, p. 9, 10.

The independence of European Union law is also confirmed, *nolens volens*, by the disposition of Article 8(1) of the Constitution of the Republic of Poland, according to which the Constitution is the supreme law of the Republic of Poland. It is, therefore, a source of supreme law, establishing – as the Preamble states – "laws fundamental to the State". In conjunction with Article 87(1), it is clear that the Constitution has a positivist meaning, as a specific normative act in a catalogue of other acts. This feature of the constitution, at the same time, presupposes that all its provisions, regardless of their form, have a normative character, and from the point of view of the functions that the constitution fulfils, the importance of the legal function is emphasized.[56] The content of Article 8(1) suggests that the Constitution has been granted the attribute of supreme legal force in the entire system of sources of law. However, this force results not only from the very disposition of Article 8(1), but also from the entirety of the constitutional relationship (its norms) to other sources of law (their norms). It is also a general property (feature) of the constitution, which constitutes a basic doctrinal category in the analysis of all normative acts and their norms,[57] also in relation to international law.[58] From this point of view, it should be noted that Article 8(1) of the Constitution of the Republic of Poland, by conferring on the Constitution the attribute of the "supreme" law, by its very nature allows for the existence of another law, lower placed, which, however, will always remain a sub-constitutional law. It should be noted that the attribute of supreme law is vested in the constitution "within the system of law established in a given state"[59] and has no effect *ad extra*. However, it has absolute *ad intra* effect, which means that also acts of international law – insofar as they are in force on the territory

[56] Cf. K. Działacha, "Uwaga nr 2 do art. 8," in L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2007, vol. 5, p. 1. For more on the legalfunction of the constitution, see A. Chmielarz, *Funkcja prawna konstytucji na przykładzie Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 roku*, Warszawa 2011, passim.

[57] Cf. ibid.

[58] Cf. M. Masternak-Kubiak, *Umowa międzynarodowa w prawie konstytucyjnym*, Warszawa 1997, passim.

[59] Garlicki, *Polskie prawo konstytucyjne*, p. 37.

of the Republic of Poland – are subject to the rule of Article 8(1). Their admission to the conduct of legal transactions in Poland is, after all, constitutionally provided for, defined and sanctioned and takes place with respect for the legal order and its hierarchy. It is precisely by respecting this approach that the principle of the primacy of the application of EU law, rather than the principle of the primacy of validity, has been given its *raison d'être* in European Union law. The latter, on the basis of the particular constitutional orders of the Member States, cannot be realized due to the primacy of the constitution (principle of constitutionalism). This principle is in keeping with respect for the primacy of the constitution and, at the same time, it creates the conditions for integration, which, however, has a non-extendible framework enshrined in the constitutions of the Member States. The principle of "primacy of application" captures the essence of this principle and, at the same time, removes the attribute of "supremacy" from EU law, still reserving it for the constitutions of the Member States. Hence the conclusion, that "Union law does not take precedence over the law of individual states,"[60] as, in their case, the constitution as the basic law always has this status.

[60] S. Biernat, "Prawo Unii Europejskiej a Konstytucja RP i prawo polskie – kilka refleksji," *Państwo i Prawo*, 2004, no. 11, p. 20, 21.

Marek Káčer

Judiciary as an Element of Constitutional Identity: The Case of Slovakia after the Murder of Ján Kuciak

Introduction

For several years now, there have been concerns in the European Union as to whether the Union's constitutive values are shared by all Member States. Although these states have explicitly committed themselves in the Treaty on EU to the values of "[h]uman dignity, freedom, democracy, equality, the rule of law and respect for human rights" (hereafter "the rule of law values"),[1] it is commonplace among international lawyers that agreement on the wording of a Treaty does not inevitably imply the uniformity of legal and political practice.[2] Of course, disagreement on value questions is a typical manifestation of the normal functioning of a democracy ruled by law, but only on the condition it does not include the very foundations of its system.

Judicial independence is one of these foundations. Since the fall of the Berlin Wall, the Central and Eastern European countries have been reforming their judicial systems to meet Western standards of judicial performance and accountability. However, these reforming efforts are quite a delicate matter because even well-intended interferences with the judicial power may endanger judicial independence and instead of purging the judiciary they may bring about its even more profound

[1] See Article 2 of the Consolidated version of the Treaty on European Union.

[2] J. Charvet, E. Kaczynska-Nay, The *Liberal Project and Human Rights: The Theory and Practice of a New World Order*, Cambridge 2008, p. 281.

politicization. The most contentious disagreement on the rule of law values in the EU today is drawn somewhere along this line.

In Slovakia, the crisis of confidence in the judicial system is culminating. After the murder of investigative journalist Ján Kuciak in 2018, the links between the judicial elite and organized crime were discovered, which triggered a series of arrests. To this day, about two dozen prominent figures have been arrested and charged with corruption, including former judges, judicial presidents, a former police president, a former deputy of the Ministry of Justice and even the head of the secret service.[3] The new Slovak government is trying to reform the system of justice, but some members of the society fear that these efforts might lead to a weakening of the independence of the judiciary.

This paper explains the rationale of the judicial council model of court administration and then it questions whether this model can be used as a uniform golden standard across Europe. The paper proceeds to depict the bleak condition of the Slovak judiciary which became ever more apparent after Kuciak's murder. Finally, the paper reports on the ongoing reform of the Slovak judiciary with a special focus on the composition of the Judicial Council. It also gives a brief picture of current waves of arrests of various state officials including judges. The text ends with the conclusion that one of the most important tasks of the theory of constitutional law is to distinguish between reform aimed at cleansing the judiciary and that one aimed at politicizing it.

The failure of a golden standard

According to the classic theorem, power in a state ruled by law has to be divided into the legislative, executive, and judicial branch. Each

[3] "Intelligence Agency Director Taken Into Custody," *The Slovak Spectator*, 15 March 2021, https://spectator.sme.sk/c/22617414/intelligence-agency-director-taken-into-custody.html [accessed 4 Dec. 2021].

of these powers must be exercised by a separate institution, which must not be in a hierarchical relationship with each other. Judicial independence is an integral part of the division of power just because it prevents the formation of such inadmissible ties. Its purpose is to minimize intolerable influences on the courts' decisions of individual cases, especially by the other two power branches. In this context, legislature and cabinet must have no decisive word in the appointment of ordinary judges, neither in their disciplining.

During the 1990s, the Council of Europe, together with the European Union, took the view that judicial independence in post-communist countries could best be ensured through major institutional reform, namely the establishment of a Judicial Council. The formulation of this new gold standard was associated with the EU enlargement to the east. If Eastern countries wanted to guarantee judicial independence and thus to comply with requirements of the entrance into the EU, the best they could do was to adopt the Judicial Council model of court administration. Interestingly, this solution was originally drafted as a soft law by various consultative bodies predominantly occupied by judges but, on the official European level, it has never been properly explained and justified.[4] We can only assume that the Judicial Council as a specialized intermediary institution responsible for the appointment, promotion and disciplining of judges was supposed to insulate the judiciary from the influence of the executive and legislative branches of power and thus strengthen judicial independence.

The subsequent story of the European judicial council model of court administration is a textbook example of why the specific *l'esprit* of the post-communist countries needs to be considered when formulating institutional policies related to the protection of the rule of law values. Respected Czech scholars Michal Bobek and David Kosař observed the following: "Stated in a nutshell, the constitutional independence of the judicial power in the form of a judicial council might

[4] M. Bobek, D. Kosař, "Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe," *German Law Journal*, 2013, vol. 15, no. 7, p. 1261.

work in the case of mature political environments, where decent ethical standards extant and embedded in the judiciary guarantee that the elected or appointed judges or administrators will put the common good before their own. However, the same constitutional insulation of the judicial power in countries *in transition* in the New Europe has been either awkward or has had outright disastrous consequences for judicial independence and for the general state and reform of judiciaries in these countries."[5]

The specificity of the Central and Eastern European countries lies in the fact that a large part of judges who occupy upper layers of the judicial hierarchy was socialized in the communist regime, where the judiciary was understood as "a caste of secure and subservient civil servants".[6] In this kind of social setting, the increased portion of judicial autonomy associated with the judicial council model of court administration is likely to be used to preserve the status privileges of judges rather than to increase their performance and ethical standards of conduct.

The iconic symbol of the failure of judicial autonomy in Slovakia is Mr Štefan Harabin, a former Chief of the Supreme Court of the Slovak Republic who became a Minister of Justice during the years 2006–2009 and afterwards – chief of the Slovak Judicial Council. In the ministerial capacity, he gained a reputation of a champion of judges' interests, because he kept the main word of the judges in choosing their future colleagues. The outcome of this policy became apparent in 2012 when "as many as one in five judges had at least one family member working in the judiciary".[7] Later on, partly as a reward for his "loyal service for judiciary," Harabin regained the position of the Chief Justice of the Supreme Court together with the presidency of the Judicial Council.

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[5] Ibid., p. 1280.

[6] J.E. Moliterno, L. Berdisová, P. Čuroš, J. Mazúr, "Independence Without Accountability: The Harmful Consequences of EU Policy Toward Central and Eastern European Entrants," *Fordham International Law Journal*, 2018, vol. 42, no. 2, p. 506.

[7] S. Spáč, K. Šipulová, M. Urbániková, "Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia," *German Law Journal*, 2018, vol. 19, No. 7, p. 1751.

Slovak author Samuel Spáč and others observed that in this dual role Harabin, with the assistance of his allies, "used his influence to punish his critics through disciplinary procedures. At least fifteen judges were subjected to disciplinary procedures that resembled bullying."[8] Besides the disciplinary proceedings, Harabin exercised his influence also by the unfair distribution of salary bonuses to Supreme Court judges and by manipulative assignment of the Supreme Court's cases. These "mafia-like" structures and practices resulted in "a deep divide within the judicial branch while increasing the salience of judicial issues among the public and politicians."[9] Harabin gradually lost his power only after the new Minister of Justice Lucia Žitňanská introduced her judicial reform in 2011 and after Harabin's former political allies abandoned him for good. Interestingly, Harabin still tried his luck in the presidential election in 2018 and the parliamentary election in 2020, but his candidacy was not a great success.[10] Let us repeat that Harabin's activities in the managerial judicial functions demonstrate two important findings: 1) in an environment where judges do not have a proper sense of their social accountability, some of the guarantees of judicial independence may rather weaken than improve the performance of the judiciary; 2) in certain circumstances the independence of the judiciary may be jeopardized not only by the political authorities but also from within the judicial system.

The absolutization of the independence of courts in the sense of their nominal insulation from political bodies has slowly become an undeniable standard of Slovak constitutional law. One of the dominant case law trends of the Slovak Constitutional Court in its third term (2007–2019) was the gradual strengthening of judicial independence at the expense of other constitutional values.[11] The Court's decision

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[8] Ibid., p. 1752.

[9] Ibid., p. 1755.

[10] "Harabin Files Complaint over the Presidential Election," *The Slovak Spectator*, 27 March 2019, https://spectator.sme.sk/c/22084124/presidential-election-harabin-complaint.html [accessed 4 Dec. 2021].

[11] T. Ľalík, "Nález Pl. ÚS 21/2014 ako nevyhnutný liek na ústavné zákonodarstvo na Slovensku," *Acta Facultatis iuridicae Universitatis Comenianae*, 2019, vol. 38, no. 1, p. 281.

unifying conflicting opinions of its different session panels on the issue of the revocability of the Judicial Council members is highly illustrative.[12] The plenary session of the Court concluded in this ruling that members of the Judicial Council could not be removed on the basis of political consideration alone because such an approach would be contrary to the independence of the Council, the division of powers, the principle of legal certainty and even the right of the Council members to access elected and other offices. Even more radical was the Constitutional Court in its ground-breaking ruling Pl. ÚS 21/2014 directly repealing a part of the controversial constitutional amendment which had embedded into the constitution a special vetting process of judges. According to the Court, an in-depth examination of judicial eligibility with the help of the state secret service was contrary to – guess what? – independence of the judiciary. The Constitutional Court believed this was true even when the final decision on the judicial aptness of the vetted persons was in the hands of the Judicial Council itself.[13]

The impact of the murder of Ján Kuciak

While the Slovak judicial elites have been continuously reinforcing the institutional guarantees of their independence, public confidence in the judiciary remained at a critically low level throughout. The bleak condition of the Slovak judiciary was revealed in high resolution by the murder of investigative journalist Ján Kuciak and his fiancée in the spring of 2018. This incident triggered the most widespread protests since the fall of the communist regime,[14] lasting four weeks

[12] Decision with the file number Plz. ÚS 2/2018.

[13] M. Káčer, J. Neumann, *Materiálne jadro v slovenskom ústavnom práve. Doktirnálny dissent proti zrušeniu sudcovských previerok*, Praha 2019.

[14] "Zažili sme najväčšie protesty od roku 1989," *Aktuality*, 10 March 2018, https://www.aktuality.sk/clanok/571169/online-protesty-po-vrazde-jana-kuciaka-a-martiny-kusnirovej [accessed 4 Dec. 2021].

and resulting in a major cabinet reshuffle, including the replacement of the prime minister, the political matador Robert Fico.[15] Spring 2020 saw a political earthquake of even greater proportions, with the populist opposition leader Igor Matovič winning the parliamentary election with his promise of purging public life of corruption and cronyism.[16] These political stirrings had a profound influence on the system of justice.

Shortly after the cabinet reshuffle in 2018, the police began to investigate prominent perpetrators which it failed to tackle before Kuciak's murder. The first charge was brought four months after the killing. It concerned the forging of promissory notes worth 69 million euros, committed by Marián Kočner, a controversial businessman with suspected links to organized crime and a well-known member of Bratislava's high society with a big media profile.[17] A year after Ján's death, in addition to a number of economic crimes, Kočner was also charged with his murder. The evidence gathered in all these criminal cases gradually lifted the veil on the complex web of Kočner's contacts. People were astounded to learn how many public officials had betrayed their office. The problem was by no means limited to executive bodies as might initially have appeared. Apart from politicians, police investigators and prosecutors several judges were also entangled in Kočner's web. The list of individuals apprehended in the course of Operation Storm (*Búrka*), which aimed to root out corruption in Bratislava's courts, offers a graphic picture of the web's extent. The thirteen judges arrested in the operation include a former deputy minister of justice, a vice-chair of the Supreme Court, and presiding judges of lower courts and

[15] V. Prušová, M. Dugovič, "Fico podal demisiu a odkázal, že nekončí, prezident poveril zostavením vlády Pellegriniho," *Denník N*, 15 March 2018, https://dennikn.sk/1063689/fico-nekonci [accessed 4 Dec. 2021].

[16] J. Krempaský, "Bonjour mafia! Ako Matovič porazil neohrozeného Fica," *SME*, 1 March 2020, https://domov.sme.sk/c/22336900/parlamentne-volby-2020-igor-matovic-premier-profil-olano.html [accessed 4 Dec. 2021].

[17] J. Debnár, L.Kellöová, "Kto je Marián Kočner? (profil)," *Aktuality*, 13 Jan. 2020, https://www.aktuality.sk/clanok/755201/kto-je-marian-kocner-profil.

their deputies.[18] And this was just the beginning: one of the detained judges started to collaborate with the police and his testimony led to the launch of Operation Gale (*Víchrica*) aimed at four Bratislava judges suspected of accepting bribes from a well-known Slovak oligarch.[19] Meanwhile, the police were active also in other districts outside of the capital. The list of officially accused judges grew with further members during Operation Weeds (*Plevel*) focused on the corruption in the district court of Žilina.[20]

If the murder of Ján Kuciak and his fiancée had never happened, the low credibility of the Slovak judiciary could have been explained by the negative publicity created by the biased media always looking only for scandals. However, because of this horrific crime, we have learned that the public opinion and medial image has not been wholly unsubstantiated. Today, we can be quite confident to assert that if you decide to serve as a judge in Slovakia, there is about a 1.5% chance that you will be officially accused of corruption. And if you fall within this category, you will have approximately a 50% chance of ending up in detention ordered by your colleagues serving at a criminal court.

The purging effect of the non-judicial element

The closed status-centred mentality of judges can be understood to some extent. The obligation to create an appearance of impartiality

[18] "Kočner's Judges Charged and Detained," *The Slovak Spectator*, 11 March 2020, https://spectator.sme.sk/c/22355425/kocners-judges-charged-and-detained.html [accessed 4 Dec. 2021].

[19] "Most Suspects Facing Corruption-Related Charges in the Operation Gale Taken to Custody," *The Slovak Spectator*, 2 Nov. 2020, https://spectator.sme.sk/c/22524776/court-takes-most-suspects-from-operation-gale-into-custody.html [accessed 4 Dec. 2021].

[20] "Police Targeted Judges in Žilina Due to Corruption," *The Slovak Spectator*, 14 Sept. 2020, https://spectator.sme.sk/c/22488160/police-targeted-judges-in-zilina-due-to-corruption.html [accessed 4 Dec. 2021].

even outside the courtroom, the duty of restrained public conduct, the duty to be above the parties, however powerful, even above the state acting in the public interest, all this draw judges to a specific form of social isolation that only strengthens their sense of mutual collegiality. Yet, collegiality becomes a problem if it prevails over the judges' obligations towards the society as a whole, which is manifested mainly by ignoring or trivializing the ethical and professional misconduct of their colleagues. It is no wonder, therefore, that one of the solutions to this problem is to increase the influence of the non-judicial element in the administration of judicial matters.

This is one of the basic pillars on which the new Minister of Justice Mária Kolíková, deemed by many experts as the most capable member of the new government,[21] is building the new reform of the Slovak judiciary. Almost immediately after her appointment, she telephoned members of the Judicial Council nominated by the previous government and parliament to inform them that they had lost the political confidence of the new coalition, and, at the same time, asked them to resign. Although according to the above-mentioned ruling of the Constitutional Court, the removal of the Council members from office on the basis of political consideration was unconstitutional, all the members concerned quickly understood the new political reality and complied with the new Minister's request.[22] This anecdote confirms a remarkable fact that in certain circumstances the decision of the Slovak Constitutional Court can be overruled not only by the adoption of a new constitutional amendment but also by an assertive telephone call. The new parliament after its installation swiftly adopted an anti-pandemic law, which, *inter alia*, shortened the deadlines for the departure of old council members. At the same time, the new law allowed the council members to dismiss

[21] "Najlepší Matovičov minister je podľa ekonómov jednoznačne Mária Kolíková," *Denník E*, 10 Dec. 2020, https://e.dennikn.sk/2179825/najlepsi-matovicov-minister-je-podla-ekonomov-jednoznacne-maria-kolikova [accessed 4 Dec. 2021].

[22] Členstva v *Súdnej rade sa vzdalo päť jej* členov, 3 March 2020, https://www.sudnarada.gov.sk/clenstva-v-sudnej-rade-sa-vzdalo-pat-jej-clenov [accessed 4 Dec. 2021].

their chairwoman if they concluded that the continuation of her tenure could lead to a "serious threat to the credibility of the judiciary."[23] Such a motion to dismiss the chairwoman – signed in particular by the council members nominated by the new coalition – was indeed later filed. After a moment's hesitation, the chairwoman Lenka Praženková finally resigned.[24] In the final act of this castling, the Judicial Council elected a new pro-reform chairman Ján Mazák, a former advocate general of the Court of Justice of the European Union, who is an ardent critic of the corruption in the Slovak judiciary.[25] To complete the complex picture, let us add that about half a year after his appointment, approximately 200 Slovak judges (out of 1,200) signed an open protest letter accusing Mazák of unduly attacking the judiciary and manipulating the public opinion of Slovak citizens.[26]

Thus, from the very beginning of the Slovak judicial reform, the Minister of Justice has given priority to the personnel policy motivated by the effort to weaken the status-centred mentality of judges. The Judicial Council is like a guardian of the main entrance to the general judiciary: it controls who is allowed to enter and who has to leave. This gives rise to the expectations that a more balanced composition of interests in the Judicial Council will, in the long run, be reflected in the staffing of the entire judiciary and, consequently, future judges will be more sensitive to external criticism.

This assumption led Slovak reformers to the adoption of the constitutional amendment which enshrined, *inter alia*, higher representativeness of the Judicial Council. The Council has 18 members, nine

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[23] Art. II of Act no. 62/2020 Coll.

[24] V. Prušová, "Namiesto piatich rokov len tri. Praženková skončila v čele súdnej rady," *Denník N,* 23 June 2020, https://dennikn.sk/1940153/namiesto-piatich-rokov-len-tri-prazenkova-skoncila-v-cele-sudnej-rady [accessed 4 Dec. 2021].

[25] P. Kováč, "Súdna rada zavŕšila obmenu, za šéfa zvolili Mazáka," *SME*, 29 June 2020, https://domov.sme.sk/c/22436224/novym-sefom-sudnej-rady-sa-stal-mazak.html [accessed 4 Dec. 2021].

[26] V. Prušová, "Časť sudcov sa vzbúrila proti súdnej mape. Ministerku Kolíkovú vyzvali, aby svoju reformu stiahla," *Denník N*, 14 Jan. 2021, https://dennikn.sk/2225244/cast-sudcov-sa-vzburila-proti-sudnej-mape-ministerku-kolikovu-vyzvali-aby-svoju-reformu-stiahla [accessed 4 Dec. 2021].

of whom are elected directly by judges, and three are nominated by each of these political bodies: the President, the Government, and the Parliament. Although the Slovak legal system did not oblige these political bodies to select nominees only from among the judges, in practice the judges have always had a majority in the Judicial Council. The latest constitutional amendment has brought this practice to an end because it explicitly states that political bodies have to nominate to the Judicial Council "only a person who is not a judge."[27] From this moment on, the constitution stipulates that both judges and non-judges must be equally represented in the supreme body of the administration of justice. Moreover, to minimize elitist tendencies within the judiciary, the amendment also introduced equal constituencies for the election of the representatives of the judiciary. Therefore, after the adoption of the amendment, it cannot happen that a substantial part of the representatives of the judiciary will come merely from one court or one city. Finally, the amendment stipulated that the chairpersons of the Judicial Council as well as its ordinary members may be removed from the office at any time before the expiry of their tenure.

Critics could say that the reform of the Judicial Council has increased the influence of the political authorities in the Council's decision-making. Indeed, this assertion is factually correct. For the sake of completeness, however, it should be added that before the reform, the influence of political bodies was unbalanced compared to the influence of judges, so the novelty brought by the amendment restores the equilibrium, and does not deviate from it. Moreover, although the number of politically nominated non-judge members equals the number of directly elected judges, in practice it is not at all granted that the non-judge members would coordinate their voting

[27] Article 141a of the Constitution as amended by the constitutional amendment no. 422/2020 Coll. The amendment definitely resolved the question of whether the parity between judges and non-judges in the Judicial Council is in conformity with the Constitution. Indeed, the requirement of parity had also been contained in an ordinary law, the constitutionality of which was challenged by the previous chairwoman of the Judicial Council. Cf. decision of the Constitutional Court with the file no. PL. ÚS 6/2018.

with each other. The views of the President on judicial policies may differ from those of the Government and Parliament, and the modern political history of Slovakia has confirmed that these two centres of power regularly diverge on these issues.[28] Concerns about the politicization of the Slovak Judicial Council, therefore, do not seem to be justified at this stage of the reform.

Finally, in assessing the risk of whether the judicial reform will lead to the excessive political control of the judiciary, it should be borne in mind that the reform does not include speeding up the staff exchange of general courts. In contrast to the reforms in the surrounding countries, the Slovak reform of the judicial system raised the retirement age of general judges from 65 to 67 years. In addition, the reform abolished the discretionary power of the Judicial Council and the President as to whether they revoke the judges which have reached the prescribed retirement age. According to the previous regulation, a judge could retire only after the Judicial Council proposed him or her to the President for dismissal and the President granted the proposal. The Council did not use to file these proposals systematically, instead, it selected the leaving judges according to non-transparent criteria.[29] That is why the constitutional amendment construes the achievement of the retirement age as an inevitable and direct reason for termination of the judicial office and, as a result, it eliminates any arbitrary interventions into this process.

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[28] In fact, the disputes over the appointment powers of the President, e.g. in relation with the appointment of the Attorney General or the Constitutional Justices elected by the Parliament, are quite regular in the modern history of Slovakia.

[29] J. Sudek, "Desiatky sudcov sú jednou nohou na odchode. Súdna rada ich odvolala pre vysoký vek," *TREND*, 23 Sept. 2020, https://www.trend.sk/spravy/desiatky-sudcov-su-jednou-nohou-odchode-sudna-rada-ich-odvolala-pre-vysoky-vek [accessed 4 Dec. 2021].

Criminal investigation of corrupted judges

In addition to the above-mentioned personnel aspect, the judicial reform of the new coalition also includes a number of substantive measures: the establishment of the new Supreme Administrative Court responsible, *inter alia*, for disciplinary proceeding of judges and other legal professions,[30] stricter checks on judges' fitness for office especially concerning their property background, the introduction of a new criminal offence of "corruption of the law" committed by any judge who "harms or favours another person by the arbitrary application of the law in his or her decision"[31] and the new redistribution of court districts.[32] Many of these measures are still being implemented into practice, so, at this point, it is difficult to estimate what their real impact will be.

However, it is important to stress that the whole reform of the judiciary is taking place against the backdrop of medially covered police operations, in which two dozen judges were arrested. Indeed, even if some of the accused judges escaped with an acquittal, the significance of these operations lies in the fact that they have permanently extended the deterrent effect of the criminal law to the representatives of the judicial system. In this context, many skeptics may ask whether the systemic reform was needed to clean up the judiciary if the greatest cleansing job is currently being done by the classical institutes of criminal law. We will learn the answer only in the future, but what is sure for now is that the first wave of the judges' arrests was triggered by a blind coincidence – a mobile phone backup of the originally encrypted private conversation between Marián Kočner and his accomplices, which was seized during the Ján Kuciak murder investigation. Moreover, the

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[30] "Judiciary Will See Changes. MPs Approved the Reform," *The Slovak Spectator*, 9 Dec. 2020, https://spectator.sme.sk/c/22551831/judiciary-will-see-changes-mps-approved-the-reform.html [accessed 4 Dec. 2021].

[31] J. Mazák, "Ohýbanie práva," *Denník N*, 16 August, 2020, https://dennikn.sk/2005331/ohybanie-prava.

[32] https://www.justice.gov.sk/Stranky/Ministerstvo/Sudna-mapa.aspx [accessed 4 Dec. 2021].

determination with which the police knocked on the door of the first accused judge was also not a matter of course, but the result of a change in the political and social circumstances initiated by the same murder.

Regardless of the outcome of the debate on whether it is better to clean up the Slovak judiciary through new judicial reforms or classical institutes of criminal law, the success of both of these alternatives seems to depend on the personal commitment of those responsible for putting them into practice. The unavoidable relevance of this personnel aspect is also the greatest source of eventual risks: If today the interference of political power with the independence of the judiciary is motivated by efforts to improve the performance of the courts, what are the assurances that tomorrow such interference will not be motivated by an effort to politically influence decisions in particular cases? Part of the Slovak political spectrum, as well as the lay and professional public, thinks that such an influence already occurs today. Some opposition political leaders say, for example, that investigators, prosecutors, and judges "act opportunistically and against their own conscience" rather than undergo "the media lynch mob of public tribunals, now referred to as opinion-forming media."[33] Finally, in her public statement on the massive arrests of judges during Operation Storm, the former chairwoman of the Judicial Council added a note that she observed "long-term attempts to violate the principles of a democratic state and the rule of law from some of the future government politicians, which is absolutely unacceptable."[34] The former chairwoman Praženková later explained that this comment was not meant to morally support the arrested judges but to point to the fact that some politicians were considering abolishing the Judicial Council.[35] Despite this clarification, it

[33] Facebook status of the former Prime Minister Robert Fico published on 21 August 2020, https://www.facebook.com/robertficosk/photos/a.738618529655505/1478527212331296/ [accessed 4 Dec. 2021]. It is important to note that the current wave of criminal investigation includes many of Fico´s colleagues from the time of the previous government which he used to lead.

[34] https://www.sudnarada.gov.sk/data/files/1157_ts-english-16032020.pdf [accessed 4 Dec. 2021].

[35] https://www.sudnarada.gov.sk/reakcia-predsednicky-sudnej-rady-sr-k-prispevkom-dennika-n [accessed 4 Dec. 2021].

remains a mystery why, when formulating her opinion on prosecuting corruption of the Slovak judges, the chairwoman did not resist the temptation to comment on the potential abolition of the Judicial Council, a proposal which no politician had seriously thought of at that time.

Anyway, the massive stripping of judges from their robes always raises suspicions of undue interference with the independence of the judiciary. Yet, instead of hasty conclusions, it is necessary to make a thorough inspection of particular cases in which individual judges are investigated, arrested, disciplined, or removed from their offices. Were particular individuals stripped of their judge's robes because of their unconventional opinions, or because of their criminal or unethical behaviour? Were they known in society as critics of the government? What reputation did they enjoy in the legal community and the general public? What do distinguished experts think about their disciplinary or criminal proceedings? How does the government generally respond to its critics? What is the government's relationship with the initiators of the disciplinary prosecution of judges? The answers to all these and similar questions provide us with clues indicating whether judicial reform is motivated by a sincere effort to improve the quality of the judiciary or an effort to build an authoritarian state. So let us look at a portrait of a usual suspect, who has recently been stripped of his judge's robes in Slovakia.

The paradigmatic example of a judge currently prosecuted in Slovakia is Vladimír Sklenka. While working as a bodyguard of Štefan Harabin, Mr. Sklenka studied law at a private university. When Harabin exchanged the chair of the Minister of Justice for the chair of the Supreme Court president, Sklenka completed his studies and started to work as a judiciary clerk at the Supreme Court. After five years, he started serving as a judge at the Bratislava District Court which is one of the busiest courts in the country and, thereafter, he became its deputy chair. Sklenka was arrested among 13 judges in Operation Storm. The police suspected him of leaking confidential information about pending cases to Kočner, the main suspect of Kuciak's murder. Sklenka was also suspected of influencing other judges on Kočner's behalf in return for bribes to the amount of at least 150,000 euros. After

his arrest, he started to cooperate with the police in anticipation of a lower punishment for his testimony. Thus, he became a key witness in the biggest corruption affair in the history of the Slovak judiciary.[36] Interestingly, shortly after Sklenka's close communication with Kočner was revealed in public, a disciplinary proceeding was initiated against him and he was temporarily suspended from his judicial function with the loss of half of his salary. The disciplinary panel, however, did not remove him from his office because Sklenka had voluntarily resigned before the end of the proceeding. Nevertheless, this did not prevent Sklenka from suing his court for paying the rest of his salary. Sklenka's logic was clear: Since the disciplinary panel did not punish him, his suspension was not justified and, therefore, he was entitled to the rest of his salary.[37]

So, Sklenka first betrayed the trust of the society when he took bribes from a mafioso, then he betrayed the trust of his accomplices when he told on them to the police and, finally, he sued the state for the reimbursement of his reduced salary as if he were the one who fell victim to injustice. Sklenka is now held in general contempt because he violated both the morality of society and even the honour code of the mafia. If this gentleman is an exemplary case of judges currently being prosecuted in Slovakia, then it is pretty unlikely that this prosecution is used for politicization rather than a purge of the Slovak judiciary.

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[36] A. Valček, "Why Did the Police Move Against Judges? One of Them Collaborated," *The Slovak Spectator*, 11 March 2020, https://spectator.sme.sk/c/22355558/why-did-the-police-moved-against-judges-one-of-them-collaborated.html [accessed 4 Dec. 2021].

[37] V. Prušová, "Na úplatkoch zobral vyše 170-tisíc eur, teraz sa Kočnerov vybavovač Sklenka súdi o 14. sudcovský plat," *Denník N*, 4 Feb. 2021, https://dennikn.sk/2256478/na-uplatkoch-zobral-vyse-170-tisic-eur-teraz-sa-kocnerov-vybavovac-sklenka-sudi-o-14-sudcovsky-plat [accessed 4 Dec. 2021].

Conclusion

Maybe it is accurate to claim that state power is more likely to be abused in Eastern Europe than in the West, but, if this claim is true, it is true not only of cabinet and parliament but also of the judiciary. In a democracy ruled by law a society can only get rid of those corrupted officials occupying the first two branches of power, not the third one. This is why the absolutization of judicial independence in Eastern Europe might be part of the problem, not its solution. The lesson to be taken from the current situation in Slovakia is that the problem of a lack of judicial accountability is real, not fictitious and that it cannot be fixed by granting judges more autonomy. As Bobek with Kosař observed long before Kuciak's murder: "Politicians, lawyers, as well as the general public became increasingly frustrated with the judicial non-performance in the institutional context of judicial brotherhoods or even mafia-like structures declaring themselves to be untouchable due to their 'constitutionally guaranteed' institutional independence."[38]In this social context, it has gradually become apparent that high standards of judicial accountability are not attainable without subtle interferences into judicial independence from the part of other branches of power.

If an Eastern European politician wins an election with the promise of eradicating corruption from the judiciary, it is not necessarily a symptom of cheap populism, but a genuine social problem. Therefore, a bit of leniency is certainly appropriate when evaluating a proposed reform targeting corruption in the courts.[39] Yet, we cannot ignore the risk of the rule of law collapsing, which is greatly enhanced by ambitious judicial reforms. The courts, acting as the most important neutral arbiters in society, are particularly vulnerable to attempts at political subjugation. Independent judiciary jeopardizes the plans of would-be autocrats because its purpose is to detect and sanction

[38] M. Bobek, D. Kosař, "Global Solutions," p. 1289.

[39] Cf. Judgment of the ECHR (Third Section) in the case of *Xhoxhaj v. Albania*, Application no. 15227/19, decided on February 9, 2021. See especially paras. 96, 218, 272, 299, 391–393, 404, 412.

the abuses of state power. However, if neutral arbiters are occupied by people who are loyal to would-be autocrats, this leads to a significant change in the rules of the game. On the one hand, would-be autocrats are guaranteed impunity, and on the other hand, they can use nominally neutral arbitrators to effectively suppress political opposition.[40] This is the reason why, for example, judges who cannot be bent or intimidated by would-be autocrats may face various disciplinary or criminal proceedings or selective shortening of their terms of office. That is why courts in which these judges operate are gaining a more fragmented organizational structure, which is suddenly or gradually filled with "new blood". In this context, it is perhaps no surprise that the popular slogan of the fight against corruption in the courts may be a sophisticated vehicle for building an autocratic state. One of the most important tasks of the theory of constitutional law nowadays is, therefore, to distinguish reform aimed at cleansing the judiciary from that one aimed at politicizing it.

I am inclined to believe that the judicial reform currently implemented in Slovakia is part of the legitimate purging process which Slovak citizens have been longing for for decades. Although the reform increased the influence of the political authorities in the Judicial Council, in fact, this measure restored, not destroyed, the power equilibrium between judges and non-judges in the Council. In addition, the reform increased the retirement age of judges from 65 to 67 and, at the same time, it abolished a discretionary power to control which judges from those who have achieved the prescribed age will leave the judicial system. There are approximately twenty judges (out of 1,200) who are currently being investigated because they are suspected of corruption or related crimes. However, the law-enforcing agencies act by standard criminal procedures under the strict supervision of general criminal courts. Some of the accused judges have even admitted their guilt and have started to cooperate with the police. The investigating police officers and prosecutors might seem to be too zealous, sometimes

[40] S. Levitsky, D. Ziblatt, *How Democracies Die*, New York 2018, chapter "Subverting Democracy".

they seek unnecessary media attention, but, in the overall view, they do not seem to be politically biased. After all, the latest big fish they caught was the chief of the Slovak Information Service appointed by the new government.

Despite this favourable assessment of the Slovak judicial reform, it cannot be ruled out that some of the reform institutes will be misused in the future attempt to politicize the judiciary. A characteristic feature of Slovakia is its position between the West and the East not only in geographic but also in psychological terms. For example, a recent opinion poll has shown that only 49% of Slovaks are keen on liberal democracy, while as many as 38% are in favour of the authoritarian rule.[41] This sociological data cautions against excessive optimism. It may well happen that "society's changed mood", which today raises hopes of a reform of the justice system, may tomorrow bring about curbs on the constitutional rights of various minorities or the gradual concentration of power in the hands of an autocrat.

[41] https://www.globsec.org/wp-content/uploads/2020/09/Voices-of-Central-and-Eastern-Europe_Slovensko.pdf [accessed 4 Dec. 2021].

Jivko Draganov

National Identity and European Solidarity from a Bulgarian Perspective

Introduction

Respect for the national identity of the Member States is becoming increasingly important for the functioning of the European Union and its legal system. As the application of this principle also may result in limiting the principle of the supremacy of EU law, the question arises as to whether national identity can cause obstacles to the future development of the EU integration. The basis of EU integration is solidarity, and solidarity requires the readiness of the Member States in certain cases to give priority to the Union's interest over their own and even to bear a certain weight in the interests of other states and in the interests of the Union.

Bulgaria, as a Member State, is directly affected by the processes in the EU, and some events in recent years have put on the agenda in our country both the issue of solidarity within the Union and the problem of preserving national constitutional identity. Unsurprisingly, what is observed as attitudes in Bulgarian society is an expectation of solidarity when support is needed for our country, and a reluctance to show solidarity when it threatens the interests of our country. There are similar attitudes in other Member States. These attitudes reveal a growing need to seek a solution that prevents the principle of respect for national identity from ultimately becoming an obstacle to solidarity and that also contributes to the development of integration while respecting the identity of the Member States.

Solidarity in EU law

Solidarity is one of the foundations of the European Union. Solidarity is enshrined in the Schuman Declaration[1] and has found expression in the provisions of the Treaties as a fundamental value, as a goal and as a principle of EU law. The Founding Treaties which create the Union have incorporated the principle of solidarity as a fundamental principle to be taken into account in connection with the establishment and development of EU law. Solidarity is considered one of the fundamental ideas underlying the creation of the first European Community[2] and can be seen as an important prerequisite for building this new legal order, which is in the interest not only of states but also of their citizens.

Solidarity is not just about sharing common values and pursuing common interests, but it involves, where necessary, taking risks together, even with adverse consequences, in order to achieve the higher objectives set out in the Treaties. It is also regarded as a constitutional paradigm by some commentators.[3] The legal literature outlines various aspects of solidarity in EU law. According to some, these are solidarity between the Member States, solidarity between the Member States and citizens, and solidarity between generations.[4] According to others, solidarity is a generic, open concept. It gains specific content from the nature of its attachments and dependencies, or, more precisely,

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[1] "A united Europe was not achieved and we had war. Europe will not be made all at once, or according to a single plan: it will be formed through concrete measures which bring about a de facto solidarity" – The Schuman Declaration (1950).

[2] P. Hilpold, "Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with Particular Regard to Monetary Union," *Yearbook of European Law*, 2015, vol. 34, pp. 257–285, https://ssrn.com/abstract=2599725 or http://doi.org/10.2139/ssrn.2599725.

[3] M. Ross, "Solidarity – a New Constitutional Paradigm for the EU?" in M.G. Ross, Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union*, Oxford 2010, p. 25.

[4] I. Domurath, "The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach," *Journal of European Integration*, 2013, vol. 35(4), pp. 459–475.

the nature of the social and community relationship wherein solidarity is desired and demanded of individuals.[5]

The word "solidarity" is present in a number of articles of the Treaties. The Preamble to the Treaty on European Union already expresses the desire and intention of states to deepen solidarity between their peoples while respecting their history, their culture and their traditions. Article 3(3) provides that the Union shall promote solidarity between generations and solidarity between the Member States. A number of provisions of the TEU and of the Treaty on the Functioning of the European Union contain an explicit reference to this principle. According to Article 21(1) TEU, the EU's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights, and fundamental freedoms, respect for human dignity, the principles of equality and solidarity. Article 24(2) places the conduct of a common foreign and security policy on the basis of mutual political solidarity, and paragraph 3 requires Member States to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and to comply with the Union's action in this area. References to solidarity also contain the provision of Article 31 TEU; in Article 67(2) TFEU which introduces the principle of solidarity as a fundamental principle of the common policy on asylum, immigration and external border control; in Article 80; in Article 122(1); Article 194(1); as well as in the special Solidarity Clause established in Article 222 in connection with terrorist attacks or disasters.

Solidarity in EU law has its own legal meaning and its own content. They are determined by the interpretation of the rules of primary law, where the main role is played by the Court of Justice. Their specificities are closely linked to the supranational nature of EU law, which should

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[5] E.-W. Böckenförde, "Conditions for European Solidarity," in K. Michalski (ed.), *What Holds Europe Together?*, Budapest 2013, pp. 30–41, https://books.openedition.org/ceup/1784.

always strike a balance between the interests of the Member States and those of their citizens. Solidarity in the EU is not and should not be seen as a form of altruism. This kind of solidarity stands also at the basis of the social contract that unites individuals to a political community.[6] Solidarity in the EU is one of the intersections between the various interests affected by the functioning of the European Union. Therefore, the debatable financial assistance provided by the EU to the governments of the countries affected by the global financial crisis must be seen as a measure of common interest – both in the interests of the countries in question and to ensure financial stability in the Union, which is crucial for the other countries of the Eurozone, and also in the interest of the citizens of those countries.[7]

Solidarity in the EU should not be seen as equivalent to solidarity in international relations. Solidarity in international relations is based on the principle of reciprocity. Solidarity in EU law has its own content, which is determined by the peculiarities and characteristics of Union law. The EU is not just a union of states. The European Union is an integration community that has a supranational character, so solidarity should reflect these dimensions. Thus, it cannot be limited to reciprocity between countries, but must cover all aspects of integration.

The practice of the Court of Justice of the European Union in cases related to the principle of solidarity is not very rich. To date, the CJEU has ruled on specific issues regarding respect for solidarity in relation to the enforcement of legislative acts of the EU in a relatively small number of areas of Union law, such as free movement, economic policy, energy, asylum and migration. The CJEU does not find that all solidarity clauses embedded in the Treaty provisions give rise to legally enforceable obligations.[8]

In the field of free movement, the Court has held that Directive 2004/38 recognizes a certain degree of financial solidarity between

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[6] Hilpold, "Understanding Solidarity," p. 5.

[7] Ibid.

[8] D. Obradovic, *Cases C-643 and C-647/15: Enforcing solidarity in EU migration policy*, https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy (accessed 20 March 2021).

nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.[9] In the field of European Union policy on energy, the General Court stated that the "spirit of solidarity" referred to in Article 194(1) TFEU is the specific expression in this field of the general principle of solidarity between the Member States.[10] The court held that as regards its content, the principle of solidarity entails rights and obligations both for the European Union and for the Member States. On the one hand, the European Union is bound by an obligation of solidarity towards the Member States and, on the other hand, the Member States are bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it.[11] The Court also states that the principle of solidarity entails a general obligation on the part of the European Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders.[12] An important point of the judgment is the view expressed by the General Court that the application of the principle of solidarity does not necessarily mean that the Union's energy policy must in no way have a negative impact on a country's private interests in this field (para. 77). In its judgment, the General Court accepted respect for energy solidarity under Article 194(1) as a principle which gives rise to an obligation for the Union and which enjoys protection.

The principle of solidarity is protected by the CJEU in the field of asylum and immigration policy. The Court has held that in setting quotas for the distribution of immigrants, the Council was required to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which applies, under Article 80 TFEU, when the EU common policy

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[9] Judgment of the Court of 19 September 2013, Case C-140/12, *Pensionsversicherungsanstalt v Peter Brey*, para. 72, ECLI:EU:C:2013:565.

[10] Judgment of the General Court in Case T-883/16, para. 69, ECLI:EU:T:2019:567.

[11] Ibid., para. 70.

[12] Ibid., para. 72.

on asylum is implemented.[13] In recent CJEU cases on the migrant crisis, the Advocate General has identified solidarity as the lifeboat of the European project and emphasized that without an appropriate legal mechanism based on the principle of solidarity, inequalities between countries in sharing the burden of policy, may jeopardize the viability of European integration (para. 253 and 254 of the Opinion of the Advocate General in cases C-715/17, C-718/17 and C-719/17).[14]

Notwithstanding recent decisions, at this stage the practice of the CJEU cannot provide clear and unambiguous answers to the questions concerning the application of the principle of solidarity and, in particular, on what grounds and in what areas its protection can be relied upon.

National identity and the practice of the Bulgarian Constitutional Court

The principle of respect to national identities of the Member States was introduced into EU law by the Maastricht Treaty, but the Lisbon Treaty put it in a new light and emphasized its importance.[15] In addition to enshrining it in Article 4(2) from the TEU, where it is placed between the principle of conferred competence and the principle of sincere cooperation, the Charter of Fundamental Rights states that the Union shall contribute to the preservation and development of common values while respecting the diversity of the cultures and traditions of the peoples of Europe, as well as the national identities of the Member States and the organization of their public authorities at national,

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[13] Judgment of the Court in Joined Cases C-643/15 and C-647/15, para. 252, ECLI:EU:C:2017:631.

[14] ECLI:EU:C:2019:917.

[15] Theodore Konstadinides argues that this attribute of Article 4(2) TEU merely repackages the old free movement case law of the CJEU on legitimate interests – *The Constitutionalisation of National Identity in EU Law and Its Implications* (1 Sept. 2013), https://ssrn.com/abstract=2318972 or http://doi.org/10.2139/ssrn.2318972 (accessed 20 March 2021), p. 3.

regional and local levels. Its systematic place in the TEU, between the principles of conferred competence and sincere cooperation, makes it a central element in the functioning of EU law. Its inclusion in the Charter of Fundamental Rights complements its importance with a view to respecting the cultural identity of the Member States. Thus, the primary law underlines the significance of the national identity principle, opening new space for Member States to rely on it against EU legislation. As the Advocate General states in Case C-399/11,

> a Member State which considers that a provision of secondary law adversely affects its national identity may therefore challenge it on the basis of Article 4(2).[16]

In applying the principle of respect to national identity, it must be borne in mind that this is a concept of Union law and its interpretation can only be made by the Court of Justice of the EU, especially since it represents the possibility of incidental non-application of legislative norm of the Union law[17] and the corresponding exception from the principle of the supremacy of EU law. This article is not intended to analyze the content of the concept of national identity, but it should be noted that the CJEU case law so far does not allow us to outline its main elements with sufficient clarity.[18] There are two main aspects of the national identity that can be outlined, though: political and cultural. The political dimensions refer to the constitutional form of state and state government, including the organization of public authorities at

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[16] Opinion of Advocate General Bot delivered on 2 October 2012 in Case C-399/11, *Melloni v Ministerio Fiscal*, para. 139, ECLI:EU:C:2012:600.

[17] A. Semov, "Printsip na zachitane na nacionalnata identichnost na darzhava-chlenka na ES (Vazmozhnost za neprilagane po izklyuchenie na sayuzna pravna norma – izvodi za natsionalniya sadiya ot klyuchovata, no I nepredvidima praktika na Sada na ES)," in *Mezhdunarodna naychna konferentsiya. Role and Significance of International and Supranational Law in the Modern World. On the occasion of the 90th anniversary of Prof. Dr. Ivan Vladimirov*, Sofia 2018, p. 47.

[18] Ibid.

national, regional and local levels. The cultural aspects encompass traditions, history, culture and language diversity.[19]

Until now, the Bulgarian Constitutional Court has not had the opportunity to rule on issues directly affecting the national constitutional identity. Below we will consider a decision of the Constitutional Court, which sheds some light on its principled position on the issue. The possible non-application of a union legal norm that might be in contradiction with the Bulgarian constitutional identity is discussed in Decision 7 of 2018 of the Constitutional Court in constitutional case 7/2017.[20] The case was initiated at the request of the President of the Republic of Bulgaria for interpretation of certain provisions of the Constitution regarding mixed international treaties of the EU, such as the Comprehensive Economic and Trade Agreement.[21] Mixed agreements are international agreements between the European Union, the Member States and thirds states. These agreements include provisions in an area of exclusive competence of the Union and also other issues that require ratification from the Member States.

In the said decision, the Constitutional Court interprets the provision of Article 4(3) of the Constitution, which is the founding principle for the application of the Union law in Bulgaria. According to that provision, "the Republic of Bulgaria shall participate in the building and development of the European Union." The Constitutional Court states that the norm in question is a framework rule that introduces the European dimension in the activity of the state, and that the EU development process is an expression of the competence already granted to the Union and the provision of paragraph 3, Article 4 of the Constitution is "a new basic principle, one of the fundamental principles of the established constitutional order of the country". In the view of the Constitutional Court,

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[19] Ibid., p. 42.

[20] Decision of the Constitutional Court No. 7 of 17 April 2018 and Case No. 7 of 2017.

[21] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.1.2017, pp. 23–1079.

> EU law and national law together form the space in which public authorities simultaneously participate in the creation of Union law and develop the national legal order while respecting the values and basic principles of the EU and national interests. It is also a framework in which the transfer of powers takes place, which is not an unlimited process.

The restriction of the transfer of powers from our country to the EU is based on the placement in the considered norm of an emphasis on the name "Republic of Bulgaria". The Court comes to the conclusion that by emphasizing this name the constitutional legislator stresses that the constitutional identity is preserved at the participation of the Bulgarian state in the building and development of the EU. Considering the content of the said constitutional case, it becomes clear that the Constitutional Court includes in the content of the national constitutional identity the political and state structural aspects, which are enshrined in the Constitution of the country. In addition, the decision of the Constitutional Court clearly states the principle of respect of national identity as a possible limit to the principle of the supremacy of EU law.

Another decision of the Constitutional Court,[22] which is not on issues related to the application of EU law, expressed the opinion of a member of the Court concerning some aspects of national identity. In this case, the Constitutional Court was referred to the issue of the possible contradiction of the Council of Europe Convention on Prevention and Combating Violence against Women and Domestic Violence (Istanbul Convention) with the Constitution of the country, in connection with the ratification of the Convention by Bulgaria. In the opinion of one of the members of the Constitutional Court, arguments were presented for the existence of a conflict between the Convention and the political and cultural aspects of the Bulgarian constitutional identity. His considerations for this are that the concepts contained in the Convention ("gender", "gender identity") are extraneous to the

[22] Decision of the Constitutional Court No. 13 of 27 July 2018, Case No. 3 of 2018.

Bulgarian constitutional and legal system, as well as that they do not have a clear, precise and generally accepted legal content and, therefore, would create dangerous consequences for the Bulgarian legal system. According to the judge,

> [t]he rule of law in the formal sense (the state of legal certainty) requires that the content of legal concepts be clear and unambiguous. The order of legal certainty and predictability precludes the existence of two parallel and mutually exclusive notions of "gender". Ratification of the Convention would lead to the introduction into the national legal order of a concept contrary to the constitutionally established one.

Despite the scarce practice of the Constitutional Court on issues related to the interpretation of the concept of the national constitutional identity, the two decisions considered above clear the position of the Constitutional Court to uphold the constitutional identity of the state, including as a limit of the application of union legal norms that would affect it in a manner inadmissible by the Constitution, as well as when admitting the effect of international legal acts on the territory of the country.

European solidarity and national identity in the context of the refugee crisis in Bulgaria in the years 2015–2016

So far, we have looked at some of the most important and essential legal dimensions of the principles of solidarity and respect to national identity. In the lines below we will analyze the notion of the application of these principles in the conditions of the migrant crisis of 2015–2016. The migrant crisis provided both political and cultural considerations of the Member States and their citizens to challenge certain measures of the Union claiming that such measures affect their national identity.

At the same time, the migrant crisis has raised the question of the need for more solidarity between the Member States. The conflict between the requirement of more solidarity and respect to national identity has led to the refusal of individual states to comply with acts of Union law. This contradiction has created tensions between the countries and revealed the connection between respect to national identity and solidarity in the EU. This connection will be illustrated by the results of a nationally representative public opinion poll in Bulgaria conducted during the migrant crisis and by some rulings of the Court of Justice on the refusal of individual states to comply with acts of Union law.

Bulgaria's geographical location at the entrance of Europe placed our state among those countries that were directly affected by the influx of refugees to the EU in 2015 and 2016. Bulgaria, as an external border of the EU with the Republic of Turkey was one of the possible routes for the refugees to the territory of the Union. According to the authors of a survey of citizens'attitudes towards refugees in Bulgaria,[23] our country is considered by refugees mostly as a transit corridor and is not the main route of refugee flows, which pass from Greece to the Republic of North Macedonia and Serbia and thence to Central Europe. Despite the fact that the enormous pressure was borne by Greece and Italy, Bulgaria also experienced the severity of the crisis. The number of persons seeking refugee protection in 2015 was 20,391, and in 2016 – 19,418.[24] The flow of refugees necessitated the construction of accommodation centers and led to tensions in some of the smaller settlements where these centers were established.

The survey of public opinion attitudes during this period revealed the expectations of Bulgarian citizens for solidarity on the part of the Union, but also reported attitudes against the relocation of refugees on our territory due to fears for the national security in the country.

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[23] L. Kyuchukov, *The Impact of the Refugee Crisis on Bulgarian Society and Bulgarian Politics: Fears but No Hatred*, Friedrich Ebert Stiftung, April 2016, http://library.fes.de/pdf-files/bueros/sofia/12571.pdf (accessed 20 March 2021).

[24] According to data of the State Agency for Refugees at the Council of Ministers, https://aref.government.bg/sites/default/files/uploads/docs/2019-04/Charts-website-bg_12.pdf.

One of the tasks of the study is to analyze Bulgaria's policy on the refugee problem, the measures taken by the Bulgarian authorities and the effect of pan-European approaches and solutions on the country's national security risks.[25] The results largely reflect public attitudes, which are directly related, on the one hand, to the solidarity approach within the Union, and on the other, to the possible negative impact over the elements of the national constitutional identity, both in political and cultural aspects.

Unsurprisingly as a country that is the EU's external border with Turkey, and which directly bears the brunt of the refugee wave, the majority of the country's population (57% of the adult population) share the view that a solution to the refugee crisis must be sought for all EU Member States. This shows the expectation of Bulgarian citizens for solidarity in dealing with the problem on the part of all Member States of the Union. At the same time, more than half (54%) are of the opinion that Bulgaria should not show solidarity with the EU decision and accept its due quota of refugees that has to be relocated from Greece and Italy. This shows that the majority supports a common solution with which all countries should participate in solving the crisis, which, however, does not involve a proportional burden on our part. The fears of affecting the order and the national security in the state and other elements of our constitutional identity are clearly expressed. Sixty percent of respondents believe that refugees pose a threat to national security, and 51% say it is unacceptable for them to have a refugee as a colleague or neighbor. The most pronounced attitude is that strict control is needed and the creation of a system that will allow the selection of refugees admitted to the EU outside the Union (81%).

The study shows deep concern about the consequences of the refugee crisis in Bulgaria, which is associated with the possible impact on public order and public security, as well as some value aspects of Bulgaria's constitutional identity (language, religion, way of life and traditions, etc.). These attitudes are reflected in two conflicting views: one for more solidarity within the EU and between the Member States,

[25] Ibid., p. 5.

and another for the country's non-participation in the adoption of the relevant refugee quota.

Although not brought to the fore, the contradiction between the application of the principle of solidarity in the distribution of migrants and the principle of respect to national identity has also manifested itself in the case law of the Court of Justice. With the adoption of Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece[26] and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece,[27] the EU has created an obligation for the Member States to accept certain refugee quotas on their territory. Following the failure of some of the states to challenge the Decisions before the CJEU, the Commission brought an action for infringement against those States[28] for failing to fulfil their obligations under the Decisions. Some of the arguments of the states in question for non-implementation of the Council Decisions were based on Article 4(2) from the TEU, as a provision which gives them an exclusive competence for the maintenance of public order and the protection of public security on their territory.

The application of the principle of solidarity by the EU in dealing with the migrant crisis is based on its explicit enshrinement in Article 80 TFEU on the Union's asylum and immigration policies. In its judgment in the above-mentioned cases, the CJEU rejected the defendants' statements that Article 4(2) had been affected. The Court states that

> there is nothing to indicate that effectively safeguarding the essential State functions to which the latter provision refers, such as that of protecting national security, could not be

[26] OJ L 239, 15.9.2015, pp. 146–156. The Decision provided for a temporary and exceptional relocation mechanism from Italy and Greece to other Member States of persons in clear need of international protection.

[27] OJ L 248, 24.9.2015, pp. 80–94.

[28] Joint cases C-715/17, C-718/17, and C-719/17 European Commission against Poland, the Czech Republic and Hungary.

> carried out other than by disapplying Decisions 2015/1523 and 2015/1601.[29]

In its judgment, the Court adopted the reasons set out in paragraph 226 of the Opinion of the Advocate General, in which she cited the Judgment of the Court of Justice in Case C-51/08[30] European Commission v. Luxembourg, according to which

> while the preservation of the national identities of the Member States is a legitimate aim respected by the legal order of the European Union, as is indeed acknowledged by Article 4(2) TEU, the interest pleaded by the Grand Duchy can, however, be effectively safeguarded otherwise than by a general exclusion of nationals of the other Member States.

In paragraph 227 of the Advocate's opinion,[31] we read that

> for the same reason, Article 4(2) TEU cannot provide grounds for simply refusing to relocate applicants under the Relocation Decisions. The Member States' legitimate interest in preserving social and cultural cohesion may be safeguarded effectively by other and less restrictive means than a unilateral and complete refusal to fulfil their obligations under EU law.

In the present case, the Court does not deny the potential possibility of affecting the principle of respect for national identity by the application of the principle of solidarity, but rather considers inadmissible by European Union law the measures taken by States in order to protect their national identity by refusing to comply with the decisions of the

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[29] Judgment of the Court in Joined Cases C-715/17, C-718/17, and C-719/17, ECLI:EU:C:2020:25, para. 170.

[30] Judgment of the Court (Grand Chamber) of May 24, 2011 in Case C-51/08, para. 124, EU:C:2011:336.

[31] Opinion of Advocate General Sharpston of 31 October 2019 in Case C-715/17, ECLI:EU:C:2019:917.

Council. The Court considers that the mechanism provided for in the decisions

> left the Member States of relocation genuine opportunities for protecting their interests relating to public order and internal security in the examination of the individual situation of each applicant for international protection whose relocation was proposed (para. 171).

We may think that if the Court's discovery was that the mechanism provided for in the decisions did not provide genuine opportunities for the states for protecting their interests relating to public order, then to the principle of respect to national identity should have been given priority over the principle of solidarity.

Assuming that in a hypothesis, as the one in the case above, the examination of the individual situation of each applicant would contribute to better opportunities for states to protect their interests in relation to public order and internal security, we may have different understandings when the potential negative effect on national identity as a result of accession of migrants is considered by the society to be a danger of significantly violating cultural and traditional values in these countries. In any case, the results of the public opinion poll in Bulgaria show fears in this regard. These fears, in turn, create attitudes for closure and denial of solidarity.

Solidarity as an expression of union identity

In addition to the migrant crisis, at least two other very important events for the European Union can be mentioned, in which we can witness some form of refusal of solidarity. These are: the financial crisis of 2008 and Brexit. These events also demonstrate that deepening solidarity in the EU cannot be achieved without finding a solution to

the question of the relationship between solidarity and national identity. The principle of solidarity in the EU is closely linked to the principle of sincere cooperation, and the principle of respect to national identity is a counterpoint to the sincere cooperation. If the respect to the national identity is seen as an obstacle for more solidarity, then it is difficult to expect a development towards the deepening of solidarity in the Union. Even the opposite. Judging by the attitudes of the Bulgarian society during the migrant crisis, they would rather reveal a refusal of solidarity in favor of preserving the national identity.

A very similar effect was seen in another recent crisis for the EU – the withdrawal of Britain. In Britain, one of the main arguments for Brexit was the burden on the social security system because of the free movement of people. A burden which is determined by solidarity or even by treating as British citizens persons who are not only not such, but also who do not exercise purely economic rights – not working migrants, but migrants who have access to insurance funds under conditions of solidarity. The reluctance of British citizens to maintain this situation in the future was so great that even the undoubted benefits of the other three freedoms of movement in the internal market – goods, services and capital – seemed insufficient to justify staying in the Union. In the end, the British were not against the benefits, but they were also reluctant to take on the negative effects of their participation in the EU on their country, which is also an expression of a refusal of solidarity. In the same way, Bulgarian citizens are not against the benefits of EU acts in support of our country to deal with the migrant crisis, but are against the adoption of a quota of migrants.

At this stage of integration, it is clear that the application of the principle of solidarity by the Court of Justice is limited, and that it is difficult to find support in understanding that Union law creates a general obligation of solidarity to the Member States. But there is no denying what Advocate General Sharpston has said, that "solidarity cannot be based on penny-pinching cost-benefit analysis along the lines," and that

> such self-centredness is a betrayal of the founding fathers' vision for a peaceful and prosperous continent. It is the

> antithesis of being a loyal Member State and being worthy, as an individual, of shared European citizenship.[32]

The principle of respect for national identity is a strong card in the hands of the Member States, which can be used in various ways, including as a waiver of solidarity. This phenomenon would be difficult to overcome if it relied solely on the CJEU and EU law enforcement mechanisms, as both are related to the way citizens of the Member States perceive the Union. Indeed, EU law enforcement mechanisms can solve a particular problem, but they are not in themselves capable of ensuring a peaceful and harmonious coexistence between solidarity and national identity.

The respect of national identity refers to the preservation of the most important political and cultural characteristics that distinguish the peoples of the Member States from one another. While solidarity in the EU requires countries to bear the negative consequences, these may, to a greater or lesser extent, affect or threaten their national identity. The negative consequences, the burden of sharing a measure is always undesirable and implies rejection, not cooperation. It is not surprising that citizens perceive negatively any union measure that may have an adverse effect on their country. For them, there is a clearly recognizable national but not European identity. And the manifestation of solidarity is, in fact, mostly an expression of a union identity.

Solidarity means respecting the political and cultural foundations of the European Union, including by taking on an undesirable but necessary burden in favor of the Union. The processes of democratization of the Union and the deepening of integration lead to the gradual building of a union identity, but this identity can be hardly distinguished as a separate concept and often for the citizens of the Member States, integration is nothing more than bureaucratization of processes and bringing them to a higher level. Moreover, the union identity is often perceived as excluding the national identity, which puts it in a weaker

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[32] Opinion of Advocate General Eleanor Sharpston, delivered on 31 October 2019 in joined Cases C-715/17, C-718/17 and C-719/17, para. 254.

position and does not allow it to be formed and developed. A stable and secure basis for more solidarity could not be provided by legal mechanisms. As Peter L. Lindseth points out,

> [i]n a system where democratic and constitutional legitimacy remains fundamentally national, but significant normative power is increasingly supranationalized (heretofore on a "pre-commitment" basis), it must be recognized that there are limits to European solidarity and hence integration.[33]

Perhaps instead of following the path of opposing solidarity and national identity, one can seek to build strong union identity based on solidarity. As it is pointed out by the Constitutional Court of Poland,

> [t]he idea of confirming one's national identity in solidarity with other nations, and not against them, constitutes the main axiological basis of the European Union.[34]

Conclusion

The application of the principle of respect to national identity enables the Member States to challenge the Union law in order to prevent and to protect the fundamental elements of the sovereign state from being affected. Currently there is not enough clarity on the concept of national identity as principle in EU law. The national identity comprises both political and cultural elements, that may find a different expression. The CJEU has the task, in cooperation with national courts,

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[33] P.L. Lindseth, "European Solidarity and National Identity: An American Perspective", in Ch. Calliess (ed.), *In Vielfalt geeint: Wieviel europäische Solidarität? Wieviel nationale Identität?*, Tübingen 2013, https://ssrn.com/abstract=2217102.

[34] Judgment of the Constitutional Tribunal of 4 November 2010, ref. no. K 32/09, http://www.europeanrights.eu/public/sentenze/Polonia-24novembre2010.pdf.

to define the content of the concept of national identity in EU law. National identity is an instrument for the governments of the Member States to refuse to fulfil obligations arising from Union law for them because their identity is affected. In a situation where a Member State has to bear the burden of a Union measure, national identity may serve as an option for a Member State to seek to avoid that burden.

The attitudes of EU citizens in such a situation are no different. In the midst of the migrant crisis, under the threat of a large number of refugees entering the country, Bulgarian citizens believe that our country should not implement the EU decision and accept refugees in the quotas set by the EU. At the same time, society acknowledges that the EU must support countries in tackling the problem. This shows that Bulgarian citizens also see solidarity as a necessity when seeking support, but not as a commitment when it comes to bearing the burden of EU participation. The same can be said to a large extent in the formation of attitudes in British society towards withdrawing from the Union. The threat that British citizens saw in this situation was closely related to the protection of their national identity. Thus, it seems that national identity acts as a limit of solidarity, and that the manifestation of solidarity threatens the principle of respect to national identity to some extent.

Undoubtedly, solidarity is at the heart of integration. Undoubtedly, the EU has also reached this stage of its development, in which the question is increasingly being asked: How much more solidarity does the EU need? Solidarity in the Union is seen as a renunciation of national identity. And another solution is possible – the construction of Union identity, which should not compete, should not exclude, but should be built and developed in parallel with the national identity. Solidarity can be the foundation on which Union identity can be developed. Instead of seeking and creating legal mechanisms for normative obligations to secure the application of the principle of solidarity, one can embark on the path of forming an understanding of Union identity based on solidarity as a fundamental value and principle of the EU. If this does not happen then the principle of respect to national identity will continue to be opposed to the obligation of solidarity, and so one will be

a limit to the other. Conversely, in establishing solidarity as the basis of the Union's identity, it will be possible to seek their coexistence for the benefit of EU citizens, the Member States and the Union.

Stephen Baskerville

The Family and Sexuality in European Axiological Conflict and the Rule of Law – Perspectives from Central Europe

Issues of the family and sexuality have come to dominate political agendas worldwide. They certainly exert a major impact on the politics of the European Union (EU), though this impact has seldom been studied in a detached manner.[1] In fact, in no realm of life has the tension between the traditional religious values of many Member States and what are presented as "European values" been more acute or salient. It is no exaggeration to say that sex and family issues are on the cutting edge of axiological conflict. This is true within individual states but especially across the region as a whole, because sexual politics is a relatively recent import into the politics of Central and Eastern Europe and only then because it has been introduced from outside, whereupon it often meets with resistance.[2]

Moreover, the impact has been especially strong on the law, to the point of radically redefining its purpose and meaning. Legal innovations introduced with policies governing family and sexuality carry

[1] M. Golubiewski, *Europe's Social Agenda: Why is the European Union Regulating Morality?*, New York 2008, https://c-fam.org/wp-content/uploads/Europe-Social-Agenda-7.pdf (accessed 6 Dec. 2021).

[2] S. Baskerville, "Poland's 'Constitutional Crisis': Less and More Serious Than It Appears," *Providence*, 13 January 2016, https://providencemag.com/2016/01/polands-constitutional-crisis-less-and-more-serious-than-it-appears; or the Polish version: "Polski kryzys konstytucyjny – mniej i bardziej poważny niż się wydaje," *Arcana*, May 2016.

major new implications for what we mean when we use a phrase like "rule of law" in the EU context.[3]

On the one hand, under the principle of subsidiarity, the EU has no competence in fields like family policy and family law, which are categorically left to the prerogative of Member countries.[4] Yet it effectively claims jurisdiction in these areas through matters such as discrimination and human rights, when they involve women, children, homosexuals, and other groups defined by sexuality and the family. Though discrimination policies were originally conceived to address minorities defined in terms of ethnicity and race (and later, categories such as disabilities), extending them to groups defined (often self-defined) sexually, has inevitably extended the processes of law and policy formulation into spheres of life from which it was previously excluded and sometimes deep into private life.

It is for this reason that subsidiarity is often ill-defined and "practically ineffectual on social policy matters."[5]

Two major innovative measures illustrate and epitomize the trends. Both have provoked sharp controversy, both substantively and procedurally. That is, they arouse opposition because of both the social policy matters at issue and for the radical legal innovations they would bring about. One involves law governing "discrimination" and the other "human rights": the Equal Treatment Directive and the Istanbul Convention.

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[3] J. Banasiuk, T. Zych (eds.), *State of Democracy, Human Rights, and the Rule of Law in Poland: Recent Developments*, Warsaw 2016.

[4] For legal analyses of some topics discussed in this paper that argues for their inconsistency with these EU principles, see the "Remarks to the Announced Legislative Initiative of the European Commission on Gender-Based Violence" (Ares(2020)7664101), *Ordo Iuris*, 13 January 2021; and A. Portaru, "A Critical Approach to the Equal Treatment Directive," *Romanian Review of European Law*, 2016, no. 2, pp. 77–89.

[5] Golubiewski, *Europe's Social Agenda*, 52.

The Equal Treatment Directive

The proposed Directive on Equal Treatment (ETD), pending since 2008 at the Council of the European Union (Council of Ministers) promises to prohibit discrimination in the provision of goods and services based on "sexual orientation", as well as religion, age, and disability. (These categories are already protected in employment.)

The ETD involves a number of dramatic and radical innovations, not only in family policy but also in the very nature of law itself. If enacted, it would govern the behavior of not only government bodies and businesses, but also private citizens as they interact with other people who might claim discrimination based on "sexual orientation" or "age". It would extend dramatically the presence and power of the law into the private lives of ordinary citizens. In fact, so radical are its departures from standard legal principles, including discarding due-process protections for the innocent, that its provisions could be considered diametrical opposite to the rule of law as generally understood.

All sides agree that the ETD raises fundamental axiological issues. "The principle of equal treatment is essential to the process of European integration," writes one advocate. "It is one of the main principles – if not *the* main principle – driving this process forward." Others, citing Article 2 of the Treaty of the European Union on the "*values* of respect for human dignity, freedom, democracy, equality, *the rule of law* and respect for *human rights*," insist that "[a]dopting the Equal Treatment Directive would make the EU a union of *values* – *values* aligned with universal *human rights*."[6]

But the ETD changes significantly in what we mean by these values and what most people understand when they hear these terms. What

[6] E. Muir, "The Essence of the Fundamental Right to Equal Treatment: Back to the Origins," *German Law Journal*, 2019, no. 20, p. 817; B. Van Hout, T. Šimonović Einwalter, "Time to Adopt the Equal Treatment Directive," *Euractive*, 25 June 2018, https://www.euractiv.com/section/justice-home-affairs/opinion/time-to-adopt-the-equal-treatment-directive (emphasis added, accessed 6 Dec. 2021).

were previously considered private matters could be deemed "discriminatory" and punished by law.

In fact, one of its major departures from standard legislative norms is the use of extremely vague language to describe infractions. Long-accepted legal practice requires that the law be precise, so that people can know if their actions will transgress it and incur punishment, and adjudicators can know if someone should be accused and punished, for what precisely, and how severely. Law is traditionally required to provide "certainty (the law must give anyone subject to it the ability to regulate their conduct), foreseeability (reasonable anticipation of the possible results of an action), and predictability (like cases are treated alike)".[7]

Yet the ETD uses language that is general and sweeping. One criterion for discrimination is labelled as "harassment", which pertains to private individuals, and in turn is defined in extremely vague language: "including *unwanted* verbal, physical, or *other non-verbal conduct*. Such conduct may be deemed harassment in the meaning of this Directive when it is either repeated or otherwise *so serious* in nature that it has the purpose or effect of violating the *dignity* of a person and of creating an *intimidating*, *hostile*, *degrading*, *humiliating* or *offensive* environment" (emphasis added). Terms such as "unwanted", "other non-verbal conduct", "serious", "violating the dignity", and "offensive" can mean anything and could be stretched to turn what many would regard as everyday private comportment and interaction into legal offenses. Almost anything a person does or says, that someone else might not like, could be made to fit into these descriptions, making it possible for accusers or officials to turn people into offenders at will.

Discrimination is also said to occur when "a person is *treated less favourably*, or harassed, because of an association which that person has with persons of a particular religion or belief, disability, age or sexual orientation." It is not clear what kind of "treatment" is "less favorable" and punishable by law or what kind of "association" or "belief" is required to make it so.

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[7] Portaru, "A Critical Approach," 82.

By using terms that describe people's everyday behavior and interaction and private speech to define "discrimination" and legally prohibited "treatment", the rationale of preventing discrimination could easily be used to punish the speech, opinions, beliefs, and even the private conversations of private individuals.

An even more serious departure from accepted legal norms is that the ETD contains an explicit presumption of guilt. Accusers are not required to prove their accusations against their alleged discriminators. Instead, the burden falls on the accused – who may be private citizens minding their own business – to prove their innocence. Article 8 states: "it shall be for the respondent [the accused] to prove that there has been no breach of the prohibition of discrimination". This overturns the most elementary principles of legal justice.

In fact, the innovation is even more extreme than a presumption of guilt, because it amounts to nothing less than guilt by accusation. The ETD is formulated so that an *accusation in itself* effectively constitutes guilt. This is because discrimination and harassment are defined – and guilt is determined – entirely by the subject feelings and emotions of the accuser. An accuser automatically becomes a "victim" of discrimination and harassment merely by being "offended" by someone else's actions, words, or beliefs – a state of mind expressed and effectively proven by the accusation itself.

Likewise, with "discrimination" defined as being treated by someone "less favorably" (less favorably than what?), the determination of whether the accuser has been treated less favorably is left to the accuser. "Throughout the entire text of the directive, 'less favorable treatment' refers to a subjective perception of offense or the violation of one's dignity," writes Sophia Kuby of European Dignity Watch.

> There are no objective criteria given in order to define which behavior is deemed to be discriminatory and which is not. Anybody can claim to having been treated in a "less

> favorable" or "offensive" way, in large part subjective states, which could be automatically conceded as being true.[8]

The accuser determines the guilt of the accused simply by his or her state of mind. Kuby, explains:

> [W]hoever is accused of "discrimination" must prove his innocence, whereas any person claiming to have been a victim of discrimination is automatically presumed to be one. The reversal of proof puts the defendant into a trap from which there is no escape: it is impossible for him to disprove that something has had the effect of "intimidating" or "offending" the victim (because that solely depends on the victim's subjective perception). At the same time, it is also hardly possible for the defendant to disprove the Directive's legal assumption that he acted the way he did solely out of a prejudice against the plaintiff's religion, belief, disability or sexual orientation.[9]

Because "offending" someone constitutes a legal transgression, all accusations are automatically true. As William Wagner of Thomas Cooley Law School has observed, it is impossible to defend against an accusation of offending someone; one is guilty by being accused.[10]

Moreover, an even more vague standard than this "direct discrimination" is possible:

> Indirect discrimination shall be taken to occur where a rule or a practice which seems neutral, has a disadvantageous

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[8] S. Kuby, "'Principle of Equality' to Overrule Fundamental Freedoms," *European Dignity Watch*, 16 October 2010, quoted in S. Baskerville, *The Politics of Sex: The Sexual Revolution, Civil Liberties, and the Growth of Governmental Power*, Kettering 2017, pp. 243–247.

[9] Kuby, "'Principle of Equality'."

[10] Video on Christian Concern internet site: https://archive.christianconcern.com/our-concerns/religious-freedom/video-eu-directive-equal-treatment-professor-wagner-explains-concerns (accessed 21 Dec. 2021).

> impact upon a person or group of persons having a specific characteristic. The intention to discriminate is explicitly not relevant.[11]

The Directive is thus highly subjective and vague in what it prohibits, making it impossible to know if one has transgressed, and leaving enormous latitude to adjudicators to decide if an action is an infraction and a person is a violator. Subjective and even arbitrary judgments of adjudicators could determine if a person has broken the law and is subject to punishment and how severely. "The experience with already existing 'anti-discrimination' measures shows that these concepts, which at times refer even to completely subjective sentiments, perceptions, and states of mind, lead to dangerous legal uncertainties: nobody can ever be sure not to be found guilty of infringing the law," writes Kuby. "Mr. A cannot know what Mr. B perceives to be intimidating, hostile, humiliating, or offensive. The question of whether something constitutes harassment therefore largely depends on the subjective perception of the 'victim', not on any verifiable and objective criteria."

> The Directive is thus drafted in a way that everybody could be found guilty of "discrimination" at any time.... The creation of general legal uncertainty that puts everybody under threat of legal persecution.[12]

This vagary turns the law into a weapon that can be used by anyone who is able or willing to be the first to take advantage of it. According to Christian Concern, "[t]he ambiguous language of the harassment provision fails to provide the public with adequate notice of the kind of conduct that is prohibited by the law."[13] Everyone becomes guilty from the moment they are accused. Justice itself is eliminated from the

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[11] Kuby, "'Principle of Equality'."

[12] Ibid.

[13] Christian Concern for our Nation & The Christian Legal Centre, *Information and Action Pack on the European Union "Equal Treatment" Directive*, London 2009, https://archive.christianconcern.com/sites/default/files/docs/CCFON_

law, leaving it simply a weapon in the competition for political power, a bludgeon with no moral or ethical or objective grounding that can be wielded by whoever has better access to the legal machinery for use against anyone they choose.

The ETD also encourages accusations by offering rich financial rewards to accusers and inflicting crushing financial penalties on the accused. Anyone claiming discrimination based on "sexual orientation" can sue and collect from the alleged discriminator, with a guilty verdict virtually assured. The law becomes a shakedown, because the accuser may then demand to be paid virtually any amount of money from the accused. Being offended brings lucrative payoffs, and being offensive (in the accuser's opinion) means ruin. This obviously creates financial incentives to bring as many accusations as possible, in turn creating a windfall for lawyers who can then create pressure to reward accusers with generous payoffs. According to one proposed amendment, accusers would have their legal fees paid, but the accused would be required to pay for their own defense.

Since failure or inability to pay can mean incarceration, criminalization is the next step in this ostensibly "civil" process. The law becomes an extortion racket, in which hurt feelings can be avenged with plunder and prison.

The Directive also creates new cadres of civil servants who can rationalize and finance their own existence by encouraging accusations ("promotion of equal treatment"). The ETD requires governments to create new functionaries to provide "independent assistance to [alleged?] victims of discrimination in pursuing their complaints". These officials could mount legal cases in the names of the alleged victims and assume (and then recoup) the legal costs. No equivalent officials are created to assist or protect the accused. The Directive also allows private groups to launch legal actions in the name of alleged third-party victims and share in the rewards. "Any NGO, who has the necessary financial power, could henceforth accuse alleged offenders

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%26_CLC_Information_%26_Action_Pack_on_the_EU_Equal_Treatment_Directive_FINAL.pdf (accessed 21 Dec. 2021), p. 5.

and appear in court as complainant although the presumed discriminatory behavior is not directly related to them," says Kuby. Because such groups could then figure their own "costs" into the inevitable award, this is a risk-free invitation to loot anyone whose beliefs are designated as "offensive". "This possibility of litigating at no cost and no risk will, in conjunction with the reversal of the burden of proof, further encourage frivolous [but lucrative] litigation," says Kuby with some understatement.[14]

The Directive also penalizes discrimination based on "age" but provides no guidelines for what this means. Because it can include children, it can probably be used against parents. Though children are beneath the age when they can be bound by contracts, it is likely that, under this measure, they could sue their parents for "discrimination" and "harassment" and certainly for being "treated less favorably".

Likewise, and with breathtaking irony, the measure also purports to protect "religious belief", but this is inverted to mean not freedom to express one's beliefs but freedom to bring legal proceedings against others for expressing their beliefs – again, simply by claiming that one is "offended" by them. As Kuby explains, "explanation of one's religious tenets to a person of another faith could also be interpreted as harassment". Religious faith is not a belief to be exercised, expressed, and defended from state interference but a claim to wield government power to silence other religions. Ironically, this intertwines religion and government rather than separating them. A measure advertised to protect religious freedom will have the effect of curtailing it. As noted by Andrea Williams of Christian Concern, "[r]ather than protecting people against harassment, the harassment provisions become nothing less than a licence to harass those who disagree with one's views."[15]

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[14] Ibid; see also P. Coleman, R. Kiska, "The Proposed EU 'Equal Treatment' Directive," *International Journal for Religious Freedom*, 2012, vol. 5(1).

[15] Christian Concern for our Nation & The Christian Legal Centre, *Christian Concern For Our Nation and the Christian Legal Centre Response to the Government Equalities Office UK Consultation on the European Commission's Proposal for an Equal Treatment Directive*, London 2009, https://archive.christianconcern.com/sites/default/files/docs/CCFON_and_CLC_

In effect, "discrimination" and "harassment" include simply expressing one's religious or other beliefs.

Finally, in what amounts to little less than a *coup d'etat*, comparable in breadth to the Nazi Enabling Law, the proposed Article 13 provides that all existing law deemed to be contrary to the sweeping and subjective "principle of equal treatment" are summarily repealed: "any laws, regulations and administrative provisions contrary to the principle of equal treatment are immediately abolished."

It is difficult to imagine a more draconian prescription for suppressing both freedom of expression and procedural safeguards and ensconcing in power and enriching those most intent on doing so.

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None of this came out of the blue. Similar legal innovations have already been implemented elsewhere, and the occasions for most of them likewise involved sexual and family politics. Many of the new principles seem to originate in the Anglo-American system of "no-fault" justice, specifically that governing divorce, and others obviously originate in the law governing sexual harassment.

With no-fault divorce, legal proceedings can be launched without any legally recognized transgression. Once a proceeding begins, perfectly legal everyday behavior can be cited as evidence for a judgment against a "respondent" or "defendant." A plaintiff is not required to show any actual legal infraction, and his/her subjective feelings replace concrete evidence of legal wrongdoing. A presumption of guilt likewise exists, first, in the fact that every case has a predetermined outcome, and second, if accusations of domestic violence are brought. Such accusations are seldom charged and adjudicated as crimes but instead as subjective infractions, in which an accuser's state of mind – whether he/she feels "fear" – is likewise decisive. Punishments too are usually automatic, without trial, to the point where acquittal is seldom

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Response_to_GEO_Consultation_on_the_EU_Equal_Treatment_Directive_24_July_2009.pdf (accessed 21 Dec. 2021), p. 5.

a possibility.[16] Here too, a plaintiff can reap rich financial rewards from a defendant who has committed no legal infraction, and inability to pay likewise turns a "civil" matter into a criminal one, though often without trial.[17]

Existing law on sexual harassment is likewise well known to be vague, to blur distinctions between personal behavior and legal transgression, and to determine guilt by the subjective perceptions of the accuser rather than the objective deeds of the accused. According to American harassment law, "[i]f the listener takes offense to sexually related speech for any reason, no matter how irrationally or unreasonably, the speaker may be punished."[18] Here too, the crime is "offending" someone, and the accused is guilty by virtue of being accused.

The Istanbul Convention and related measures

Riding a wave of sexual activism, the European Union proposes to endorse the Istanbul Convention, an initiative of the Council of Europe, along with other measures promising to prevent "violence against women".[19] Yet the Convention is not designed to address violent crime.

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[16] See the next section on the Istanbul Convention.

[17] S. Baskerville, *Taken Into Custody: The War Against Fathers, Marriage, and the Family*, Nashville 2007.

[18] G. Lukianoff, "Federal Government Mandates Unconstitutional Speech Codes at Colleges and Universities Nationwide," *FIRE*, 17 May 2013, http://thefire.org/article/15767.html (accessed 21 Dec. 2021).

[19] As of this writing it appears that the European Commission plans to implement the Convention's provisions using other methods. But the Commission insists that "[f]inalising the EU's accession to the Istanbul Convention remains a political priority. In addition, this political commitment will be realized through this legislative initiative, which shares the same objectives as the Istanbul Convention. Depending on the outcome of the negotiations on the EU's accession to the Convention, the legislative initiative will either implement the Convention under EU competence or implement the rights and obligations under the Convention in an alternative way." In any case, the issues remain the

It is a political innovation that includes many measures other than crime prevention, including prohibitions on "discrimination" and "harassment" and campaigns to inculcate political opinions and values.

The Convention is likewise highly innovative legally. Violence of any kind is normally addressed by domestic criminal law, not international agreements, and of course every jurisdiction on earth has statutory criminal prohibitions against violent assault.[20] It is not clear what an international agreement can add to existing laws prohibiting criminal assault.[21]

Here too, we find radical departures from accepted legal norms, requiring the law – in this case criminal law – to be clear and specific. Otherwise, people can be prosecuted for matters that are not understood to be crimes by the community, the accused themselves, or those who sit in judgment on them. The Convention describes criminal acts in terms that are very vague. The word "violence" is redefined broadly and includes matters not normally understood to be comprehended under that term in plain everyday speech. Under the Convention, "violence" need not be "physical" but may be "psychological" or "economic". No one can know what might be included under terms like "psychological" or "economic" violence, because these terms can mean anything. They become jargon that can be stretched to fit anything or anyone a prosecutor or political pressure group might wish to target for criminal punishment. This includes behaviors that most people would not consider criminal – ordinary human interaction or discussion, once again, or personal beliefs and believers. This could be a prescription for politicizing criminal law and criminalizing persons that most people would consider innocent of criminality.

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same. European Commission, Inception Impact Statement, Ares(2020)7664101, 16 Dec. 2020, p. 1.

[20] The problems of reconciling the Istanbul Convention and related measures with EU competences and principles of subsidiarity and proportionality is discussed in the "Remarks to the Announced Legislative Initiative…"

[21] This raises questions of subsidiarity, since the EU is authorized to act "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States"; see "Remarks…," p. 7.

Rather than addressing this "violence" as a law enforcement issue, the Convention makes it a matter of "human rights". Here too, the rationale is unclear. Acts of criminality are not normally considered human rights issues. No one suggests that mugging or robbery are "human rights" violations. They are crimes for which the criminal justice system either provides or it does not. If not, the system is dysfunctional and should no doubt be repaired, but it has nothing to do with "human rights". (The Convention itself is not based on any evidence that laws in Member States are defective.)[22] Why should domestic violence be different?[23]

Two scholar-advocates address this point, acknowledging, "[u]ntil recently, it has been difficult to conceive of domestic violence as a human rights issue under international law." There are logical reasons why this should be difficult. "Human rights", as generally accepted by most governments and most people (and, again, plain everyday speech), involves controlling repression perpetrated by *governments*, not acts committed by one citizen against another, which fall under the heading of crime prevention. "In traditional human rights practice, states are held accountable only for what they do directly or through an agent, rendering acts of purely private individuals – such as domestic violence crimes – outside the scope of state responsibility," the advocates acknowledge. "Systematic nonenforcement of laws against armed robbery by private actors alone is not a human rights problem; it merely indicates a serious common crime problem." To maintain otherwise is to place all criminal law enforcement and adjudication within the nebulous realm of "human rights" politics.

> States cannot be held directly accountable for violent acts of all private individuals because all violent crime would then

[22] See the previous note.

[23] The Convention acknowledges its own innovative quality in using a treaty to "punish" the alleged criminality of individuals ("non-State actors") within sovereign states – Article 5(2).

> constitute a human rights abuse for which states could be held directly accountable under international law.[24]

A further implication is that accused individuals themselves, not merely the states in which they live, would become directly subject to international law.

This accepted distinction, acknowledged by these scholars, is precisely what they and the Convention propose to erase, by replacing apolitical criminal law, with its due process protections for the rights of defendants, with the openly political human rights campaigns against acts of government committed by public officials. The criminal guilt and innocence of every citizen becomes subject to political negotiation and competition among advocates concerned with various conceptions of "human rights". Domestic courts, procedures, and protections become irrelevant, and the guilt or innocence of private persons is determined by politicians and pressure groups, especially those appointed under the Convention. The result is to turn "human rights" into a prescription for politicized justice against not only public figures but private individuals who have not been convicted of any crime.

Human rights accusations, unlike criminal accusations, are inherently political controversies, not judicial processes. Accusing a government or its officials of repression does not require observing legal standards of proof or due process of law for that government or those officials. As a matter of government policy, one can declare publicly the existence of such repression and advocate that it be recognized and curtailed, pressure can be placed on the state and officials, and those responsible punished politically (for example, by removal from office) – all without presenting evidence that would meet an evidentiary standard in a courtroom, and without observing due process protections, because no one is necessarily placed in criminal jeopardy. However serious, it involves changes in public policy, not findings of criminal culpability.

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[24] D. Thomas, M. Beasley, "Domestic Violence as a Human Rights Issue," *Human Rights Quarterly*, 1993, vol. 15(1), p. 37, pp. 41–43.

By accusing private individuals of "human rights" violations, and applying the political standard of proof that such accusations entail, the Convention removes the due process provisions that protect citizens from unjust criminal proceedings: the presumption of innocence, the right to face one's accuser, double jeopardy, criminal standards of evidence, and so forth. A citizen accused of "domestic violence" – again, a very vague term in itself, as noted above – is treated as a political figure, equivalent to a dictator who is torturing political opponents. The difference is that, unlike the dictator, the private citizen has no necessary public platform to speak in his own defense, and he can be criminally punished.[25] With human rights accusations, guilt or innocence becomes a matter of political opinion, not legal evidence, and guilt can be decided by the opinions of politicians, political activists, and pressure groups, according to their degrees of political influence and power, regardless of objective legal evidence and standards.

Confirming this logic, the Convention itself explicitly removes standard due process protections (Articles 53 and 55): accused persons may no longer face their accusers; proceedings are *ex parte* (without accused persons being present to defend themselves); and charges may be entered without proof that an alleged victim even exists.

One rationalization for reclassifying domestic violence as a human rights violation (which connects it with the ETD) is that violence becomes a human rights matter because it constitutes "discrimination". "Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men," according to a committee of United Nations.[26] Reclassifying it as "discrimination" might seem a peculiar way to treat alleged criminal violence. But the effect is then to rationalize classifying acts

[25] The dictator may also be punished in a quasi-criminal procedure, in which case due process protection will also presumably apply, though in practice this does not often seem to be the case. Such political trials confirm my argument about the effect of "human rights" law on standards of legal justice. See J. Laughland, *A History of Political Trials*, Oxford 2008.

[26] UN Division for the Advancement of Women (UNDAW), *General Recommendations Made by the Committee on the Elimination of Discrimination Against Women*, No. 19, 11th Session, A/47/38, 1992.

said to constitute discrimination as criminal violence, even when no physical violence or even physical contact has taken place. The oddity of describing an alleged violent crime as "discrimination" also further rationalizes lowering the standard of proof.

Yet, even granting the unusual "discrimination" logic, it is undercut by one incontrovertible fact: no evidence exists that "domestic violence" is even perpetrated primarily against women. On the contrary, it is well established by studies over decades (including many by feminist scholars) that men are victims of violent attacks by women at roughly the same rates as women by men.[27] This alone suggests serious problems about defining violence against women as "discrimination" – the main justification for not leaving it to ordinary criminal law.

Yet ironically (and perhaps recognizing this fact), this is not the favored rationale for the charge of "discrimination". Rather, it is also said to be justified by an alleged "widespread failure by states to prosecute such violence and to fulfill their international obligations to guarantee women equal protection of the law." This, too, is innovative:

> More recently … the concept of state responsibility has expanded to include not only actions directly committed by states, but also states' systematic failure to prosecute acts [allegedly?] committed either by low-level or para-state agents or by private actors. In these situations, although the state does not actually commit the [alleged?] primary abuse, its failure to prosecute the [alleged?] abuse amounts to complicity in it.[28]

This logic is also unusual and seems to have been applied to no other crime. It presupposes knowledge that people are guilty of crimes without them having been tried and convicted – another presumption of guilt. Yet even granting its validity, no evidence is presented for this

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[27] M. Fiebert, "References Examining Assaults by Women on Their Spouses or Male Partners: An Updated Annotated Bibliography," *Sexuality and Culture*, 2014, vol. 18(2), 405–467.

[28] Thomas, Beasley, "Domestic Violence," p. 41.

alleged failure. "Although information about government response to this problem is still minimal, the research suggests that investigation, prosecution, and sentencing of domestic violence crimes occurs with much less frequency than other, similar crimes."[29] But no such "research" is presented, and (as the scholars indicate) no evidence for this assertion can be found.

In fact, these assertions are not only unsupported but the precise opposite of what scholars have unequivocally established. In existing domestic law, domestic violence is indeed adjudicated very differently from standard criminal assault, but this is because it clearly is punished with much *more* frequency. "Relaxed rules of evidence and the lower burden of proof" ("preponderance of the evidence" rather than the normal criminal standard of "beyond reasonable doubt") enable courts to convict and punish defendants against whom no evidence exists.[30] David Heleniak, calling domestic violence law "a due process fiasco", has identified multiple violations and eliminations of standard due process protections in the statutes and practices of American states. In fact, the protections being eliminated are essentially the same ones that are discarded by the Istanbul Convention: no presumption of innocence governs domestic violence cases; hearsay evidence is admitted; and defendants have no right to confront their accusers. Domestic violence accusations are seldom adjudicated with trials and almost never a jury.[31] Most peculiar of all, one study found that no defendant is ever acquitted, and all receive some punishment.[32] Special "domestic violence courts" in several countries now exist for

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[29] Ibid., p. 48, 46.

[30] E.g., R. Verkaik, "Crackdown Unveiled on Domestic Violence," *The Independent*, 19 Nov. 2001.

[31] D. Heleniak, "The New Star Chamber," *Rutgers Law Review*, 2005, vol. 57(3), pp. 1009, 1036–1037, 1042. Heleniak describes domestic abuse as "an area of law mired in intellectual dishonesty and injustice" and identifies six separate denials of due process: lack of notice, denial of poor defendants to free counsel, denial of right to take depositions, lack of fully evidentiary hearings, improper standard of proof, and denial of trial by jury.

[32] A. Gover, J. MacDonald, G. Alpert, "Combating Domestic Violence: Findings from an Evaluation of a Local Domestic Violence Court," *Criminology and Public Policy*, 2003, vol. 3(3), table 11.

the express purpose of expediting pre-determined convictions and meting out more punishments, and coerced confessions are extracted on pre-printed forms on pain of incarceration.[33] In fact, as with the ETD, it is evident that previous departures from standard legal norms, already implemented in Anglo-American domestic violence law, are the main source for the innovations that have now been incorporated into the Convention.

The British and US governments are the two most influential exporters of gender law, including law on domestic violence. Both officially include vagaries like "criticizing" and "denying money" as "violence", as well as "psychological, emotional, sexual, and economic abuse". "Undermining an individual's sense of self-worth and/or self-esteem" is also classed as violent crime.[34]

This illuminates why some law-enforcement officials in the past may have been reluctant to prosecute some alleged incidents: because no violence was involved. After reciting a litany of instances from around the world where officials allegedly refused to prosecute domestic violence (all derived from an undocumented United Nations report), one scholar reveals that the reason they failed to prosecute was because they adhered to "a narrow definition of domestic violence as it refers only to physical violence" and did not include "psychological violence".[35]

In short, it is not plausible to believe that the innovations in criminal law proposed in the Istanbul Convention are necessary to remedy deficiencies of domestic law in individual states, when those innovations are themselves borrowed from recent trends in the domestic law of individual states. More likely, the Convention serves to export the innovative law of some states – specifically the abolition of due process protections – elevate it to a transnational level, and serve as a vehicle

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[33] Baskerville, *Taken into Custody*, chap. 4.

[34] E.g., Department of Justice website: https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/factsheets/ojpfs_domesticviolence.html (accessed 1 July 2017).

[35] C. Moore, "Women and Domestic Violence: The Public/Private Dichotomy in International Law," *The International Journal of Human Rights*, 2003, vol. 7(4), p. 97.

to impose it (and with it, transnational political authority generally) on the populations of other countries.

These innovations at various levels of government suggest that a special category of "domestic violence" is being created and artificially separated from standard criminal law for the primary purpose of circumventing due process protections and punishing people regardless of the evidence. Like many advocates, the Convention contains an implicit presumption of guilt by repeatedly referring to unspecified but prejudged "victims" and "perpetrators" without the qualification that, before a conviction, they are only "allegedly" so.

Innovative gender crimes like domestic violence are devised precisely to punish those who cannot be convicted with evidence. Once this is understood, it becomes easy to see how easily it lends itself to being further expounded into a "human rights" issue, since human rights accusations likewise are politically driven, nebulously defined, loosely adjudicated, require a low burden of proof, presume guilt, and are weighted toward conviction and punishment.[36]

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The Convention also requires (Article 13) states to take measures to disseminate political ideology and inculcate political values on their populations, rather than prevent crime. These include behavior-modification techniques of private citizens, including children, by government agents. Signatories must "take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men." Governments must also (Article 14) marshal the educational system to disseminate political "teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against

[36] Laughland, *A history*, p. 7.

women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education."

Here again, we find vague and even ideological language. Who decides what constitutes "prejudices" and "stereotyped roles", let alone what "customs" and "traditions" people are permitted to believe and practice in their private lives and homes, and which ones are to be "eradicated" by government measures? Is it the role of government officials to "eradicate" people's beliefs at all, or to mold the political opinions of other people's children? Are those beliefs now to be comprehended within the term "violence" (perhaps "psychological violence")? Are religious convictions that some people may consider "prejudices" now crimes of "violence"? Is it governments' role to modify people's "behaviours" in their private households, where individuals conduct their private affairs according to their own preferences? Are people with "prejudices" and "stereotypes" guilty of "violence"? Are they criminals?

Under this regime, governments that fail to "promote changes in the … behavior of women and men" will be violating human rights. Democratic electorates will be compelled to accept new "patterns of behavior" even in their private lives. Their own ideologically incorrect opinions must be "changed" by re-education using the state machinery and their children instructed in political doctrines.

How far would this behavior-modification be carried, given that few people are completely free from what some other people may consider "stereotypes", which can vary enormously according to different people's ideological or religious beliefs or changeable personal opinions?

Indeed, some suggest that the Convention itself perpetrates stereotypes of its own, foremost that only women are victims and men only perpetrators of violence. As we have seen, decades of research clearly demonstrate otherwise. Yet no provision exists for violence against men or children. The Convention backhandedly recognizes this contradiction by stipulating (Article 4) that "[s]pecial measures that are necessary to prevent and protect women from gender-based violence shall not be considered discrimination under the terms of this Convention."

Also relevant is the role of domestic violence accusations in breaking up families. Accusations of domestic violence are well-known weapons not only in divorce proceedings but also in accusations of child abuse, and rationalize removing one parent from the home without any conviction or finding of guilt.[37] For this reason, violence against children could be made worse, since it is well established that most child abuse takes place in single-parent homes.[38]

Nine matters are "criminalized" – starting (Article 35) with "physical violence" (already criminal everywhere) and leading (Article 33) to "psychological violence" (no precise definition) and (Article 40) "sexual harassment" (which as we have seen, also has no clear definition). As domestic violence measures do elsewhere, it provides a silver bullet to circumvent immigration restrictions (chap. 7).

Given that prohibitions against violent assault are already in place in all European countries, it appears that the only possible reason for this Convention is to enable pressure groups to make unjust accusations against innocent people and to strip the accused of the means to defend themselves. Here too, this measure would radically alter the meaning of the phrase "rule of law".

The Convention and similar measures also raise questions about their consistency with EU principles of subsidiarity and proportionality, including the serious matter of consolidating and centralizing law-enforcement authority, which is normally left to member states. These questions have been explored by others.[39]

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[37] Abuse accusations readily "become part of the gamesmanship of divorce." T. Kasper, "Obtaining and Defending Against an Order of Protection," *Illinois Bar Journal*, 2005, vol. 93(6).

[38] E.g., R. Whelan, *Broken Homes and Battered Children: A Study of the Relationship between Child Abuse and Family Type*, London 1993.

[39] "Remarks…"

Conclusion

These proposed innovations are often presented as differences of values that are specifically "European".[40] Yet the innovations themselves are legal as much as axiological, and it is not clear that the legal dimension has any deep roots in historical, cultural, or religious values of many European countries. The source of the innovations is exterior even to the legal systems of most EU member states and appears to be rooted in Anglo-American law on divorce and connected matters such as sexual harassment. Especially in the societies of Central and Eastern Europe, measures regulating family and sexual matters are often greeted with perplexity and even hostility.[41] This involves both substantive difference in attitudes toward sexual freedom and differences over legal principles.[42] What is generally recognized as the private nature of family life and sexuality may mean that any involvement of the state machinery or transnational institutions necessarily encroaches on the private sphere of life. It has often been argued that innovations in this sphere by necessity curtail individual freedom and make public what was previously private.[43] This article has shown that in practice it does more than that, entailing drastic elimination of legal safeguards, such as due process of law, for those accused of legal infractions. Without extensive debate on the full implications for both family privacy and the rights of the accused, it is far from clear who is protecting, and who is infringing, the rule of law.

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[40] E.g., Muir, "The Essence."

[41] S. Baskerville, "Academic Freedom and the Central European University," *Academic Questions*, 2019, vol. 32(2), pp. 257–262.

[42] Banasiuk, Zych, *State of Democracy*.

[43] G. Kuby, *The Global Sexual Revolution: Destruction of Freedom in the Name of Freedom*, Kettering 2015; Baskerville, *New…*

Zdeněk Koudelka

The Constitution and Constitutional Identity of the Czech Republic vs. the Law of the European Union

Introduction

The law deals with values. Every legal order and system of law has values on which it is based and, at the same time, expresses and recognizes them as the basis of the values of the state or other entity of which it is the legal order. When there is a clash of values between different legal systems or different legal orders, it is not possible to measure values separately. What determines their correlation is the relationship of their parent legal orders or the legal system as a mutual whole.

In the member states of the European Union, a fundamental legal issue is the relationship between their national constitutional rules and European law. The outcome may differ from one member state to another, as European law is the same for all of them but their constitutional standards differ. The issue becomes factually relevant when there is a conflict between constitutional and European norms. In such a case, there is not only a legal contradiction, but usually also a political one. Its solution is not and never will be a purely legal problem, but will always be linked to political struggle and the clash of values contained within conflicting legal systems. It is true that nothing is black and white, and that the struggle for values is an expression of what prevails at any given time. However, from the perspective of an observer from a different time, the assessment of the matter may be different as well. Assessing the importance of values in law is fraught with the subjectivity of those in power deciding which legal values to prioritise over others.

European law perspective

European sources of law, in particular the Treaty on European Union and the Treaty on the Functioning of the European Union, speak nothing of the relationship with national constitutional provisions. This is understandable, although it creates a fundamental problem of the relationship between the system of European Union law and national legal systems. The authors of the treaties wanted to avoid a serious problem when negotiating them. On the other hand, the clear failure to regulate this issue leads to disputes. Therefore, the conflicts which may arise over the substance of European integration should come as no surprise since the authors of the basic treaties themselves did not want to take a position on certain matters. The issues at stake are crucial, not of no importance, and this was not an oversight but a deliberate shift of the dispute from the time of negotiating the treaties to the time of their application.

In concluding the various treaties that are the source of European primary law, the leaders of the member states did not want to deal with this issue. Any textual expression of the regulation of the interaction between European law and constitutional law will raise questions about the very nature of the European Union and the sovereignty of the Member States. Either European law prevails, resulting in the European Union becoming a state and then the sovereignty of the member states ceases to exist, or the national constitution reigns supreme and takes precedence over EU law. However, this does not please those who support the supremacy of the European Union and its legal system over the member states and their legal orders, including their constitutions.

As a result, the primary law of the European Union does not state whether or not European law takes precedence over the constitution of a member state. However, this is not a new issue. At the end of the day, also in a number of federations, the relationship between the federal power and the constitution of the member state of the federation was not clearly resolved. They were often resolved with weapons. The victor then established a clear interpretation of these relations and did not

even have to proceed to explicitly amend the constitution. After all, the crux of the 1861–1865 US Civil War was whether a member state could withdraw from the federation, as the US Constitution did not address this issue. The southern states argued that they could because they were free to join the federation and, by analogy, free to leave it and form a looser confederation, the Confederate States of America, leaving sovereignty to the member states. The northern states believed that by freely joining the federation, a member state was committing itself to a permanent state relationship with the other states of the federation from which it could no longer withdraw. And because it was the North who won, not the South, present day US constitutional law textbooks state that the US federation cannot be withdrawn from. If the South had won the war, the opposite would have been taught. The relationship between the centre and the member states was also the sting of the Swiss Civil War in 1847, the last war participated by Switzerland. The proponents of federation also won in this case, although they kept the French and Italian name of the state – the Swiss Confederation, as a consolation prize, even though Switzerland became a federal state.

The aforementioned omission in the European Treaties has not prevented the European Court of Justice from pronouncing on this issue. In its view, European law takes precedence over national law. This position was adopted as early as 1964[1] at the time of the European Economic Community, but it has been applied continuously since the amendment of the original Treaties and the transformation of the Community into the European Union.

It sees this primacy of EU law as an absolute, i.e. European law also takes precedence over the constitution of a member state. Although a constitution contains the most important legal norms of a country, it is part of its legal order and the European Court of Justice makes no exceptions to the principle of primacy of EU law. In general, there is only a terminological dispute as to whether to speak of the primacy or supremacy of EU law. The result is always the same – European

[1] Judgment of the European Court of Justice of 15 July 1964, No. C 6/64, *Flamingo Costa v E.N.E.L.*, ECER 1141.

Union law prevails and overrides the law of a member state, including its constitution. The European Court of Justice initially ruled against regulations as directly binding provisions of European law on persons, but by introducing the imperfect (in the Court's view) conversion of directives by a member state into directly binding ones, the Court effectively established the primacy of European Union law as a whole.[2] It had already declared the fundamental treaties (primary European law) to be directly binding.[3]

The position of the European Court of Justice is understandable from the point of view of supporters of the federalization of the European Union. It strengthens the power of the European Union as such and, in particular, that of the Court as its body. It decides on the correct interpretation of European law and thus on what takes precedence over the law of a member state, including its constitutional provisions. The fact that the judges of the European Court of Justice have a long-standing positive attitude towards European law and European integration also plays a role here. In general, opponents of the European Union and supporters of national sovereignty do not apply for membership in EU institutions, and this also applies to the European Court of Justice. If we are talking about judges who, as lawyers, dealt with European law before their successor in the Court, the link between these lawyers and the European Union is even stronger. What would they do if EU law ceased to exist? And even if it does not disappear, they do not want to admit that any other law can take precedence over European law.

The interpretation of the primacy of European law has its basis in international law, where it is generally accepted that an international obligation cannot be invalidated because of a conflict with national law. On the other hand, the norms of international law are based on the

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[2] Judgment of 4 December 1974, C-41/74, *Van Duyn v Home Office*, ECR 1337; Judgment C 148/78 – *Criminal proceedings against Tullio Ratti*, ECR 1979, p. 1629 (possibility to invoke the direct effect of a directive only after the expiry of the time limit for conversion).

[3] Judgment of the Court of 5 February 1963, Case 26-62, *Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, ECR 1.

principle of reciprocity, and the obligations arising from international treaties concern the states that have acceded to them. There is no world legislator who can impose its will on everyone. For the enforceability of international law, the question of state sovereignty and its actual assertion is also crucial.

Coercion in international law can in practice be implemented by force against small and medium-sized states. Inter-state coercion cannot be used against superpowers with nuclear weapons. It can be assumed that other countries will not risk nuclear war by attacking the US, Russia or China. This is why some other states have also sought to possess nuclear weapons (North Korea, India, Pakistan). A state publicly declaring that it has a nuclear bomb will not be attacked by other states, unless we count limited border conflicts (China-India, India-Pakistan).

European law is not the literal equivalent of international law. The fundamental contradiction is that European law can impose new obligations on a member state which were not known when the given member state joined the European Union and to which it did not consent, but which were adopted by a majority decision against its will. There is therefore a difference between European primary law, which consists of international treaties concluded by the member states and to which everyone must always agree, and European secondary law (regulations, directives), which can be adopted against the will of a member state.

Constitution and constitutional acts

In order to resolve the matter of the relationship between the constitutional law of the Czech Republic and the law of the European Union, it is important to define the scope of what the legal order of the Czechia and Moravia regions consider to be the most important and valuable.

Is it only about the Constitution of the Czech Republic[4] or also about all other constitutional acts with constitutional force?

In Czechia and Moravia, i.e. the Czech Republic, the constitution contains the basic legal regulation of the state with the highest legal force. Ever since the time of the Habsburg Monarchy, it has been a tradition that there is not one basic (constitutional) law, but several constitutional acts. The constitution does not mean here a single constitutional act called "the Constitution of the Czech Republic", but the totality of all constitutional acts with constitutional force, which is also called "the constitutional order". The Constitution of the Czech Republic is itself a constitutional act, just like other constitutional acts.

The 1993 Constitution of the Czech Republic introduced the concept of constitutional order,[5] which is another name for the term "constitution" but written uncapitalized. That is, the totality of all legal acts having constitutional force. Within this category of legal provisions containing constitutional norms, in the event of a conflict between two norms, the principle of the precedence of the newer provision over the older one and the principle of the precedence of the specific provision over the general one apply. The body of constitutional law is not static (neither the state nor its legal order exists in perpetuity and never will). The constitutional order is supplemented by constitutional acts. A constitutional act is a legal act which, by its very nature, cannot be unconstitutional. If it conflicts with another constitutional law, the principle of age priority or the principle of specific priority shall apply. The exception is unconstitutionality in the process of its enactment.

What is included in the constitutional order is decided by the author of the constitution (in the Czechia and Moravia regions it is the Parliament). In the legal order of the Czech Republic there is no distinction between the constitution and the constitutional act. The constitution itself is a constitutional act.[6] If Parliament now decides to adopt a new constitution, it will find that the creator of constitutional acts is

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[4] Constitution of the Czech Republic, No. 1/1993 Coll. (the Constitution).

[5] Article 3 and 112 of the Constitution.

[6] Constitutional Act of the Czech National Council No. 1/1993 Coll. – Constitution of the Czech Republic.

institutionally and procedurally the same as the creator of the constitution.[7] Karel Klíma also makes no distinction between a constitution and a constitutional act: "In the concept of the vertical structure of the legal order, the constitution or an act defined as constitutional is the apex of the system of legal norms."[8] Similarly, the previous Czechoslovak constitution was a constitutional act,[9] significantly amended by the Constitutional Act of the Czechoslovak Federation.[10]

The adoption of a constitutional act, even if it directly amends the Constitution of the Czech Republic, does not require a special constitutional procedure. There is a difference here with states that not only call the constitution something other than a constitutional act, but more importantly, adopt a stricter (more rigorous) procedure than constitutional acts despite having the same legal force. In such a case, the constitutionality of a constitutional act may be reviewed if it directly or indirectly amends the constitution, in order to determine whether it is an amendment that should have been enacted through a procedurally more rigorous process of a constitutionality review.[11]

In Austria, a qualified majority in the National Council is normally required to approve a constitutional act, but constitutional acts limiting the powers of the Austrian states also require the approval of the Bundesrat, and a constitutional amendment requires an optional referendum if requested by at least one third of the members of the National Council or the Bundesrat, or a mandatory referendum, if it is a general (fundamental) amendment of the Austrian Constitution.[12]

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[7] Radoslav Procházka draws attention to a similar state of affairs in Slovakia: *Ľud a sudcovia v konštitučnej demokracii*, Plzeň 2011, p. 39.

[8] K. Klíma, *Ústavní právo*, Plzeň 2010, p. 68.

[9] Constitutional Act No. 100/1960 Coll. – Constitution of the Czech and Slovak Federative Republic (formerly the Czechoslovak Socialist Republic and the Czechoslovak Federative Republic).

[10] Constitutional Act No. 143/1968 Coll. on the Czechoslovak Federation.

[11] In Russia, the Federal Assembly can pass constitutional acts on its own, but the Constitution of Russia can only be amended by constitutional acts of the Federal Assembly that are approved by two-thirds of the subjects of the federation. Article 136 of the Constitution of Russia of 12 December 1993.

[12] Article 44 of the Constitution of Austria of 1 October 1920; P. Kandalec, "Materiální jádro *ústavy* v judikatuře rakouského *Ústavního* soudu," *Dny práva*,

In this case, it is permissible for the Austrian Constitutional Court to review whether a certain constitutional act passed in a simpler manner should not have been passed in a qualified, more rigorous manner. This was the case when the Austrian Constitutional Court overruled the constitutional norm.[13] This was a transitional constitutional statement that the provisions of the Austrian state acts on public procurement are valid for the period 1 January 2001 – 31 August 2002 in accordance with the Constitution, although the same provision at the federal level has already been declared unconstitutional by the Austrian Constitutional Court. The reason why the constitutional provision was repealed by the Austrian Constitutional Court was that it had been adopted as an ordinary constitutional act, and the Court concluded that it should have been adopted in a more rigorous manner because it constituted a substantive constitutional amendment if the constitutionality of state laws was exempted from review by the Austrian Constitutional Court. Even a small change in scope can be of significant constitutional significance.

2009, http://www.law.muni.cz/edicni/dny_prava_2009/files/prispevky/mezin_smlouvy/Kandalec_Pavel __1350_.pdf (accessed 3 Dec. 2021).

[13] Article 126a of 2000, adopted as a constitutional provision when under Article 44(1) of the Federal Constitutional Law of the Republic of Austria of 1 October 1920, a constitutional provision can be adopted by a constitutional majority even in an ordinary public procurement act. Judgment of the Constitutional Court of the Republic of Austria of 11 October 2001, VfGH 16.327. J. Grinc, "Přezkum *ústavních* zákonů v Německu a Rakousku," *Jurisprudence*, 2010, no. 1, pp. 31–37.

Z. Kühn, "ÚS: K pravomoci rušit protiústavní "ústavní" zákony," *Cevrorevue*, 2009, no. 8–9, http://www.cevro.cz/cs/cevrorevue/aktualni-cislo-on-line/2009/8-9/215714-pravomoci-rusit-protiustavni-ustavni-zakony.html (accessed 3 Dec. 2021). In his text, Kühn argues that Article 44(3) of the Austrian Constitution is a reaction to the Nazi era, just as in Germany the eternity clause in Article 79(3) of the Basic Law of the Federal Republic of Germany of 1949. However, Article 44(3) (originally para. 2) of the Austrian Federal Constitutional Act was already adopted on 1 October 1920, StGB. 450/1920. It was not a reaction to Nazism; on the contrary, it affirmed the sovereignty of the people as the creator of the constitution by tying some constitutional changes to a referendum. The Austrian Constitution contains no eternity clause.

The Constitutional Court of Ukraine declared the constitutional amendment unconstitutional on procedural grounds.[14] In Hungary, the Easter Constitution created a new group of organic acts adopted by a two-thirds majority of all deputies, with a higher legal force than an ordinary act adopted by a majority of the deputies present, but with a lower legal force than a constitutional act adopted by the same two-thirds majority of all deputies.[15]

The Constitutional Court of Moldova declared an article of the constitution itself unconstitutional when it entered into a purely political dispute over the definition of the official language. The problem was not the language itself, but its name. In the 1991, the Declaration of Independence of the Republic of Moldova[16] (in the Latin alphabet) was enacted and Romanian language was designated as the state's official language. In Soviet times, the language was labelled as Moldavian and written in Cyrillic. The Constitution of 29 July 1994 again changed the name of the state's official language to Moldovan written in Latin script.[17] The definition of this language has become the subject of an internal political dispute. It was, at the request of deputy Ana Gutu, resolved by the Constitutional Court of Moldova in 2013, which found that the national language is Romanian.[18] The Constitutional Court proceeded from the premise that the Declaration of Independence is the very source of the creation of the sovereign Moldovan state, it was not explicitly amended by the Constitution and is referred to in

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[14] Decision of the Constitutional Court of Ukraine of 30 September 2010, ruling on the non-compliance of the Law on Amendments with the Constitution of Ukraine of 8 December 2004. After the February 2014 coup, the 2010 constitutional amendment was reinstated and the Constitutional Court's decision to invalidate the amendment was declared unconstitutional and invalid. It even gave rise to the criminal prosecution of fugitive President Viktor Yanukovych; L. Orosz, J. Svák, B. Balog, *Základy teorie konštitucionalismu*, Bratislava 2011, p. 115, 175.

[15] Article S of the Hungarian Basic Law of 18 April 2011.

[16] Act of 27 August 1991 – Declaration of Independence, no. 691.

[17] Article 13(1) of the Constitution of the Republic of Moldova of 29 July 1994.

[18] Decision of the Constitutional Court of Moldova of 5 December 2013, No. 36, items 83–91 and 115. http://constcourt.md/ccdocview.php?tip=hotariri&docid=476&l=ru (accessed 3 Dec. 2021).

the very preamble of the Moldovan Constitution, which states in no uncertain terms that the interpretation of the Constitution that is consistent with the preamble should be applied. The Constitutional Court linked the legal force of the Declaration of Independence not to its designation as a law enacted by Parliament, but to the essence of the creation of the new state, and, therefore, to its normative core, since the Declaration was approved by the Grand National Assembly before it was enacted by Parliament as a law. The Constitutional Court defined the Declaration of Independence as immutable and the principle that a younger legal provision invalidates an older legal provision of equal force cannot be applied to it. The Constitutional Court, therefore, concluded that the content of the Declaration of Independence should be used to determine the official language of Moldova. This is an example of the judiciary encroaching on the constitutional powers of parliament. The choice of official language is primarily a political issue – e.g. Czechoslovak in the first Czechoslovak Republic 1918–1938 versus the distinction between Czech and Slovak after 1938, similarly the former Serbo-Croatian and today's Serbian, Croatian, Bosnian.

Also in Slovakia, the constitution differs from constitutional acts only in name and takes the form of a legal provision in the form of a constitutional act.[19] It is up to the creator of the constitution to decide when to exercise constitutional competence.[20] The Slovak Constitutional Court in Košice declared that: "There are no legal differences in the process of deliberation, enactment and promulgation of the Constitution and constitutional acts.… If the Constitution had a higher legal force than constitutional acts, then amending the Constitution by a constitutional act would have to be illegal."[21] The words of Slovak constitutional judge Ladislav Orosz are characteristic of the Slovak school

[19] E. Ottová, *Teória práva*, Šamorín 2006, p. 191. A. Bröstl, *O ústavnosti ústavních zákonov. Metamorfózy práva ve střední Evropě*, Prague 2008, p. 14; R. Procházka: *Ľud a sudcovia v konštitučnej demokracii*, Plzeň 2011, pp. 15–16; B. Balog, "Zrušenie rozhodnutí o amnestii ústavným zákonom," *Právny obzor*, 2012, no. 4, p. 319.

[20] Bröstl, *O ústavnosti ústavních zákonov*, p. 23.

[21] Resolution of the Constitutional Court of Slovak Republic I.ÚS 39/93.

of constitutional law: "constitutional acts are acts of constitutional power … and thus cannot be non-compliant with the constitution or unconstitutional, while at the same time they cannot in principle be subject to judicial review, unlike ordinary laws."[22] Radoslav Procházka rejects the attempt to divide constitutional law into "peripheral" and "core", possibly constitutional and supra-constitutional law or simple and qualified constitutional law. Procházka criticises the attempts made by Pavel Holländer, a proponent of the theory of the material core of the constitution, to justify the division of constitutional law[23] by means of concepts such as "metaphysical correlate" and "constructive metaphysics" as well as to seek supremacy over the constitution author. Procházka said about Holländer that "it is significant that Holländer lacks such a distinction not in constitutional regulation but in constitutionalism; in the latter, the 'metaphysical correlate' as a tool of 'constructive metaphysics' is certainly easier to find than in what the constitutionalist has actually agreed upon."[24]

However, the Slovak Constitutional Court also succumbed to its desire for constitutional supremacy, annulling by way of a ruling of 30 January 2019, EN ÚS 21/2014, certain provisions of the Slovak Constitution which were adopted as a result of its amendment by Constitutional Act No. 161/2014 Coll. It did so in order to protect judges from security lustration, even though the president could only remove judges at the request of the Judicial Council after review by the Constitutional Court. In doing so, it divided constitutional norms into those of higher and lower rank, whereas the Slovak Constitution itself does not distinguish between them in this way.

German literature theoretically mentions the possibility of repealing a constitutional act, but in practice this has never happened.[25] The German Federal Constitutional Court did deal with applications

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[22] L. Orosz, "K problematike kompatability ústavního systému Slovenskej republiky," *Justičná revue*, 2005, no. 3, p. 329.

[23] P. Holländer, *Základ všeobecné státovědy*, Plzeň 2009, p. 107.

[24] R. Procházka, *Ľud a sudcovia v konštitučnej demokracii*, Plzeň 2011, p. 31.

[25] T. Maunz, G. Dürig et al., *Grundgesetz Kommentar*, Munich 1997, Article 79, p. 14.

for the repeal of constitutional norms, but in 1953 it even dealt with an apparent contradiction between two provisions of the Basic Law at the request of the court. In this case and in two others,[26] which concerned the constitutional regulation of wiretapping, the Court held that the provisions in question were constitutional with the perpetuity clause of the German Basic Law.[27] It is true that the German Constitutional Court recognizes its jurisdiction to assess the constitutionality of laws amending the Basic Law with the eternity clause, i.e. with the fundamental constitutional principles.[28] However, no direct analogy can be drawn with the situation in Czechia and Moravia here as well, because while in the Czech Republic the constitution is a constitutional act, in Germany there is a difference between the enactment of the Basic Law which is regarded as an expression of constitutive (establishing) power, and its amendment, which is already regarded as an expression of constituted (established) power.[29] The original Basic Law was passed by the parliaments of the German states, among others, while its amendments are passed only by the Bundestag and the Bundesrat.

Vladimír Klokočka also distinguishes between the constitution and constitutional acts on the basis of Emmanuel-Joseph Sieyès' theory of the distinction between constitutive and constituted power. Klokočka believes that the constitution is a product of constitutive power belonging to the people, and constitutional acts are a product of constituted power exercised in accordance with the constitution by the relevant public authorities.[30] But then constitutive power and a true constitution only arise from a legal revolution. It is only Act No. 11/1918 Coll.

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[26] Decisions of the Federal Constitutional Court BVerfGE 3, 225, 30, 1, 109, 279; J. Grinc, "Přezkum ústavních zákonů v Německu a Rakousku," *Jurisprudence*, 2010, no. 1, p. 31.

[27] Article 79(3) of the Basic Law of the Federal Republic of Germany of 23 May 1949.

[28] Decision of the Federal Constitutional Court BVefGE 1, 14, referring to an earlier legal opinion of the Bavarian Constitutional Court.

[29] Jörg Lücke in his commentary on Article 79 of the Basic Law in M. Sachs, U. Battis et al., *Grundgesetz. Kommentar*, Munich 2003, pp. 1642–1643.

[30] V. Klokočka, *Ústavní systémy evropských států*, Prague 2006, pp. 50, 52, 98–99, 102; E. Wagnerová, *Prezident republiky a Ústavní soud. Postavení prezidenta v ústavním systému ČR*, Brno 2008, pp. 101–102.

on the Establishment of the Independent Czechoslovak State in conjunction with the Declaration of Independence of the Czechoslovak Nation that fulfils such a revolutionary material condition of a constitution as a constitutive power.[31] All other constitutions issued on the basis of the previous constitution are expressions of constituted power, i.e. constitutional acts.

The content of constitutional provisions in Czechia and Moravia is determined by the parliament. From the point of view of democracy, only a body democratically and directly elected by the people can be endowed with the power to determine what should be most important in the state and what will, therefore, be regulated by the constitutional norms of the state. The decision of a democratically-elected Parliament determines the content of the Constitution. Once the democratic legislature has determined what the content of a state's constitutional provisions are, no other body can divide constitutional norms into those of greater and lesser value. They are equal in the way they are adopted and in their legal force. In relation to European Union law, it is, therefore, necessary to assess all constitutional acts as a whole, including the constitutional law of the Constitution of the Czech Republic, which does not differ from that whole in its legal nature.

Relationship between the provisions of the Constitution of the Czech Republic and the law of the European Union

There is no explicit reference to the European Union in the provisions of the Constitution of the Czech Republic. In general, under an international agreement it is possible to transfer certain competences of the authorities of the Czech Republic to an international organization or

[31] Declaration of Independence of the Czechoslovak Nation by Its Provisional Government of 28 October 1918; J. Gronský, J. Hřebejk, *Dokumenty k ústavnímu vývoji Československa 1*, Prague 2004, pp. 20–21.

institution.[32] This provision, adopted prior to accession to the European Union, was used as a constitutional basis for accession to the European Union, but can also be applied to other international organizations or institutions in an analogous manner. If the Constitution makes no mention of the European Union at all, it shall be presumed not to refer to the law of the European Union (European law).

Since European primary law consists of treaties, and the Constitution itself recognizes that the act that can transfer the competences of the state bodies of an organization to an international institution is a treaty, the general relationship of Czech law to treaties is decisive for the relationship between the constitutional law of the Czech Republic and the law of the European Union.

Traditionally, the relationship between international law and domestic law has been considered within the framework of monism with the primacy of international law or the primacy of state law or within the dualism of the two legal systems. The Czechoslovak approach to international law was dualistic. This means that national law and international law are separate legal systems.

Since 1993, the Constitution of the Czech Republic has introduced the supremacy of treaties ratified by Parliament over state acts. These treaties are commonly referred to as presidential treaties as they are negotiated by the President of the Czech Republic, who has not delegated their negotiation to the government, as is the case with government treaties, or to individual members of the government, as is the case with presidential treaties. These treaties must also be ratified by the President. These presidential treaties in the Czech Republic include treaties that constitute the primary law of the European Union (the Treaty on European Union and the Treaty on the Functioning of the European Union). They, therefore, take precedence over state acts.

Precedence over state acts includes precedence over regulations subordinate to acts issued by the executive or local government. However, acts and constitutional law are different concepts, and constitutional

[32] Article 10a of the Constitution of the Czech Republic No. 1/1993 Coll. as amended by Constitutional Act No. 395/2001 Coll.

law is superior to acts in the hierarchy of legal regulations. Thus, precedence over an act says nothing about the relationship of treaty to constitutional acts. If the authors of the Constitution had wanted international agreements to take precedence over constitutional law, they would have written that into the Constitution. The Constitution does not include treaties in the constitutional order – the body of constitutional provisions. The fact that the principle of primacy of treaties applies only to acts means that, from the point of view of the constitutional law of the Czech Republic, the principle of dualism still applies in the relationship between constitutional provisions and treaties.

Sovereignty issue

If there is a dualistic relationship between the constitutional law of the Czech Republic and European law, i.e. there is no relationship of priority of one law over the other, other circumstances and values should be used to resolve the conflict between European law and constitutional law of the state.

The state places its core values in constitutional acts and through them defines itself as a state. A state is the organization of the power of a society within a defined territory. It is, therefore, about the fundamental values of the people who make up this society. The solution to the problem is determined by which community within the territory has the final say, what unlimited sovereign power means within the state, whether the community (population) of a member state, or the population of the entire European Union. A community with sovereignty and its own legal order is essential to regulate the lives of people in a territory.

The primacy of constitutional and European law is determined by whether or not a state loses sovereignty when it joins the European Union. If this happens, the EU law takes precedence over the legal order of the state, including its highest norms – constitutional

norms – because it is no longer the legal order of the sovereign in a given territory. If a state retains its sovereignty even after joining the European Union, the consequence of that sovereignty is the dominance of its legal order within its territory.

This does not mean that a sovereign state cannot, within its own territory, give precedence over its own laws to the legislation of an international organization or institution. This also applies to the law of the European Union. However, it is always its own decision, which can be appealed, and it always determines the extent of that priority, and its decision in no way has any legal effect on the resolution of the issue in other member states.

As a rule, the state places its core values in constitutional provisions. Thus, if the Czech Republic has recognized the primacy of treaties over its own acts, it also recognizes this primacy in favor of European law, both primary law and the secondary law of the European Union issued on its basis, over laws and legal acts of a lower order. However, it has not established this precedence over its constitutional acts. In case of conflict between European law and the constitutional law of the Czech Republic, the constitutional law of the Czech Republic shall prevail in the territory of Czechia and Moravia.

It is appropriate that international law, and as part of it – European law – takes precedence over acts. If a state joins an international organization, it is obliged to abide by its decisions. However, when it comes to the fundamental values from which constitutional acts derive, the state and its laws must take precedence within its territory. From this point of view, in the Czech Republic, the law of the European Union takes precedence over national law, but not over the constitutional law of the Czech Republic.

Position of the Constitutional Court of the Czech Republic

Sugar quotas

The Constitutional Court has repeatedly addressed the question of the relationship between European and constitutional law, and its legal opinions have evolved. It first encountered the issue of European law in the context of several sugar quota arrangements. In 2006, the court stated:

> Thus, although the frame of reference for review by the Constitutional Court, even after May 1, 2004, are still the norms of the constitutional order of the Czech Republic, the Constitutional Court cannot entirely disregard the influence of Community law on the creation, application and interpretation of domestic law, in so far as legislation whose origin, functioning and purpose are directly linked to Community law is concerned. In other words, the Constitutional Court interprets the constitutional law in this respect taking into account the principles deriving from Community law.[33]
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> However, in the opinion of the Constitutional Court, this lending of part of the powers is only conditional, since the original bearer of sovereignty and the powers derived from it remains the Czech Republic, whose sovereignty is still constituted by Art. 1 sec. 1 of the Constitution. According to it, the Czech Republic is a sovereign, unitary and democratic state based on respect for human and civil rights and freedoms. In the opinion of the Constitutional Court, the conditionality of the delegation of these powers manifests

[33] Part VI.A of the justification of the decision of the Constitutional Court of 8 March 2006, Pl. ÚS 50/04. For an analysis of the decisions of the Constitutional Court of the Czech Republic and selected other constitutional courts, see H. Komárková, *Nadstátnost komunitárního práva: vývoj, důsledky v oblasti práva a úprava v "Reformní smlouvě"*, thesis, Faculty of Law, Masaryk University, 2009, https://is.muni.cz/th/qyj53/DP_Final.pdf (accessed 3 Dec. 2021).

> itself on two levels: formal and material. The first of these levels concerns the attributes of power, which is the sovereignty of the state itself, while the second plane concerns the substantive components of the exercise of state power. In other words, the delegation of part of the powers of state authorities may continue as long as these powers are exercised by the EC authorities[34] in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic and in a way that does not threaten the very essence of the substantive rule of law. If one of these conditions for the implementation of the transfer of competences were not fulfilled, i.e. if developments in the EC or the EU would threaten the very essence of state sovereignty of the Czech Republic or the fundamental elements of the democratic state under the rule of law, it would be necessary to demand that the national authorities of the Czech Republic re-accept these competences, with the Constitutional Court being called upon to protect constitutionality (Art. 83 of the Constitution).[35]

Thus, with its ruling on sugar quotas, the Constitutional Court accepted the primacy of the application of European law over national law. It did not explicitly address the issue of constitutional provisions. However, it rejected the primacy of European law if it would threaten the foundations of the Czech Republic's state sovereignty or the fundamental elements of a democratic state governed by the rule of law. It is not clear from this ruling whether the Constitutional Court protected the primacy of all constitutional provisions or only selected ones.

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[34] European Community. This ruling was made before the entry into force of the Lisbon Treaty.

[35] Part VI.B of the justification of the decision of the Constitutional Court of 8 March 2006, Pl. ÚS 50/04.

European Arrest Warrant

Also in 2006, when examining the part of the Code of Criminal Procedure and the Criminal Code introducing the European Arrest Warrant,[36] the Constitutional Court unexpectedly took a step towards the dominance of EU law over constitutional law. The Constitutional Court stated that:

> [B]ecause of the CJEU (Court of Justice of the European Union) doctrine on the primacy of Community law, the Constitutional Court can only exercise its jurisdiction over norms of Community law in certain circumstances. According to the CJEU, in areas which are exclusively governed by Community law, that law takes precedence and cannot be negated by the reference criteria of national law, even at constitutional level. According to this doctrine, the Constitutional Court has no jurisdiction to rule on the constitutionality of European law norms, even if they are contained in the laws of the Czech Republic. Its competence to assess the constitutionality of Czech norms is therefore limited in the same sense.[37] Three constitutional judges, Stanislav Balík, Vlasta Formánková and Eliška Wagnerová, filed separate opinions against the ruling. The Constitutional Court recognized the common law provisions introducing the possibility of surrendering a citizen to a European Union member state for the purpose of prosecution on the basis of a European Arrest Warrant, despite the fact that the constitutional provision of the Charter of Fundamental Rights

[36] § 403 sec. 2, § 411 sec. 6 item e), § 411 sec. 7 and § 412 sec. 2 of Act No. 141/1961 Coll. of the Code of Criminal Procedure as amended by Act No. 539/2004 Coll. § 21 sec. 2 of Criminal Code No. 140/1961 Coll.

[37] Item 52 of the justification of the decision of the Constitutional Court of 3 May 2006, Pl. ÚS 66/04.

and Freedoms states that "a citizen cannot be forced to leave their home country."[38]

Lisbon Treaty

In its 2008 ruling on the compatibility of the Lisbon Treaty with the constitutional order of the Czech Republic, the Constitutional Court stated that "in case of a clear conflict between the state's Constitution and European law that cannot be resolved by any reasonable interpretation, the constitutional order of the Czech Republic, in particular its substantive core, must prevail."[39] The court ruled on the compatibility of the Lisbon Treaty with the constitutional order of the Czech Republic, stating that if two interpretations of a constitutional norm are possible, the interpretation in line with European law is preferable to the interpretation leading to a conflict with EU law, but in the case of an irresolvable conflict, the constitutional order of the Czech Republic shall be final, not EU law.

Slovak retirement pensions[40]

A very interesting case was the dispute between the Constitutional Court, on the one hand, and the Supreme Administrative Court and the Court of Justice of the European Union, on the other, concerning Slovak retirement pensions. In this case, the Constitutional Court took the strongest stance towards the Court of Justice of the European Union

[38] Article 14(4) of the Charter of Fundamental Rights and Freedoms.

[39] Item 85 of the justification of the decision of the Constitutional Court of 26 November 2008, Pl. ÚS 19/08.

[40] K. Špottová, *Sága slovenských důchodů z pohledu konceptu evropeizace*, thesis, Faculty of Law, Masaryk University, Brno 2016, pp. 32–63, https://is.muni.cz/th/nhet4/Rigorozni_prace.pdf (accessed 3 Dec. 2021).

and refused to apply EU law in areas resulting in unconstitutional consequences for the state.

It was about a special group of pensioners in connection with the division of Czechoslovakia. The distribution adopted the principle that the retirement pensions of future pensioners would be paid for the period of their working activity during the existence of Czechoslovakia by the successor state – the Czech Republic or the Slovak Republic – on whose territory the employer was based at the date of the dissolution of the Czechoslovak state on 31 December 1992.[41] However, these employers often operated throughout the whole of Czechoslovakia. Thus, it happened that some pensioners in Czechia and Moravia received their retirement pensions from the Slovak Republic in Slovak korunas, despite the fact that they worked in the territory of Czechia and Moravia, because the plant they were employed at was located there, while the company was registered and seated in Slovakia.

Although there was originally parity between the Czech and Slovak korunas, the Czech koruna strengthened very quickly, retirement pensions were valorized differently and retirement pension law differed, for example, on the issue of early retirement. Recipients of the Slovak pension actually received a lower retirement pension for the same period of paying social security insurance and the same salary than pensioners to whom the retirement pension was paid by the Czech Republic. On the basis of citizens' complaints, even before the accession of the Czech Republic to the European Union, the Constitutional Court ruled that the Czech Republic must make up the difference for its disadvantaged citizens.[42] The Czech Social Insurance Administration then started to pay a compensatory allowance to this citizen group.

However, the Supreme Administrative Court opposed the decisions of the Constitutional Court after the accession to the European Union.[43]

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[41] Agreement between the Czech Republic and the Slovak Republic on social security No. 228/1993 Coll.

[42] Decision of the Constitutional Court of 3 June 2003, II.ÚS 405/02.

[43] Judgment of the Supreme Administrative Court of 19 February 2004, 3 Ads 2/2003-60 (Weiszová 1) and the Judgment of the Supreme Administrative Court of 26 October 2005, 3 Ads 2/2003-112 (Weiszová 2).

The Constitutional Court, however, overturned its various decisions.[44] The Supreme Administrative Court argued for European Union law and the need to apply Council Regulation (EC) No. 1408/71, which was rejected by the Constitutional Court. The essence of the dispute was that the Constitutional Court granted a compensatory allowance to citizens of the Czech Republic with permanent residence in the Czech Republic and Moravia who had a lower retirement pension due to their employer being registered and seated in Slovakia, taking into account the citizens' legitimate right to material security in old age[45] and the principle of equality of citizens. The Supreme Administrative Court argued that not only Czech citizens working for employers based in Slovakia during the Czechoslovak period could receive such compensation, but all citizens of the European Union, due to the principle of non-discrimination.

The Supreme Administrative Court then took the opportunity, in another similar case, to refer two preliminary questions to the Court of Justice of the European Union.[46] The governments of the Czech Republic and the Slovak Republic as well as the European Commission all pronounced on the case, stating unanimously that the decision of the Constitutional Court was contrary to EU law. The Czech Government's position was motivated by the fact that the state budget would save money if the practice of paying compensatory allowances was discontinued.

Interestingly, the Court of Justice of the European Union has not accepted the initiative opinion issued by the Constitutional Court. In a letter of 25 March 2011, the Head of the Registry Office of the CJEU, on the instructions of the President of the Fourth Chamber of the CJEU, returned the submission to the Constitutional Court on the grounds that: "in line with the established practice the CJEU

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[44] Judgment of the Constitutional Court of 8 March 2006, Pl. 1. 2005, III. ÚS 252/04, 74 and Judgment of the Constitutional Court of 20 March 2007, Pl. ÚS 4/06.

[45] Art. 30 sec. 1 of the Charter of Fundamental Rights and Freedoms.

[46] Resolution of the Supreme Administrative Court of 23 September 2009, 3 Ads 130/2008-107.

members do not exchange correspondence with third parties in cases considered by the CJEU."[47]

In its Judgment, the Court of Justice of the European Union further declared that the decision of the Constitutional Court in Brno was contrary to EU law, since it linked the condition for compensation to nationality and permanent residence in the territory of a member state.[48]

The Supreme Administrative Court, supported by the Court of Justice of the European Union, then ruled again contrary to the decision of the Constitutional Court, stating that no compensation can be granted if the right to a retirement pension has arisen after 1 May 2004, when the Czech Republic became a member of the European Union.[49] It was obvious that another solution, whereby the Czech Republic would provide compensation to all citizens throughout the European Union if their retirement pension was lower than under the Czech Republic's legislation, was clearly nonsensical and unrealistic.

The Constitutional Court did not yield to the Supreme Administrative Court and the Court of Justice of the European Union, upheld its decision and used a constitutional complaint in a different but similar case to respond to the judgment of the Supreme Administrative Court and the judgment of the Court of Justice of the European Union and overturn the contested judgment of the Supreme Administrative Court.[50] It described the actions of the Court of Justice of the European Union as beyond its competence, stating that

> in the context of the impact of the CJEU Judgement of 22 6. 2011 No. C-399/09 to similar cases, no other conclusion can be drawn than that in this case we deal with a situation of an EU body going beyond the competence which the Czech

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[47] Part VII of the decision of the Constitutional Court of 31 January 2012, Pl. ÚS 5/12.

[48] Judgement of the European Court (Fourth Chamber) of 22 June 2011. *Marie Landtová v Czech Social Security Administration*, Case C-399/09.

[49] Judgment of the Supreme Administrative Court of 25 August 2011, 3 Ads 130/2008-204.

[50] Decision of the Constitutional Court of 31 January 2012, Pl. ÚS 5/12.

> Republic had delegated to the European Union on the basis of Art. 10a of the Constitution, a situation in which the scope of the competence assigned to it was exceeded, a ultra vires procedure.

It further stated:

> to make no distinction between the legal conditions resulting from the break-up of a state with a single social security system and the legal conditions resulting, in the field of social security, from the free movement of persons within the European Communities or the European Union is to disregard European history and to compare things which are not comparable.[51]

Furthermore, the Constitutional Court accused the Court of Justice of the European Union of rejecting its claim, stating:

> in this context, the Constitutional Court would like to recall that the CJEU[52] regularly makes use of the institution of amici curiae in preliminary ruling procedures, in particular in relation to the European Commission. In a situation in which the CJEU was aware that the Czech Republic, as a party to the proceedings on whose behalf the government was acting, had in its letter rejected the legal opinion of the Constitutional Court which was the subject of the examination, the CJEU's finding that the Constitutional Court represented a "third party" in the case at hand cannot be regarded as anything other than a departure from the principle of audiatur et altera pars.[53]

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[51] Part VII of the Judgment of the Constitutional Court of 31 January 2012, Pl. ÚS 5/12.

[52] CJEU = Court of Justice of the European Union = European Court of Justice (author's comments).

[53] Part VII of the decision of the Constitutional Court of 31 January 2012, Pl. ÚS 5/12.

The Constitutional Court has, therefore, taken a very harsh stance towards the Court of Justice of the European Union, even though it formally overturned the decision of the Supreme Administrative Court. In a way it became a war of the courts in the Czech Republic – Constitutional Court v. Supreme Administrative Court. The Constitutional Court has repeatedly come into conflict with the Supreme Court and imposed its will on it, systematically overturning its decisions when the Supreme Court initially refused to accept the Constitutional Court's decisions.[54] In this decision, the Constitutional Court refused to give precedence to European Union law over the constitutional provisions of the Czech Republic. In the end, the European Union did not react to this.

The Supreme Administrative Court tried to oppose this and again referred three new preliminary inquiries to the Court of Justice of the European Union to assess the compatibility of the Constitutional Court's decision with EU law. The third inquiry was the most important, in which the Supreme Administrative Court, with the help of the Court of Justice of the European Union, wanted to rid itself of the binding nature of the decisions of the Constitutional Court, which is a direct constitutional imperative.[55] The inquiry was:

> Does European Union law preclude a national court, which is the highest court of the State in the field of administrative justice and against whose decisions there is no judicial remedy, from being bound under national law by legal assessments made by the Constitutional Court of the Czech Republic if those assessments do not appear to be compatible with European Union law as interpreted by the Court of Justice of the European Union?[56]

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[54] Z. Koudelka, "Válka soudů aneb dělba moci v soudnictví," *Politologický časopis*, 1998, no. 1, pp. 71–74.

[55] Article 89(2) of the Czech Constitution.

[56] Resolution of the Supreme Administrative Court of 10 May 2013, 6 Ads 18/2012-82.

However, the claimant, whose cassation appeal was pending before the Supreme Administrative Court, withdrew its appeal and the preliminary ruling procedure ended without a decision on the merits.

In fact, the legislator resolved this dispute by an explicit statutory regulation introducing a compensatory allowance, which was no longer linked to the condition of Czech citizenship, but to the acquisition of 25 years of social security insurance in Czechoslovakia, at least one year of social security insurance in the Czech Republic between 1993 and 1995 and the simultaneous receipt of a pension from both the Czech and Slovak Republics.[57] In this way, the conditions were defined in such a way that they actually applied only to citizens of the Czech Republic, without this fact being explicitly stated. The economic situation has also changed, Slovakia has adopted the euro and has strengthened its exchange rate against the Czech koruna, so that Slovak retirement pensions have sometimes already exceeded those paid at the same time in the Czech Republic.

Summary

The relationship between the law of the European Union and the law of the Czech Republic is set out in the Constitution of the Czech Republic, which provides for its primacy as treaties or acts resulting from the implementation of treaties (regulations, directives) over acts. Its relationship to constitutional acts is linked to the question of state sovereignty.

If we recognize state sovereignty, European law does not take precedence over the constitutional norms of a member state, unless that member state explicitly declares otherwise. In the Czech Republic, the Constitution does not place European law above constitutional law.

[57] Section 106a-106c of Act No. 155/1995 Coll. on social security, as amended by No. 274/2013 Coll.

All constitutional acts of the Czech Republic are valid without exception on the territory of the Czech Republic and take precedence, even if they contradict the law of the European Union.

The basic European treaties do not regulate the relationship between European law and the constitutional law of a member state. The theory of the primacy of European Union law, including directives and regulations adopted by majority vote against the will of a member state, over the legal order of the member state as a whole, including constitutional law, is based on the practice of the Court of Justice of the European Union.

However, with regard to constitutional law of member states, this primacy can only exist if a member state has lost sovereignty as a result of its accession to the European Union. A sovereign state cannot be subordinated to any authority except through voluntary self-restriction. Its constitution cannot be subordinated to another, foreign legal system.

As the content of the referendum on the accession of the Czech Republic to the European Union was the transfer of certain competences of the Czech authorities to the European Union and not the transfer of sovereignty, the law of the European Union does not take precedence over the constitutional acts of the Czech Republic. However, it cannot be ruled out that a supporter of the loss of member state sovereignty as a result of accession to the European Union will have a different opinion. This is a purely political issue in which a member state's position will depend on the extent to which its head of state, government and parliament are made up of people advocating one approach or the other. At the same time, the issue of the extent to which the European Council will decide to enforce the alleged primacy of European Union law enforced by the Court of Justice of the European Union will be a highly political one. When a member state joined the European Union and signed the successive amendments to the basic treaties, it was never explicitly stated that this was the moment when the sovereignty of the member state was lost.

Tanja Karakamisheva-Jovanovska

Does National and Constitutional Identity Matter in the EU Context – Who Is the *Herren der Verträge*? EU versus the Western Balkan Axiology

To protect national sovereignty is *passé*,
to protect national identity by insisting on
constitutional spécificité is *à la mode*[1]

1. Basic notes on the constitutional and the national identity

Before the issue of national and constitutional identity is considered in the context of the EU, I will give a brief overview of the content and significance of these two categories. The constitutional theory is a treasure chest of a variety of opinions, positions, concepts, etc. which determine the essence and the meaning of the term "constitutional identity." In the EU, but also in some member states of the Union, often used as synonyms, the "constitutional identity" is also considered as "identity of the constitution." The link that joins them all is the position that the constitutional identity of one country is, in fact, an institutionalized and collective political identity of that country that all citizens identify or bond with within the national constitutional order.[2]

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[1] J.H.H. Weiler, "On the Power of the Word: Europe's Constitutional Iconography," *International Journal of Constitutional Law*, 2005, vol. 3(2–3), pp. 173, 184.

[2] See my views presented in the paper prepared for the 9th World Congress "Constitutional Challenges: Global and Local", Oslo 16–20 June 2014, Workshop no. 9: Constitutional Identity and Constitutionalism Beyond the Nation

From a constitutional-legal aspect, "the constitutional identity"[3]can be considered through self-identification as the collective identity of the constituent factor(citizens, nation, people) as mentioned in the constitution. In a certain historical period of the state, the people's sovereignty and the national sovereignty are defined as a constitutional power exercised through referenda and other forms of direct democracy or indirectly through elections.The different definition of the "constitutive factor" in the country depends on other identities on an individual or collective level, such as cultural, historical, religious and the like.

The term "constitutional identity" is directly linked with the democracy, i.e. with the concept of citizen-identity for purposes of integration.[4] The constitutional identity has been a very important issue that attracted the attention of not only the great theoreticians from the Ancient period, like Aristotle and Plato,[5] but also of Thomas Hobbes, John Calvin, Jean-Jacques Rousseau, whose work found reflections in

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State, https://www.academia.edu/8372637/MACEDONIAN_CONSTITUTIONAL_IDENTITY_LOST_IN_TRANSLATION_OR_LOST_IN_TRANSITION (accessed 23 Jan. 2021).

[3] See: R. Toniatti, "Sovereignty Lost, Constitutional Identity Regained," in A. Saiz Arnaiz, C. Alcoberro Llivinia (eds.), *National Constitutional Identity and European Integration*, Cambridge 2013. The Polish Constitutional Court considers that the concept of constitutional identity is an equivalent of, or at least is very closely related with, the concept of national identity. The concept also includes the traditions and cultural heritage of the country, drawing its interpretation not only from Article4(2) TEU but also from the Preamble to the TEU, where one of the indicated objectives of the Union is to deepen the solidarity between the peoples of the Union while respecting their history, culture, and traditions. In this respect, according to the Polish Constitutional Court's view, "the idea of confirming one's national identity in solidarity with other nations, and not against them, constitutes the main axiological basis of the European Union." See: Case K 32/09 by the Polish Constitutional Tribunal, Nov. 24, 2010.

[4] See: C. Rile Hayward, "Democracy's Identity Problem: Is 'Constitutional Patriotism' the Answer?" http://polisci.wustl.edu/files/polisci/imce/democracys_identity_problem_compact.pdf (accessed 30 Jan. 2021).

[5] In book 3 of *The Politics*, Aristotle asked: "On what principle ought we to say that a State has retained its identity, or, conversely, that it has lost its identity and become a different State?" His answer requires that we distinguish the physical identity of a state from its real identity. Thus, "[t]he identity of a *polis* is not constituted by its walls." Instead, it is constituted by its constitution. See details in: http://www.iep.utm.edu/aris-pol/#H9 (accessed 15 Jan. 2021).

the work of Bruce Ackerman, Ran Hirschl, Gary Jeffrey Jacobsohn, Mark Tushnet, Heinz Klug, Erik H. Erikson, Michael Rosenfeld, John E. Finn, and many others.

> Constitutional identity can take many different forms, and evolve over time, because it is often immersed in an ongoing process marked by substantial changes.[6]

Constitutional identity means constitutionally-defined identity.

While some authors believe that the constitution is a mere reflection of a collection of beliefs, positions and values shaped throughout the history and culture of the given community, which actually means that the constitution is a recognition of the pre-existing identities,[7] others believe that the constitution, the culture and the identities are all in a mutual correlation, i.e. influence each other as a result of the direct connections coming from different social aspects. This makes the constitution serve as a recognition and creation of new identities.

What the majority of the authors agree with is that the constitutional identity is, in fact, composed of elements that create the political identity of the community, such as: citizens' awareness about the need of having a specific identity, the sense of belonging to a specific community, identification with the values of the political system, the sense of joint interest and common welfare, etc. Therefore, we may conclude that the constitutional identity can be viewed from a formal, as well as from an informal, aspect.[8]

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[6] See: M. Rosenfeld, "Modern Constitutionalism as Interplay between Identity and Diversity," in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy*, Durham 1994, p. 8.

[7] See: "G.W. Hegel," in A. Arato, *Civil Society, Constitution, and Legitimacy*, Lanham 2000, p. 169.

[8] See: G.J. Jacobsohn, "Constitutional Values and Principles," in M. Rosenfeld, A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law*, 2012, pp. 756–776; as well as in: M. Rosenfeld, A. Sajo, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community*, London 2010, https://www.routledge.com/The-Identity-of-the-Constitutional-Subject-Selfhood-Citizenship-Culture/Rosenfeld/p/book/9780415949743 (accessed 21 Jan. 2021). Rosenfeld, post similar questions to those set out above, stated that "constitutional

The formal aspect, by default, is linked with the citizens as direct holders of the sovereignty who are at the same time holders of the constitutional identity; and the informal (cognitive and affective) aspect is explained through a set of beliefs and values embraced by the citizens of a given country, who share a specific identity.

There is one interesting idea present in practically all theories about the constitutional identity which indicates that the constitution should not be viewed merely as a historical or as a legal document which aims only to define the legal structure of the country, but should be viewed as a broad regime that is constituted as a combination of legal ties, political institutions and a continuous political contest of ideas, values and sources.[9]

Or, as Mark Tushnet explicitly explains the idea of constitutional orders, "constitutional order (or regime) is a reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions."[10]

Indeed, the constitutional identity is directly linked with the idea of constitutional order or regime, as well as with the issues concerning the differences and the conflicts that can trigger a trajectory of changes within a given regime. His idea of constitutional order as a "dominant set of institutions and principles" allowed for an understanding of constitutional change through processes of gradual construction and transformation. Key to his conception of a constitutional order (as well as a constitutional identity) is the "idea that the constitutional order is a combination of institutions and principles (values)."[11]

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identity must be moulded to guide answers to three principal questions: To whom shall the constitution be addressed? What should the constitution provide? Moreover, how may the constitution be justified?"

[9] See: H. Klug, "Constitutional Identity and Change," *Tulsa Law Review*, 2011, vol. 47(1), Art. 5.

[10] See: M. Tushnet, *The New Constitutional Order*, Princeton 2003.

[11] His conception also includes the idea that the guiding principles of any particular constitutional order are reflected not only in the legal and philosophical principles articulated in judicial opinions, but also in the statutes and policies adopted and pronounced by the legislature and executive, respectively. Thus, he identifies Franklin D. Roosevelt's State of the Union message in 1944, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and Medicare as defining the

As for the term "national identity" it should be noted that within the modern political philosophy, there are two dominant concepts. According to the first, the national identity is based on the individual beliefs of people who have common roots, history, culture, tradition, i.e. people with the same ethnicity. This notion was primarily placed in the works of Max Weber and Walker Connor.

The second concept considers the national identity as a broader concept anticipated through the principle of national self-determination and self-identification. Analysis of this concept is present in the works of David Miller, Kai Nielsen, Yael Tamir and others.

Regardless of the concepts applied, it is considered that the national identity is built on the individual feelings of the citizens for their common belonging to a given nation. Being a member of a nation is an essential dimension of the broader social-psychological theory for social identity, defined as an individual awareness of belonging to a particular group and a psychological sense of connection to that group.[12]

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

In the context of the EU, the question still arises as to what extent the national identity stories are compatible with European integration and the hybrid identity that EU membership brings with it.[13]

"guiding principles of the (New Deal-Great Society) constitutional order which prevailed in the United States from the 1930s to the 1980s." See: M. Tushnet, *supra* note 4, p. 1.

[12] There are different meanings of the term "identity". See details in: L. Huddy, N. Khatib, "American Patriotism, National Identity, and Political Involvement, *American Journal of Political Science*, 2007, vol. 51(1), pp. 63–77. The term "national identity" indicates the citizen's "sense of belonging" with their nation.

[13] During the negotiations on the Norwegian national identity, i.e. in the process of institutionalizing the relationship between Norway and the EU, the question of the extent to which the stories of the national "I" are compatible with the institutional integrations became more than visible in context of the "hybridization" of identity that the EU membership brings with it. The attempts

The concept of national identity is seen separately from the concept of creating or changing the constitution which frames the constitutional definition and the content of the legal nation. In Western Europe, it's built on the principle of the *demos*, while in the tradition of the countries of Southeast Europe, it is built as a cultural nation based on the *ethnos*. These two principles are part of the constitutions of the countries in Western and Southeastern Europe where national identity is defined as collective identity of the constituent entity that represents the values and the consensus present at the moment of drafting the constitution.

Although the constitutional and national identity are not synonyms, it is a fact they are related one to another.The national identity is enshrined in the constitution at the time of its writing. Thus, the Preamble of the constitution contains all historical events and circumstances, important to the constituent, while the content of the constitution incorporates all the most important relations with the national identity. That is why the national identity is considered the basis for formulating the constitutional identity. Due to the integrative function of the costitution, this constitutional identity should not only be generally accepted, but also the constituent people, i.e. the nation must identify itself with it, regardless of the differences that exist in society. It is for this reason that the constitutions 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 as the relation between the national and the constitutional identity of the EU member states has become a very important issue for the further development of European constitutionalism recently.[14]

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to implement pluralist policy have lost the battle against the nationalist policy in Norway. See: J.B. Neumann, "Upotrebe drugog," *"Istok" u formiranju evropskog identiteta*, Beograd 2011, pp. 237.

[14] The term "national identity" was first introduced in the Maastricht Treaty, Treaty on European Union (Maastricht text) OJ C 191, 29.7.1992, p. 1. In Article F(1) TEU, an obligation is established by the Union to respect the national identity of its Member States. This article was later replaced by Article 6(3) of the Treaty of Amsterdam, Treaty of Amsterdam amending the Treaty on European

Many papers by well-known legal theorists and judges have been written on this topic. The approach to this question depends on whether the topic is seen from a conceptual or philosophical approach,[15] from an approach based on EU law, or an approach arising from the analysis of the "case law" of several constitutional courts from 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 on its meaning. While some conceptions 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 character of the state (federal, confederal or republican), what is the relationship between the constitution and the culture in the country, the relationship between the "constitutional identity" and "identity of the constitution", other concepts emphasize the identity of different constitutional models, the identity in the context of the creation of the constitution, the identity created through the constitutional interpretation.

The third group of conceptions address the problem of "constitutional identity" through the identity contained of the supranational constitutions. Despite the different approaches in the analysis, the approach

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Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997, OJ (P 340), which then paved the way for Article 4(2) of the Lisbon Treaty (Art. 4(2) TEU of the Lisbon Treaty in 2009), which is currently in use (consolidated version of the Treaty on European Union Art. 4(2), 2010 OJ C 83). "National identity" as a general principle was introduced into EU law in 1992 by the Maastricht Treaty, Article F(1): "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy." The clause was later revised by the Amsterdam Treaty of 1997 by removing the second part of the sentence and left its first part stating: "The Union shall respect the national identities of its Member States." The latter not only renumbered the articles of the TEU but also gave Article 4(2) TEU its current shape: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including 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."

[15] See: A. Appadurai, *Modernity at Large: Cultural Dimensions in Globalization*, Minneapolis 1997.

of legal conceptualization based on regional European jurisprudence and doctrine seems to be dominant.

The constitutional identity in the legal sense of the word is seen as "identity of the constitution. "These two terms are considered synonyms. Although there are dilemmas 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 the identity and in the essence and the role of the Constitution as the highest legal act in constitutional democracy. Given the fact that the very term "identity" has cultural, sociological, psychological, political significance, the "constitutional identity" is also viewed through a multidimensional prism. It is precisely the legal-political significance of the "constitutional" and the "national" identity in the context of EU law that is the focus of this paper.

It can also be draw as a conclusion that the "constitutional identity" in a given country comes as a result not only of the content of the existing constitutional provisions, but also of the judicial jurisprudence dominant at the time when the constitution was composed, and later, at the time of drafting of the constitutional amendments. It should be noted that the "constitutional identity" and the "national identity" are analyzed differently in the national context, than in the context of EU and European integration.

And while the "constitutional identity" in national terms is seen through the prism of the three above-mentioned concepts, the "constitutional identity" in the EU context takes into account only those articles of the national constitution that are in the context of EU law.[16]

Or, according to the jurisprudence of the constitutional courts of Germany and Hungary, we are discussing the identity that "confronts the EU legal model."On the other hand, according to the jurisprudence of the Italian Constitutional Court, this is a "cooperative model," a model of cooperation that has a pre-defined constitutional identity.

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[16] See: N.W. Barber, "Legal Pluralism and the European Union," *European Law Journal*, 2006, vol. 12, p. 306.

2. EU and the national/constitutional identity of its Member States – Legal facts vs legal interpretations

Today, the "identity of the Constitution" of a given EU member state is most often protected through the model of active and cooperative dialogue between the supranational and the national constitutional courts. Another,less acceptable way, is by demonstrating a uniqueness in the content of the national "constitutional identity" of one versus the other member states. The issue concerning the "constitutional identity" is a topic of great importance for the contemporary constitutional democracy. Its legal conceptualization from the perspective of European integration is still insufficiently analyzed. One can notice equalization between the constitutional and/or the national identity, through different interpretations of Article 4(2) of the EU Treaty.

Although this article is precise and refers to the "national identity" of the member states, there are differences in its interpretation by the constitutional courts of Hungary, Germany, Spain, Poland and Italy.

As I have already mentioned, formally, the "constitutional identity" is not part of Article4(2) of the EU Treaty. On the other hand, the national constitutions of the EU member states do not contain strict constitutional provisions that define the "constitutional identity."[17]

This term is most often the product of a constitutional interpretation of the national constitutional courts in order to establish precise boundaries between the national Constitution on one hand, and the application of EU law in the domestic legal systems, on the other.

In this context, the position of the EU Court of Justice is certainly important. Article 4(2) of the Treaty has been in force since 2009 when

[17] Still, in the constitutional practice of four EU member states, resulting from the activism of the constitutional courts, the term "constitutional identity" is mentioned. The concept of constitutional identity of Germany was used in 1928, in the theories of Carl Schmitt and Carl Bilfinger, to justify the limits of constitutional amendments to the Weimar Constitution. Under the German regime it re-emerged in the legal doctrine regarding the same subject matter, and it was used by the Constitutional Court *vis-à-vis* European law.

the Lisbon Treaty entered into force, although the question of "national identity" was contained already in the Maastricht Treaty.

Article 4(2) of the EU Treaty does not contain the values that define the national identity. But, it's a fact 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 be incorporated following this principle. EU member states often rely on this article, especially in cases related to the protection of the national official language, or, for example, the need to abolish nobility in Austria, for which it was the EU Court of Justice that emphasized the need for respect of the "national identity."

I will first briefly mention the position of the Constitutional Courts of Germany, Hungary, Italy and Poland[18] regarding the "constitutional identity," and then I will move on to the practice of the EU Court of Justice.[19]

The term "constitutional identity" was first mentioned by the German Constitutional Court in its decision on the Lisbon Treaty, although

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[18] The term "constitutional identity" is not defined in the Polish Constitution but has been developed and expounded by the Constitutional Tribunal. Constitutional identity has become both a normative and a descriptive concept in the Polish constitutional jurisprudence. The Tribunal used the concept of constitutional identity to determine the limits of the competence for conferring power to the European Union as well as to denote axiological similarity, equivalence, or convergence between the EU and the Polish legal order.

[19] "Based on the three states that have already developed and applied the legal term 'constitutional identity' in the EU, three models (the German confrontational with EU law model (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 cooperation with embedded identity model (decision n 24/2017 of the ICC8), and the Hungarian confrontational individualistic detachment model (22/2016 (XII.5) Decision of the HCC, Dissenting Opinion to 23/2015 (VII.7) Decision of the HCC9), two attitudes (EU-friendly and antagonistic), three legal procedures (against EU and international human rights law and constitutional amendments) and one communication channel (preliminary ruling procedure) can be identified in which 'constitutional identity' displays legal relevance. It also follows from the case law of the three jurisdictions that when applied in legal proceedings, 'constitutional identity' is meant to refer to the 'identity of the constitution' (BVerfG, 2009, Judgment of the Second Senate, paragraphs 208)." Cited according to: T. Drinóczi, "The identity of the constitution and constitutional identity, Opening up a discourse between the Global South and Global North," *Iuris Dictio*, 2018, vol. 21, no.21, pp. 2018.

the Court did not give a specific description. "The identity of the Constitution" as a term differs from "the identity of the Federal Republic of Germany", which is practically equal to the sovereignty of the state. The German Constitutional Court (BVerfG) has concluded that the German constitutional identity is in Article 23(1),[20] in the third sentence – EU clause – and in Article 79(3) which covers the eternity clauses of the German constitution.

With the formation of the EU, apart from the apparent abolition of the sovereign German statehood, the German Constitutional Court confirmed only a few specific powers belonging to the national sovereign government and the sovereign people. These powers are related with the "eternity clauses"in which the identity of the Constitution of Germany is visible.

It is interesting to note that in the preliminary reference to the 2014 decision related to Outright Monetary Transactions (OMT), the German Constitutional Court has affirmed that despite the need for its compliance with EU law, the Court has the right to assess it in terms of the respect for the Constitutional identity. According to the Court, the democracy as an integral element of the constitutional and the national identity of Germany will be violated if the parliament gives up from the budgetary autonomy.The Constitutional Court recalled that the EU Court of Justice (CJEU) is obliged to provide proportional and relative protection of the national identity. In the context of the judicial consistency towards the stated paragraph is its decision regarding the

[20] 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 (accessed 31 Jan. 2021).

application of the European Arrest Warrant (EAW). As a reminder, it was the German Constitutional Court that did not allow application of the decision, based on the explanation that it means violation of human dignity.[21]

The Constitutional Court developed a detailed analysis of the importance of the "identity of the German Constitution" already in 2016 when it analysed whether the constitutional principles contained in Article 79(3), together with those of Article 1 and 20 of the German Constitution could be affected by the transfer of sovereign power from the German Parliament to the EU institutions.

Similar analysis was carried out by the Hungarian Constitutional Court in 2016, in the context of the government's disapproval of the quota for reception of migrants, which came as a legal obligation from official Brussels.[22]

A referendum was held in Hungary on this issue, and the results of which were politically interpreted as the will of the majority of citizens in Hungary who oppose the reception of migrants in the country. The Hungarian authorities appropriately addressed this will in a form of a constitutional amendment, which was not accepted by the required 2/3 majority in the Hungarian Parliament. Immediately after the unsuccessful attempt to prevent the acceptance of the quota

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[21] A German Constitutional Court was undecided about whether to permit the execution of two EAWs issued by Hungary and Romania due to their poor prison conditions – including overcrowding – which had already been condemned by the ECtHR. The CJEU apparently offered an alternative interpretative method for constructing legal argument. It applied both Articles 1 and 4 of the Charter of Fundamental Rights of the EU and Article 3 of the ECHR in ruling that the consequence of the execution of such a warrant must not be that an individual suffers inhumane or degrading treatment.

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 (accessed 21 Jan. 2021).

See: Ch. Tomuschat, "The Defence of National Identity by the German Constitutional Court," in A. Saiz Arnaiz, C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*, Cambridge 2013, p. 206.

[22] Council Decision 2015/1601 of 22 September 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1523&from=EN.

of migrants with a constitutional amendment, the Hungarian Constitutional Court investigated the possible violations of other fundamental rights, other than human dignity, on which the German constitutional court also spoke its mind. Among the other fundamental rights, the Court also introduced the sovereignty of Hungary, or Hungary's self-identity 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 discourse, but also for all matters jointly pursued with the EU institutions or with other Member States.[23]

The Hungarian Constitutional Court defined two boundaries in exercising the competences assigned or shared with the EU. The first

[23] "In the understanding of the Court, constitutional identity equals with the constitutional (self-)identity of Hungary. Its content is to be determined on a case-by-case basis based on the FL as a whole and its provision in accordance with Art R) (3), which requires that the interpretation of the FL shall be in harmony with their purposes, the National Avowal contained therein and the achievements of our historical constitution. Even though the Court holds that the constitutional (self-)identity of Hungary does not mean a list of exhaustive enumeration of values, it still mentions some of them. For example: freedoms, the division of power, the republican form of state, respect of public law autonomies, freedom of religion, legality, parliamentarism, equality before the law, recognition of judicial power, protection of nationalities that are living with us. These equal with modern and universal constitutional values and the achievement of our historical constitution on which our legal system rests. According to the Court, the protection of constitutional (self-)identity may also emerge in connection with areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, and in areas in which the linguistic, historical and cultural involvement of Hungary can be detectable. The Court holds that the constitutional (self-)identity of Hungary is a fundamental value that has not been created but only recognized by the FL and, therefore, it cannot be renounced by an international treaty. The defense of the constitutional (self-)identity of Hungary is the task of the Constitutional Court as long as Hungary has sovereignty. In its view, it follows from the above mentioned that sovereignty and constitutional identity assorts in many points; therefore the two reviews need to be employed considering one another."

See: https://www.cambridge.org/core/journals/german-law-journal/article/constitutional-identity-in-europe-the-identity-of-the-constitution-a-regional-approach/83D8D1737788756FEF098CF9485D7B1C (accessed 19 Jan. 2021).

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.

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 the one applied by the German Constitutional Court.It is interesting to note that in Hungary there is no exhaustive list of values included in the constitutional identity of the country, but still the following are mentioned as general values: the rights and freedoms of the citizens, the separation of powers, the republican character of the state, the respect for the autonomy of the public law, the freedom of religion, the principle of legality, the parliamentarism, the equality before the law, the respect for the judicial independence and respect for the national rights of the minorities living in Hungary. These values are practically universally accepted constitutional values.

The Italian Constitutional Court used the term "constitutional identity" for the first time in its decision No. 24 of 2017, when they asked the EU Court of Justice (ECJ) to explain whether the handling of the Taricco case had left the national courts with the power to disregard the domestic law, even to the extent of disrespecting the fundamental principle contained in the Constitution, the principle of legality.

The Constitutional Court remained of the opinion that the rule laid down in Article 325 of the Treaty on European Union (TFEU) applies only when it is consistent with the constitutional identity of the Member State, whereas the assessment of such compliance falls within the competence of a national authority.[24]

[24] In its *Taricco II* judgment, the ECJ did not use the word "identity" but, following the EU law-friendly language and approach of the Italian CC, it recognized that the *nullum crimen* and *nulla poena* principles form part of the constitutional traditions common to the Member States.

Except in the case of Lithuania for the protection of the official national language, the case of Austria for the abolition of nobility,[25] in the context of the republican identity protection, the EU Court of Justice is known for other cases where it has defended the national identity of the EU member states. For example, the case of Spain for protection of the system of organization of government at central, regional and local level,[26] the case of Italy for establishing rules for access to specific professions, as well as the case of Slovakia for protection of its statehood and sovereignty.

In 2004, regarding the EU Constitutional Treaty, the Spanish Constitutional Court emphasized that the Spanish state, more specifically the Spanish nation, preserves the right to sovereignty, and that the sovereign state power can be limited only if EU law is compatible with its national fundamental foundations, i.e. the identity of the Spanish Constitution. This doctrine was later confirmed in the case *Melloni*.[27]

This analogue line of reasoning is also followed in the practice of certain 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 has ruled that the "material substance" of the Lisbon Treaty takes precedence over EU law.[28] This ruling empowers the constitutional courts to assess the compatibility of EU law with the "national/constitutional identity".

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[25] In the case *Sayn-Wittgenstein*, the CJ accepted Austria's claim that it had sought to protect its constitutional republican identity. The CJ agreed that the law on the abolition of nobility constitutes a fundamental decision in favor of formal equality of treatment of all citizens before the law.

[26] Spanish Constitutional Court, Declaracion 1/2004, 13 Dec. 2004, paras. 37, 47, 50 and 58.

[27] The ECJ found that Spain could not make extradition of Mr Melloni conditional on his conviction being open to review because this would compromise the primacy and effectiveness of the EU law, as the facts of the case did not fall within the specific amendments to the EAW Framework Decision in relation to *in absentia* convictions agreed by the Member States in 2009, http://curia.europa.eu/juris/document/document.jsf?text=&docid=134203&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=234017 (accessed 12 Feb. 2021).

[28] The position of the Czech Constitutional Court is more open toward European law, but has some similarities to the German interpretation. The Court

In this sense, the Polish Constitutional Court in its 2010 ruling on the European Arrest Warrant portrays the EU as an international organization of sovereign states.This Court also concluded that the power deriving from the Polish constitutional identity could not be conferred, transferred or alienated to the Union.

It is worth mentioning that the British Supreme Court also spoke openly about the value of the UK 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 the 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 should be seen in contrast as a gradation of the basic moral principles which the multinational political community will have to respect. Here, of course, the identity of the given constitutional national group is crucial.

Despite the relatively limited case law on this issue, the EU Court of Justice seems to accept the position that constitutional identity is part of the test of proportionality, or as Werner Vandenbruwaene says, "[t]he closer the question is to the essence of the constitutional identity of the member states, the greater the margin of discretion is."[29]

I would like to emphasize that both terms "constitutional identity" and "national identity" refer to the same obligation to the EU

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acknowledges the principle of an EU-conforming interpretation of constitutional law, but in the case of a conflict between EU law and the Czech Constitution – especially its "material core"– the latter must prevail. The identification of the "material core" of the Czech Constitution came to the forefront not only with respect to EU law, but also in the internal forum, with the declaration of the unconstitutionality of a constitutional amendment. See: Treaty of Lisbon I, *supra* note 45, paras. 110, 120, 196, 197, 208, 215 and 216; cf. Y. Roznai, "Legisprudence Limitations on Constitutional Amendments? Reflections on The Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act," *Vienna Journal of International Constitutional Law*, 2014, vol. 8, pp. 29, 31.

[29] https://www.cambridge.org/core/journals/german-law-journal/article/constitutional-identity-in-europe-the-identity-of-the-constitution-a-regional-approach/83D8D1737788756FEF098CF9485D7B1C%20-%20fn11 (accessed 13 Jan. 2021).

institutions, and that 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 national courts on this issue is different.

The term "national identity" referred to in Article 4(2) of the EU Treaty is applied in order to determine whether the actions taken by the EU institutions are legitimate, while the term "constitutional identity" as defined in the judicial jurisdiction of the highest national courts or the constitutional courts, aims to defend the national constitution and the national constitutionality. There are attempts in the constitutional theory[30] to connect the two concepts into one "national constitutional identity."

The conclusion regarding this part of the paper would be that the active and cooperative use of the preliminary ruling procedure, and the application of friendly integration arguments can lead to an understanding among the Member States' concern regarding their constitutional issues.

Besides the above-mentioned, also in other EU Member States the issue of constitutional identity retains attention in theory and in the case law, and this must not be neglected or denied.

In this regard, I would like to emphasize the reckoning of François-Xavier Millet according to whom, the French constitutional identity

[30] This is 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 Roberto Toniatti, constitutional identity is a "transformed use of sovereignty." According to Monica Claes, however, the term is "closely related to the concepts of sovereignty, independence and national democracy," while according to Hèctor L. Bofill, the term is the primary source of political legitimacy. Constance Grewe offers a constitutional law-oriented technical approach to identifying the national constitutional identity, as she calls it, which she finds in several indicators, such as in constitutional amendments and the introductory provisions of constitutions. Biljana Kostadinov sees constitutional identity as a special form of national identity. In her view, national identity is a psychological and sociological phenomenon that embodies a totality of conscious and unconscious elements that develops the bond with a certain community. From: A.S. Arnaiz, C.A. Llivina (eds.), *National Constitutional Identity and European Integration*, 2013, https://intersentia.com/en/national-constitutional-identity-and-european-integration.html (accessed 21 Jan. 2021).

is not based only on the principles contained in the text of the Constitution, but it contains elements related to the cultural and historical circumstances that are part of the state. Hence, the national identity is considered part of the constitutional identity, and *vice versa*.

The constitutional identity arises from the past, but, at the same time, it contains obligations towards the future. The elements of constitutional identity are not once and for all established, they evolve, and in the case of France they 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.

3. The EU Court of Justice and the question of the EU Member States' identities

In the European constitutional practice and theory, the terms "national identity"[31]and "constitutional identity" are commonly viewed together. On the one hand, several general advocates of the EU Court of Justice have applied the concept of "constitutional identity" in order to define what is protected with the Article 4(2) of the EU Treaty, although

[31] Some legal authors explain "national identity" as a general principle of EU law, which derives from the Court of Justice's jurisprudence and is based on a clear legal provision. Article 4(2) TEU stipulates that the Union shall respect important State functions, like 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 for the Member State to decide what values should be protected by its national identity, while the CJ is only empowered to determine the relevance of national identity under EU law. See: M. 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 (accessed 22 Feb. 2021).

precisely speaking, that article refers to the national identity of the EU Member States, and is inferior when it comes to their fundamental structures.

Although the link between these two concepts is not based on any theory of legal interpretation, it should be noted that the obligation coming from the EU Treaty to respect the national identities of the member states is based on certain normative assumptions.

Firstly, as already elaborated above, there are the claims of several national constitutional courts that the EU law must be in line with the constitutional identity of the given member state, so that it can be applied in the domestic legal order. The EU's obligation to pay attention to the national identity is based on the Union's concern for the dignified treatment of its member states in the multinational political community,while the preoccupation of the national constitutional courts with the constitutional identity is based on the very concept of sovereignty.

In other words, the demands for simultaneous respect for the national and constitutional identity of the EU member states originate from different theoretical narratives.

The authors of the Treaty are believed to have had better reasons for stating the demand for respect for the national identities of the Member States rather than for the national sovereignty,[32] or countries' constitutional identities.

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[32] In the absence of a theory of sovereignty with which both the EU and the Member States could agree, it is safe to expect that any reference in the sovereignty treaty would be a new source of tension or conflict. In this sense, the EU is different from the United States, where the US Constitution has a widely held narrative of sovereignty that is widely accepted. 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, agreement between rival theories of sovereignty over the location of sovereignty 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 given up on the idea that the Union also has sovereign status. In response

It is a legal fact that the principle of "national identity" is not strictly defined in any founding treaty of the EU, nor in any EU regulation. That is why it is considered to be the result of judges' interpretation of the TFEU provisions as a part of the CJEU jurisprudence.[33]

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to the conflict between legal opinions in the EU and the Member States, a new approach capable of adapting/softening the rival sovereignty between the EU and the Member States should be developed in European legal theory.

Deliberately locating EU sovereignty, the EU Treaty focuses on national identity as an attractive alternative. Practically, Article 4 (2) of the EU Treaty prevents the attempt of the constitutional courts or the Court of Justice of the EU to rely on their own sovereignty, but also on firm views on supremacy. In other words, this article was supposed to prevent the dominance of the losers' strategy and the development of a "zero-sum game," which facilitates 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 the idea 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 an appropriate constitutional theory for Europe, too. In the EU, the state's exclusive sphere of power is progressively shrinking, with both levels of government cooperating intensively in 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. The paragraph of Article 5 of the Agreement 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."

[33] *C-473/93 Commission v Luxemburg*, ECLI:EU:C:1996:263, para. 36. In this case, the CJ rejected arguments based on this principle because of the disproportionality of the national measures in question. 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. Luxemburg*, ECLI:EU:C:2011:336, para. 124; C-393/10 O'Brien, ECLI:EU:C:2012:110, para. 49; C-202/11 Las, ECLI:EU:C:2013:239, para. 26; C-58/13 and C-59/13 Torresi, ECLI:EU:C:2014:2088, para. 56-59. In case *Torresi*, the CJ held that Article 3 of Directive 98/543 concerns solely the right of establishing legal practice in a Member State in order to practice the profession of a lawyer under the professional title obtained in the home Member State. That

The favorite method of interpretation utilized by the Luxembourg Court is the teleological method, which seeks to interpret the provisions by taking into account the aim, objective and purpose it pursues. A logical question is how ["a judge has come" or "judges have come"] have come to a specific decision to use a certain method of interpretation? Who determines the direction or the obligation of the judge to apply a particular method of interpretation in a concrete situation? Obviously, the Luxembourg Court judges have discretion to choose the application of concrete method of interpretation in a particular case meaning that judges have discretion to construe a legal text! The Luxembourg court is often criticized for its unclear reasoning and inconsistent judicial approach in using the methods of interpretation which is also the subject of criticism within the scientific community.

The next legal fact is that the Court of Justice has emphasized the importance of national identity in several cases[34] although without success for the parties who invoked this principle.

Despite the case law, the national identity remains insufficiently clear, at least in the EU context.[35] Hence, the interpretation of the identity clause based on moral reasoning might be the most promising path for the Court. In other words, when the content of the identity clause is indefinite, the court should read it in accordance with the moral principles and values contained in the identity clause. These values differ from country to country and depend on both the normative assumptions based on the doctrine of constitutional identity, and on their articulation by the constitutional courts of the particular Member States.

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provision regulates neither access to the profession of a lawyer nor the practice of that profession under the professional title issued in the host Member State, and it, therefore, cannot affect the Member State's national identity.

[34] C-208/09 Sayn-Wittgenstein, para. 83 and 92; C-391/09 Runevič-Vardyn, para. 86; C-51/08 Commission v. Luxemburg, para. 124; C-393/10 O'Brien, para. 49; C-202/11 Las, para. 26; C-58/13 and C-59/1 Torresi, para. 56–59. In O'Brien, although the Latvian Government in its written submissions invoked the national identity principle, the CJ found that remuneration of part-time judges on a daily-fee-paid basis could not have any effect on national identity.

[35] See: E. Cloots, *National Identity in EU Law*, Oxford 2015, pp. 127–134.

4. The term "Western Balkan region" – narrative confusion or illusion?

The Western Balkan region is an artificial construct of the European West.[36] Any definition or rational explanation of this artificial term is problematic and questionable. It is problematic in a geographical as well as in a political sense. Without entering into endless debates why this construct was created and why "Western Balkan" is in the heart of the Central Balkan area, I will use the term as it is defined by its "authors" – "ex-Yugoslavia minus Slovenia and Croatia plus Albania".[37]

Today the region of Western Balkans comprises six countries: Albania, Bosnia and Herzegovina, Macedonia, Kosovo, Montenegro and Serbia. If we try to justify this term, Western Balkans with the membership of the countries in the former Yugoslav federation, a problem will arise because Albania was never part of that federation. Without intending to explain in more detail the geographical nonsense of the construction of this term visible to anyone who opens a map of Europe, I would like to dwell on its legal and political effects relevant to labor.

In the past, and also today, there is a negative perception of the countries that fall under the Western Balkans concept, both from the economic, legal and political senses of the word. This negative image of the states is created both due to the high level of corruption and organized crimein these countries, as well as due to the captured legal and political systems which results in delayed processes of European integration.[38]

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[36] See: M. Todorova, "The Balkans: From Discovery to Invention," *Slavic Review*, 1994, vol. 53(2), pp. 453–482.

[37] The term "Western Balkan" was officially introduced in 1998 by the Austrian Presidency of the EU once Bulgaria and Romania were allowed to open membership talks with the EU. In the very beginning it included 7 countries: Albania, Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro and Serbia. Today, the Western Balkan region consists of 6 countries, all mentioned minus Croatia. Although unreasonable and illogical, the term "Western Balkan" will be used in this paper as a notion which includes countries that underwent similar processes of state-building, delayed and problematic transition and different modes of EU integration.

[38] Delayed European integration processes are linked to slow processes of efficient and quality transition understood as the period between the dissolution of the old regime and the installation of a new regime.

At the expense of the slow, tedious and complicated processes that are taking place in the context of the European integration, there is also a process for regional cooperation between the countries of the Western Balkans forced by the EU.[39]

The regional cooperation between these countries is seen as a necessary precondition for the European integration of the region, and the Union appears as a kind of supervisor of the processes that take place within that cooperation. After the 2004 enlargement of the EU, the countries of the Western Balkans became the closest neighbors to the EU member states, which gave the whole region additional importance for the Union itself.

The regional cooperation[40] in the Western Balkans in political, economic and security aspects, has emerged as a necessary step for the European integration process, a prelude to the more difficult task – full integration of the region into the EU (which is considered an increasingly difficult mission due to the general distrust of the Union towards the quality of the reforms undertaken by these countries,

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[39] See: O. Anastasakis, V. Bojicic-Dzelilovic, *Regional Co-operation and European Integration*, London 2002, p. 6. Co-founded by the EU, the Regional Cooperation Council is established.

[40] https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/nf5703249enc_web_en.pdf. In May 2020, the European Commission reinforced its support to regional cooperation in the Western Balkans. The signed contract for continued cooperation with RCC worth EUR 12.5 million aims at further strengthening RCC's activities over the next three years in the six Western Balkan economies: Albania, Bosnia and Herzegovina, Kosovo, Montenegro, Macedonia, and Serbia. https://ec.europa.eu/neighbourhood-enlargement/news_corner/news/eu-boosts-support-regional-cooperation-western-balkans_en (accessed 20 Jan. 2021). "With the EU's backing, the Regional Cooperation Council will continue working with the Western Balkans to support a sustainable socio-economic transformation and increase the economic competitiveness of the region notably through the development of a competitive Regional Economic Area (REA). This will unlock the sources for long-term growth and convergence with the European Union. By committing to the development of a Regional Economic Area, the Western Balkan leaders can help the region make the most of its economic potential. Consolidating a market of 18 million citizens will create new opportunities for citizens and business alike. A deeper level of economic integration would bring about significant benefits for the region – an opportunity the region cannot afford to miss" (ibid.).

the unpreparedness of the institutions, but also due to the enlargement fatigue clearly visible in the EU institutions).

It is a fact that the Western Balkans is lagging behind the EU member states economically, as well as on any other field. That is why the EU insists on improving the performance of the Western Balkan countries through the implementation of programs and projects aimed at strengthening the rule of law, enhanced economic development, fight against corruption and organized crime, and strengthening of the judiciary.

On the other hand, the countries of the Western Balkans have very similar problems, and similar values coming from the so-called Balkan axiology. In the context of this paper, I will address in more detail the content of the Balkan axiology and its similarities and differences with the European axiology in the context of the national and constitutional identities.

5. Western Balkan axiology – political myth or reality? General observations

Former Yugoslav republics,[41] which, without Albania, are all part of the Western Balkans, have common collective values whose roots (when it comes to Serbia, Croatia, Bosnia and Herzegovina, Montenegro) are found even before the formation of Yugoslavia, i.e. from the time of the Kingdom of Serbs, Croats and Slovenes.[42]

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[41] "SFRY" is the abbreviated name of the former federal state of Yugoslavia which was composed of 6 republics (Bosnia and Herzegovina, Macedonia, Slovenia, Croatia, Serbia and Montenegro) and two autonomous provinces (Vojvodina and Kosovo). The original name of the country was "Democratic Federal Yugoslavia" (DFJ) which was changed on November 29, 1945 at the Third Session of AVNOJ in Belgrade, in the Federal People's Republic of Yugoslavia (FNRY), to finally be renamed the "Socialist Federal Republic of Yugoslavia" on April 7, 1963 (SFRY).

[42] The Kingdom of Serbs, Croats and Slovenes (SCS) was created on December 1, 1918, as the successor constitutional unitary monarchy. Until April 1922, there were seven provisional provinces in the Kingdom: Serbia (Northern Serbia and Southern Serbia), Montenegro, Bosnia and Herzegovina, Dalmatia, Croatia

These common values have found their place in the national[43] and the constitutional identity which found its full expression with the formation of the Yugoslav Federation. The Yugoslav collective axiology formed the Yugoslav national identity as a set of different ethnic identities formed within the six republics and the two autonomous provinces within the former SFRY.[44]

The first value of the common collective identity would be the struggle of the Yugoslav people against the fascist occupation in the Second World War.

The liberation from the fascist occupation and building a common constitutional and political system of equal people and nationalities within the Yugoslav federation was considered as a basic collective national and constitutional value of all former Yugoslav republics, including the people and nationalities living in this area.

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and Slavonia (Croatia, Slavonia, Meŕimurje, Krk island with the municipality of Kastav), Slovenia (Slovenia with Prekmurje), Banat, Backa and Baranja. The Vidovden Constitution of 1921 established the Kingdom of SHS as a unitary state and from April 26, 1922, 33 new administrative districts were governed by the city around which they were established.

[43] See: P. Weinreich, W., Sounderson (eds.), *Analysing Identity: Cross-Cultural, Societal and Clinical Contexts*, London 2003.

[44] The first Constitution of the Federal People's Republic of Yugoslavia of 1946 defined the new federation as a federal nation-state with a republican form, a community of equal peoples who, based on the right to self-determination, including the right to secede, expressed their will to live together in a federal state. The Federal People's Republic of Yugoslavia consisted of: the People's Republic of Serbia (with the Autonomous Province of Vojvodina and the Autonomous Kosovo-Metohija District), the People's Republic of Croatia, the People's Republic of Slovenia, the People's Republic of Bosnia and Herzegovina, the People's Republic of Macedonia and the People's Republic of Montenegro. The sovereignty of the people's republics within the FRY remained limited in relation to the rights transferred to the FRY by the Constitution of the FRY. According to the Constitution, in the Federal People's Republic of Yugoslavia, all power comes from the people and belongs to the people. According to the 1963 SFRY Constitution, also known as the "Charter of Self-Government", the Socialist Federal Republic of Yugoslavia is defined as a "federal state of voluntarily united and equal peoples and as a socialist democratic community based on the power of the working people and self-government." The territory of Yugoslavia is unique and is composed of the territories of the socialist republics. This Constitution declares the Autonomous Region of Kosovo and Metohija as an Autonomous Province of Kosovo and Metohija.

This led to incorporating other values, such as: common official language of the federation with the right to nurture and use the languages of the peoples and nationalities within the republics and provinces, common national identity (an identity that arose from the Yugoslav citizenship and being part of equal peoples and nationalities belonging to the Yugoslav political community), brotherhood and unity as a principle of loyalty, solidarity and link among the people and the nationalities.

In fact, the principle of brotherhood and unity between the nations and nationalities was considered a constitutional *spiritus movens* in Yugoslavia, which was in context with the other spiritual values, such as the shared emotions between the nations and nationalities about the fallen fighters during the Second World War and the liberation of the territory of the country from the fascist occupation, the post-war formation of the common state based on the principle of solidarity and involvement of the people in numerous labour actions to rebuild the destroyed infrastructure, hospitals, schools and similar facilities, creation of common political bodies, constitutions, history, past.

Simply said, the Yugoslav national identity was seen as a mosaic of distinct identities of the people and nationalities living within the republics and provinces of the Yugoslav federation. The separate identities as constituent elements of the Yugoslav federation were most plastically presented as separate pieces of the mosaic of the Yugoslav national identity. The principle of brotherhood and unity among the nations and nationalities was the most important connecting point between the separate identities within the Yugoslav national and constitutional identity.

It was the disintegration of solidarity and the need to express brotherhood and unity among the peoples of the Yugoslav federation that marked the end of the Yugoslav nation,that is, the end of the common national identity that occurred in the late 1980s when the *de facto* collapse of the Yugoslav state began.

Or, in the words of Endru B. Vahtel:

> Yugoslavia did not fail due to the disintegration of the political or economic fabric of the Yugoslav state; on the

contrary, the decline, which was clearly seen and abundantly documented, began with the gradual destruction of the notion of the Yugoslav nation (and, therefore, also of the Yugoslav identity). Had the idea of that nation been alive after the overthrow of the political authorities, and especially after the death of Josip Broz Tito, the Yugoslav state would have been rebuilt, as it was after World War II, and separate nation-states would not have emerged for the various groups of South Slavs.[45]

Table 1. The stages of Western Balkan complex transformation.[46]

Stages	The "last" Balkanization	The "delay" transition	The "pre-" Europeanization
The process of…	Nation- and state-building	Institution-building	Member-state building
Problems and challanges	Violent disintegration (dissolution & disorder)	Governance incapacity (INstitutional incapacity & De-industrialisation)	Compliance (Institution and policy adaptation)
Causalities and Mechanisms	Correlation between the homogeneity and acceptance of difference (state – citizens relations)	High uncertainty (because of modes of communism, role of EU and domestic political elities)	Conditionality (Pre-accession impact)

[45] See: E.B. Vahtel, *Stvaranje nacije, razaranje nacije*: *Književnost i kulturna politika u Jugoslaviji*, Beograd 2001, p. 11.

[46] The table is taken from the paper of: D. Jano, "From 'Balkanization' to 'Europeanization': The Stages of Western Balkans Complex Transformations," *L'Europe en Formation*, 2008, vol. 349–350(3–4), https://www.cairn.info/revue-l-europe-en-formation-2008-3-page-55.htm (accessed 13 Jan. 2021), p. 55.

The fall of the SFRY and the formation of the independent republics did not lead to automatic erasure of the common national history and system of values. On the contrary.

The values of the previous national identity remained embedded in the collective memory of the individual national and constitutional identities formed after the independence of the former republics in independent states.[47]

After the fall of the Berlin Wall and the end of socialism as a system of government, the newly-formed independent states of the Western Balkans embraced the acceptance of democratic values within their own national and constitutional identities. Democracy, the rule of law, separation of powers, pluralism, an independent judiciary, a market economy, respect for internationally-recognized human rights and freedoms, humanism, solidarity, environmental protection and other values have become integral elements of their national identities.

What can be seen as a paradox that "infected" all the former Yugoslav republics, but also the other countries of South-Eastern Europe was the trend of the rapid "change" of the former communists in the "new clothes" of democracy.

Leading preachers of communism and socialist "values" overnight became preachers of democracy and the West, treating these new values as if they were born and raised with them. The greatest defenders of socialism, Marx and Engels, Feuerbach and communism overnight became "supreme scholars" of democracy.

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[47] "Identity is not something that is naturally acquired once and for all and as such is unchangeable. It is constantly exposed to a process of reformulation, it is influenced by the contacts, exchanges, relationships it enters with other identities. This is because ethnic differences do not depend on the absence of interaction and social consensus, but, on the contrary, often represent the foundations on which complex social systems are built. Interactions in such a social system do not lead to its abolition through change and articulation; cultural differences can exist despite interethnic contacts and interdependence. This boundary 'survives' precisely because the identity is always created in an 'opposite and opposing context', meaning in a specific setting where different groups are in often competitive interaction". See: P. Zanini, *Značenje granice: prirodna, istorijska i duhovna određenja*, Beograd 2002, p. 104.

Another visible trend in these countries was the unconditional copy-pasting of the western democratic systems by the post-socialist authorities, even though the national institutions were far from ready to achieve this transformation. There was a real influx of adoption of new national constitutions which, at least in the territory of the former Yugoslavia, looked like "an egg to an egg". The process of simple copying EU constitutional decisions in some countries of the former Yugoslavia led to inconsistencies and disproportions between the written and the practical democracy.

Specifically in the Macedonian practice, we witnessed such "copy-paste" democracy, we faced an extreme pluralism on the political scene which never came naturally, but was largely copied from other post-socialist countries, we faced a devastated economy due to the problematic (criminally) implemented privatization of the social capital.[48]

The Western values overnight become constitutional values in the Western Balkan countries embedded in their new constitutional identities. It should be mention, however, that by accepting the European values, the Western Balkan countries have formally incorporated the European axiology into their political and legal structures.

Or, to put it simply, on paper, Europe very quickly "entered the homes" of the Western Balkans people due to the trend of transcribing the European concepts into the national law, however, the actual implementation of these values proceeded with serious difficulties. No one at that time expected that the transition would take place quickly and with great quality, however, even today, 30 years after the transformation, these countries have not yet embarked on the path of complete transformation of their national systems into democratic ones. Some of these countries are still qualified as hybrid regimes, as partially free states, as captive states ruled by corruption and crime.

Although the processes of transition and transformation did not go swiftly and without challenges, It is a fact that after gaining their independence, the former Yugoslav republics moved forward with

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[48] M. Uvalic, "Economic Transition in Southeast Europe," *Southeast European and Black Sea Studies*, 2003, vol. 3(1), pp. 63.

the process of taking over and formally incorporating the democratic values into their constitutions and political institutions.

The acquisition of democratic values in some of these countries was more successful due to the greater harmonization of the new with the old values and the retention of the most important national identity features in the system, while in other countries what happened was an unreserved copying of the European values without taking into account the national authenticity and the possibility of success of such authenticity at the national level.[49]

Most of the constitutions of the independent states that are today part of the Western Balkans were adopted in 1991. These constitutions put an end to the constitutional continuity of the former Yugoslav Federation and gave a completely new dimension, free from the numerous ideologies and values present in the previous constitution (like, for example, socialist democracy, joint labor system, system of delegates, working class, etc.).

Their new constitutional identity also abandoned the monopoly of the one-party system and introduced a new democratic value reflected through the political pluralism and the multi-party system, abandoned the idea of unanimity of the power, and introduced the idea of power sharing. This led to the creation of independent states with a Republican type of governance in which priority is given to the citizens' rights and freedoms, which puts the new constitutions in the group of liberal-democratic constitutions. They also defined the concept of democratic local self-government.

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[49] For instance, it seems that at that time the authors of the Macedonian Constitution did not have their authentic constitutional concept or vision for the constitutional order in the country, which is why they found inspiration in the most approximate constitutional solutions of other countries, and why the content of the Constitution that lived from 1991 until the first half of 2001 is referred to as "copy-paste Constitution". It lacked its own originality or constitutional individuality. The discontinuance from the old socialist constitutional identity was executed though a new constitution which brought along some recognizable elements that were offered as a substitute for the old constitutional solutions and which, unfortunately, did not find fertile soil to result with some original Macedonian constitutional solutions.

It is visible that in almost all countries of the Western Balkans the new constitutions did not base their statehood and uniqueness exclusively on *demos*,[50] but on the citizens as the sole bearers of the sovereignty from which it arises and to which it belongs. These processes were different from those in the old European democracies, where the *demos*, and in that sense, the nation, played a key role in laying the foundations for the statehood. Although there are numerous studies and analyses in the professional literature which explain the processes of post-socialist national and state building, it seems that the "paradigm of Balkanization" can be most precisely explained only by those who live in this area. And while the nation-building was reduced to the introduction of a civic concept on which the national constitutions rest (a scientific and realistic contradiction), the new statehood came down to putting a new façade over the old socialist walls.[51]

For example, Article 2 of the Constitution of Kosovo says:

> 1. The sovereignty of the Republic of Kosovo stems from the people, belongs to the people and is exercised in compliance with the Constitution through elected representatives, referenda and other forms in compliance with the provisions of this Constitution. 2. The sovereignty and territorial integrity of the Republic of Kosovo is intact, inalienable, indivisible and protected by all means provided in this Constitution and the law. 3. The Republic of Kosovo, in order to maintain

[50] Article 1 of the Constitution of Serbia states that "[t]he Republic of Serbia is a state of the Serbian people and all citizens living in it, based on the rule of law and social justice, the principles of civil democracy, human and minority rights and freedoms and belonging to European principles and values." In Article 2, titled "Sovereignty holders", it is stipulated that "sovereignty is vested in citizens who exercise it through referenda, people's initiative and freely-elected representatives. No state body, political organization, group or individual may usurp the sovereignty from the citizens, nor establish government against freely-expressed will of the citizens." See: https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/74694/119555/F838981147/SRB74694%20Eng.pdf (accessed 14 Feb. 2021).

[51] A good explanation of the situation can be found in the paper of: M. McFaul, "The Fourth Wave of Democracy and Dictatorship: Non-cooperative Transitions in the Post-communist World," *World Politics*, 2002, vol. 54(2), p. 215.

> peace and to protect national interests, may participate in systems of international security.[52]

Article 2 of the Constitution of Montenegro[53] says:

> A bearer of sovereignty is the citizen with Montenegrin citizenship. The citizen shall exercise power directly and through the freely-elected representatives. The power not stemming from the freely-expressed will of the citizens in democratic elections in accordance with the law, can neither be established nor recognized.

The last sentence of the Preamble of the Constitution of Bosnia and Herzegovina says that constitutional nations in this country are: Bosniacs, Croats, and Serbs (along with others), and that the citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows.[54]

The Preamble to the Constitution of Albania says:

> We, the people of Albania, proud and aware of our history, with responsibility for the future, and with faith in God and/or other universal values, with determination to build a social and democratic state based on the rule of law, and to guarantee the fundamental human rights and freedoms, with a spirit of religious coexistence and tolerance, with

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[52] https://www.constituteproject.org/constitution/Kosovo_2016.pdf?lang=en (accessed 11 Nov. 2021).

[53] http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm (accessed 11 Nov. 2021).

[54] Article I: Bosnia and Herzegovina, The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally-recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations; ibid.

> a pledge to protect human dignity and personhood, as well as for the prosperity of the whole nation, for peace, well-being, culture and social solidarity, with the centuries-old aspiration of the Albanian people for national identity and unity, with a deep conviction that justice, peace, harmony and cooperation between nations are among the highest values of humanity, We establish this Constitution.

Pursuant to Article 2 of the Constitution of Albania:

> 1. Sovereignty in the Republic of Albania belongs to the people. 2. The people exercise sovereignty through their representatives or directly. 3. For the maintenance of peace and national interests, the Republic of Albania may take part in a system of collective security, on the basis of a law approved by a majority of all the members of the Assembly.[55]

In the Macedonian Constitution, the *demos* as a concept is not present in the normative text, although it is the Constitution's legal and obligatory part. The Preamble to the Macedonian Constitution from 1991 reads:

> The citizens of the Republic of Macedonia, the Macedonian people, as well as the citizens living within its borders who are part of the Albanian people, the Turkish people, the Vlach people, the Serbian people, the Roma people, the Bosniak people and others.

The Preamble to the Constitution is not a mandatory part of the Constitution. Article 2 of the normative text of the Constitution defines the citizen as a key holder of the sovereignty.[56]

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[55] Ibid.

[56] Ibid. Ever since it gained independence in 1991, the Republic of Macedonia has been facing with the challenge of defining its own constitutional identity in a unique way. Despite the 30 years of being an independent country, the dilemma

On the other hand, one can notice the development of a new collective identity in the Western Balkans under the influence of the EU integration processes for each country individually and also within their regional cooperation collectively. The harmonization of the legal regulations with the values and norms of the EU has been going on for more than 20 years now, which led to the defining of a new Balkan identity with a European content.[57]

However, what attracts the interest of the researchers is the model of connecting the old values that remains as part of the collective system memory, and the history of the Western Balkan countries, with the new democratic values "imported" from the Western tradition. Although it is impossible to mix these characteristics and properties of these two values from the base and the superstructure due to their different ideological and theoretical basis, they are still an integral part of the broader picture of the national and constitutional identities of the peoples and states that were part of the former Yugoslav federation.

It seems quite appropriate if we connect this example with the countries that emerged from other post-socialist countries in Central, Eastern and Southeastern Europe. They all had almost identical collective values in the past (the fight against fascism, the socialist past,

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on whether the Macedonian constitutional identity is a "story lost in translation" or a "story lost in the transition" is still very popular. The speed of the process of dissolution of SFRY brought the need of urgent consolidation and quick adoption of the Macedonian Constitution, which was based more on the computer phrase of "copy-paste" rather than on a deeply developed strategy for building an authentic Macedonian constitutional system. Most of the constitutional provisions resembled those from the constitutions of the ex-Yugoslav republics, however, there were also some vague copies from the constitutions of some EU Member States. The simple copying of the provisions from various European constitutions also reflected on the quality of the Macedonian constitutional identity. Many of these provisions still cannot find their bond with the Macedonian identity and reality. See: T. Karakamisheva-Jovanovska, *Macedonian Constitutional Identity – Lost in Translation or Lost in Transition?,* https://www.academia.edu/8372637/MACEDONIAN_CONSTITUTIONAL_IDENTITY_LOST_IN_TRANSLATION_OR_LOST_IN_TRANSITION (accessed 12 Feb. 2021).

[57] D. Bechev, *Constructing South East Europe: The Politics of Regional Identity in the Balkans*, RAMSES Working Paper 1/06, European Studies Centre, University of Oxford, Oxford 2006, p. 22.

the one-party system, socialist ideology, etc.) and completely identical values in the present related to the EU. The difference between these countries and the countries of the Western Balkans is that some of the former are already EU member states, while the latter are in the waiting room of the Union with a status of EU candidate countries for more than 10 years.[58]

The values from the previous system of the Western Balkan countries are predominantly embedded in the preambles to the constitutions adopted after independence, i.e. after the separation from the Yugoslav federation. The rule of law, pluralism, respect for universally-accepted and internationally-recognized human rights and freedoms, market economy, democracy and the independence of the judiciary were the alpha and omega principles on which all constitutions in the Western Balkans were based.

The problems that arose in the practical application of democratic values in certain areas of the systems of these countries were similar, and in some cases identical. The fight against corruption and organized crime, problems in the judiciary (insufficient efficiency, susceptibility of public prosecutors and judges to party influence, pressure from state and external centers, etc.), partisanship of the administration,

[58] For some countries, such as the Republic of Macedonia, the waiting room for opening negotiations with the EU is not only related to meeting the well-known criteria for accession to the Union, but also to additional problems related to the implementation of irrational and indecent "good neighborly" policies and requirements. The example with Macedonia and the blackmail that came first from Greece, Macedonia having to accept another name different from the constitutional one that the people have chosen and practiced for centuries is one of those conditions contrary to international law, but also to European values. Another example reconnected with Macedonia are the ultimate demands of Bulgaria to Macedonia, the Macedonian people having to give up their Macedonian identity, history, tradition, culture, language. Two EU Member States in the 21st century apply Stalinist and fascist methods of denying the cultural and national diversity of the Macedonian people, disguising this "modern" genocide as a European value. True European values have nothing to do with denying the national identity of a people, but on the contrary, the EU is built on the principle of unification by nurturing all kinds of differences between the peoples united in the Union. Bulgaria and Greece have shown fundamental disregard for these values by creating new genocidal policies directly applicable to Macedonians.

problems in the economy and financial system are just some of the common problems that the countries of the Western Balkans have been facing for the past 30 years.[59]

Regarding the national/constitutional identity of the Western Balkan countries, it should be noted that these two categories are generally viewed together. It is common for every nation in the country to have its own national identity which should be reflected in the constitution. Hence, the right of citizens to choose and accept the constitution through a free and democratic process with respect for free will and human dignity is considered as a procedural aspect of the constitutional identity that should be protected.[60]

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[59] The problems are noted in all European Commission reports on the individual progress of the Western Balkan countries. Think-tanks also write about weak institutions, the existence of a hybrid regime, poor protection of human rights, insufficient systemic commitment to the fight against corruption and crime, problems with the rule of law, and so on. After the EU leaders failed to agree on the opening of accession negotiations with Macedonia and Albania in 2019, there was a change in the enlargement methodology and it was concluded that no Western Balkan country will become an EU member before 2030. The Union offered a process of harmonization and accession of these countries through two levels: the main goal of the negotiations should remain full membership in the Union, while the middle goal is to offer these countries entry into the single market. At the end of 2019, France proposed various steps in the integration process. Those steps were simplified through both levels. The first level is entry into the Single Market as offered to Finland, Sweden and Austria in 1994. The EU has a strong political and economic incentive to offer to any interested Western Balkan nation the chance to join its Single Market as an interim goal in a reformed two-stage EU accession process. And that there was a precedent for this: the "Finnish road to accession". Instead of opening and closing "chapters" one by one, roadmaps in all areas, setting out what needs to be done, should be offered to all participating countries at the very outset. Negotiations will only close when the European Commission establishes that a country is "well advanced" in all 22 fields and that it has a strong track record on the rule of law. Rule of law conditions would need to be as demanding as they are for joining the EU, to ensure that regulations are enforced everywhere in the Single Market. See: https://esiweb.org/sites/default/files/newsletter/pdf/ESI%20-%20Slovenia%20Serbia%20and%20an%20EU-Balkan%20breakthrough%20in%202021%20-%209%20March%202021.pdf (accessed 12 Jan. 2021).

[60] In Macedonia, despite the unsuccessful referenda held on September 30, 2018, for accepting the Prespa Agreement to change the constitutional name of the Republic of Macedonia, the government changed the Constitution and

The identity of the constitution is found among the provisions of constitutional texts and may differ from jurisdiction to jurisdiction. In a European context all this may be explained by borrowing the words of Anna Śledzińska-Simon, referring to Willfried Spohn,[61] who argued that it can be generalized that the interplay between the individual, the relational, and the collective selves takes the form of "a triadic interaction between national identities, European civilizational identities and identifications with the European integration project."

In the collective constitutional dimension of the self, the question of whether constitutional identity in a nation-state in Western Balkan can dismantle the European identity – or, *vice-versa*, whether European constitutional identity dismantles the constitutional identity of the nation-state – has no basis, because the two notions are not exclusory but complementary. This approach remains in a social science context and does not really help to legally conceptualize "constitutional identity".[62]

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introduced the new name of the country, although the citizens did not accept it. The name of the state is the core of not only individual but also collective constitutional and national identity. The ability of the nation, of the citizens to choose the name of their political community is one of the key aspects of political and cultural identity of that community, and, as such, an emanation of the Macedonian people's fundamental right to internal self-determination. This right belongs only to the Macedonian people and other national minorities, and the sitting Macedonian government is unable to waive the Macedonian people's right to self-determination protected by international law. The June 2018 Agreement's contravention of the right of the Macedonian people to self-determination may go beyond the Agreement's individual provisions, considering belief that the entire June 2018 Agreement was in fact concluded as part of a long-term effort by Greece to deny the identity and history of Macedonians (and to do so also with respect to Macedonians living within the borders of their existing Republic of Macedonia), and that the incumbent Macedonian Government has colluded with Greece and certain Western States in this effort. The right to internal self-determination of an entire population of a State is memorialized in the Human Rights Covenants, the UN Friendly Relations Declaration, and other international Treaties and no State may deny the population to choose the name of its existing State in the exercise of its right to self-determination.

[61] W. Spohn, "National Identities and Collective Memory in an Enlarged Europe," in W. Spohn, K. Eder (eds.), *Collective Memory and European Identity*, London 2005.

[62] T. Drinóczi, "Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach," *German Law Journal*, 2020, vol. 21,

The applicability of constitutional provisions may be subject to the jurisdiction of the respective constitutional or high courts. The constitution, by including these provisions, may have its individual and collective and relational selves, which are, as a second tier, sustained by procedural rules on constitutional amendment processes that create the link with the people – the collective identity of the constitutional subject.

Democratic constitutions need to reproduce the will of the constituent people and also be able to adjust to any change of the collective identity of the constitutional subject by this subject, the people. Both the state and the people, when considering these constitutional provisions, can experience the individual, the relational, and the collective, and the "procedural" sameness and selfhood.

6. Final remarks

I started this paper with a thought by Joseph H.H. Weiler and I want to end with it, because the content and the message in that thought were confirmed throughout this analysis.The protection of national identity is a mission impossible without protecting its constitutional specifics, or, in other words, the national identity is the second face of the constitutional identity. Without a constitutional identity, a country does not have a complete national identity and *vice versa*.

Although no founding treaty of the EU mentions the constitutional identity, it is found in a broader axiological sense and is confirmed in the national identity of each member state or of each country candidate for membership in the Union.

From this analysis we can conclude that the connection between the national and the constitutional identity is part of the practice of the

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pp. 105–130, doi:10.1017/glj.2020.1, https://www.cambridge.org/core/services/aop-cambridgecore/content/view/83D8D1737788756FEF098CF9485D7B1C/S2071832220000012a.pdf/constitutional_identity_in_europe_the_identity_of_the_constitution_a_regional_approach.pdf (accessed 15 Jan. 2021).

constitutional courts of some EU Member States that favor that ratio and relation as a natural course of the development of the social phenomena.

Having in mind that the term "identity" has a cultural, sociological, psychological, political significance, both the term "constitutional identity" as well as the term "national identity" is considered through that multidimensional prism.

The question about the constitutional identity becomes especially complicated when viewed through the prism of the functioning of the EU and the position of the CJEU.

Although Article 4(2) of the EU Treaty does not contain any values that define the 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 be included in the content of this principle.

It is a fact that the views of the 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 in contrast should be seen as a gradation of the basic moral principles to which the multinational political community must show respect.

Here, of course, the identity of one's constitutional national group is crucial.Despite the relatively limited case law on this issue, the CJEU seems to accept the view that the constitutional identity is part of the test for the principle of subsidiarity and proportionality,whereasthe closer the question is to the essence of the constitutional identity of the member states, the greater the margin of discretion is.

The CJEU's practice, which must also take into account the views of the constitutional courts of the member states, seems to be crucial for understanding the relationship between the constitutional and the national identity, both for the members of the Union and for the candidate countries for EU membership.

I would like to emphasize that both terms "constitutional identity" and "national identity" refer to the same obligation for the EU institutions, and that is the obligation to respect the core constitutional values

of each member state separately. On the other hand, it is a fact that the CJEU's and the national courts'approach on this issue is different.

The term "national identity" referred to in Article 4(2) of the EU Treaty is applied in order to determine whether the actions taken by the EU institutions are legitimate, while the term "constitutional identity" as defined in the judicial jurisdiction of the highest national courts or constitutional courts is intended to defend the national constitutionality.

The CJEU itself has acknowledged that the preservation of the member states' national identities (which means also the constitutional identities) is a legitimate aim respected by the EU legal order. This means that the CJEU recognizes the right of each member state to protect and nurture its constitutional identity as a national principle and value. On the other hand, the CJEU practice has a different and sometimes controversial approach in implementation of the Treaty provisions.

Different "measurements" of the Court activity in protection of certain constitutional values produces a "fabric" of views, opinions and dilemmas which are seen differently in Germany, on the one hand, and in Poland and Hungary, on the other. Different use of methods of interpretation by the Luxembourg court sometimes produces a chaotic situation that is difficult to be resolved in a constructive manner. The current case law framework mentioned in the paper hides dangers for possible judicial voluntarism that could cause serious legal consequences at the European level.

The CJEU may, at times, have the task of providing a "creative" answer to questions where there is no obvious answer, which leads to a situation for the judges to create a new law, to act as legislators, which, *de facto* and *de jure*, they are not.

The EU law and the CJEU could not demand primacy and supremacy if the measure is not covered by the competencies that have been explicitly transferred to the EU by the member states with the founding treaties. This means that the constitutional identity is still preserved by the national states and its constitutional courts and is not transferred to the EU.

Vladan Petrov

European Versus National Constitutional Identity in the Republic of Serbia: A Concurrence or Unity?

Introduction

The concept of the constitutional identity created at the end of the 20th century originates from constitutional doctrine and jurisprudence of referent European countries (Germany, Italy, and France). However, it has remained insufficiently defined and blurry until today. Is this the reason why we should have a questioning approach to it? Does it even have a purpose? Is it some normative construct? Maybe a doctrinal fiction? An unsuccessful attempt to differently name some "outdated" state sovereignty concept? Does it represent an implicit recognition that the EU can no longer be a real political community, supranational union or at least "a more perfect union"? Or is it the contrary – finding a new way to establish balance between the EU goals, principles and values (particularly defined in Articles 2, 4 and 6 of the European Union Treaty from 2009) on one hand, and political, legal and cultural peculiarities of member states on the other?

There are too many questions to be given a quite complete answer in this kind of paperwork. It might be inconvenient for the author coming from a non-EU country, a country that has been on the so-called European path for a relatively long time and that seemingly will not become a member state any time soon, to try to answer these questions.

Firstly, I will present my point of view on the concept of the constitutional identity. Then, I will further explain why I believe the dilemma between European and national constitutional identity is false. I will also look into the role of the Venice Commission, which is the guardian

of European constitutional identity in the process of reforming the national constitution (or "national constitutions" if relevant). Lastly, I will discuss several controversial solutions in the Constitution of Serbia which are contrary to both European and national identity. I adopt viewpoints that do not identify European, but national constitutional identity as a source, while perceiving European values and principles, represented also by the EU to a great extent, as a "framework" or "preferable environment" to preserve national features. I share the doctrinal approach that supports harmony between European and national principles and values. The main idea is not dualism of value orders, especially not just a simple supremacy of the European system over national ones, but unity, or to be more precise – reaffirmation and fulfillment of the old formula "unity in diversity" under the contemporary circumstances.

Briefly about the concept of constitutional identity

At the end of the 20th century, constitutional identity was being written about more in political philosophy than in constitutional law or legal theory in general. It seems that the interest for the constitutional identity originates from two sources. The first one is the European integration that is an attempt to define the European Union as a community that is more than a loose (political) union of the member states, and less than a state itself. Writings about European constitution and European constitutional identity are numerous and seductive to a certain extent. It seemed as if some new questions arose that the traditional theory of the constitutional law could not answer (redefining the sovereignty concept and transferring jurisdiction from member states to the EU institutions, creating the European constitutional law, building a particular type of European federalism, etc.). It is where the particular contradiction between European and national constitutional identity comes from. Both needed to be reconciled because

the greatest constitutional democracies did not want to renounce the "autobiographical" features of their constitutionality for the sake of the "chimera" of a supranational creation of the member states. What they were not ready for, they demanded from the new member states, which belonged to the former real-socialist bloc. Another "source" of the concept of constitutional identity lies here. In most of the cases, former real-socialist countries had a new task of reconciling the European and national constitutional identity when enacting new constitutions. They did it more in favor of "European" identity, and to the detriment of the national identity. In the last couple of years, some of the countries have been waking up to this fact (Poland, Hungary).

The concept of constitutional identity is extremely indeterminate, vague, and sometimes confusing. When reading about constitutional identity, it gives us the impression that not even the best experts on this concept are entirely sure about what is the "minimum" that it has to encompass.[1]

The vagueness of the concept is also its weakness.[2] The concept that is clearly and precisely defined is more likely to succeed in practice. Otherwise, it stays on the level of abstract theoretical reasoning. However, in law and politics, the vagueness of terms and concepts sometimes serves a purpose. Here we will look at two examples. One is about constitutional customs and (or) constitutional conventions, while the other is about constitutional principles. Both types of rules are known to be part of what is called an "uncodified constitutional law in theory". What exactly are these rules? Where is their source? How are they formulated? Is their violation resulting in some legal or similar sanctions? Those are all questions that cannot be given reliable answers. Nevertheless, it does not question their meaning and role in the life of the constitutional order. The constitutional customs in stable constitutional democracies allow the codified constitution to function

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[1] See: M. Rosenfeld, "Constitutional Identity," in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, pp. 756–757.

[2] See more in F. Fabbrini, A. Sajó, "The *Dangers of Constitutional Identity*," *European Law Journal*, 2019, vol. 25, pp. 457–473; https://doi.org./10.1111/eulj.12332.

better and last, to "live" longer, and not be formally changed too often. Certainly, these rules apply also to interpreting the constitution. Constitutional principles give basic criteria and guidelines for interpreting the constitution, for better and correct understanding the constitutional norms that are general and insufficiently clear, sometimes even mutually contradictory. Therefore, the vagueness of the constitutional identity concept does not need to be endangering the interpretation and application of the constitution but can contribute to constitutional stability as one of the core values of a modern constitutional democracy.[3]

The fact that the constitutional identity concept is vague should not prevent the doctrinal reflection on this topic. This should be the task of the constitutional jurisprudence because constitutional principles and constitutional values are part of constitutional identity content and are defined and developed best through the explanations of the constitutional court decisions. Concerning this, some of the questions that should be answered would be: Is the constitutional identity more than just a norm that defines the carrier of the sovereignty (people, nation, citizens)? Can constitutional identity be found only in constitutional tradition? Is the constitutional identity composed of all or only basic constitutional principles and values? If the latter, then what is a "minimum of the identity"? When and why do changes to constitutional identity happen and what needs to be changed so that we can discuss the new identity? If the "autobiographical" part is the essential part of the identity of every constitution, is it even possible to talk about European constitutional identity when "Europe" does not have a constitution, etc.? Each one of these questions deserves separate studies, so they will not be discussed in detail here.

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[3] See: Venice Commission, *Compilation of Venice Commission Opinions Concerning Constitutional Provisions for Amending the Constitution*, CDL-PI(2015)023, http://www.venice.coe.int./webforms/documents/?pdf=CDL-PI(2015)023-e (accessed 20 March 2021).

National and (or) European constitutional identity

National constitutional identity consists of constitutional principles and values that are the foundation and essence of every constitution. Since the European Union does not have a constitution of its own, at least not in the strict sense, the term "European constitutional identity" cannot be related to this union. The dualism of constitutional identities, as well as their potential opposition and need for adjustments, could exist only if we fully accept that besides the national constitutional identity, there is also European constitutional identity. However, this is absolutely disputable and hard to prove, and so it reminds us of the old quote of Lord Palmerston who said in the mid-19th century in the British Parliament that he was ready to give a great reward to the person who would bring him a copy of the English Constitution. Actually, it is not just about the fact that a formal document named "European Constitution" does not exist, not even an institutional structure and a clear enough division of competencies between European and national authority levels. It is about principles and values that are not originally a legacy of the European Union. They derive from European legal and political culture that is what is called "European constitutional heritage". National constitutional identity is "the other side of the same coin". It was created in the jurisprudence of European Constitutional Courts, firstly in stronger member states (Germany, France, Italy, Spain), and then in younger member states that have a firmly grounded historical and cultural identity (Poland, Hungary). At first site, it might seem as if its nature is "defensive" because its goal is to maintain the "broken" sovereignty as much as possible while, at the same time, protecting the national dignity. Nevertheless, its purpose is different. Constitutional identity is the "heart" of the constitution, its essence, which cannot be changed or is hard to change.[4] It originally

[4] "Constitutions entrench the principles of the political and societal order and shield them from rapidly changing majorities and situations. Rather, they provide the lasting structures and guidelines under which an adaptation of the legal system to new challenges or altered preferences can take place" – D. Grimm,

belongs to the nation if we consider that anti-identity question in the 19th century, even the first half of the 20th century, was about fighting for national liberation or defining national sovereignty. However, constitutional identity is certainly an amalgam of the highest achievements of European legal civilization and of the most valuable national features. This concept should reflect unity of common principles and values, and not a "border stone" between original national and imposed European principles and values. When we look at it from the EU point of view, then it is based on exactly those European principles and values exposed in the first articles of the European Union Treaty. It is written in the Preamble: "[R]esolved to mark a new stage in the process of European integration undertaken with the establishment of the European Communities, drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable right of the human person, freedom, democracy, equality and the rule of law … confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedom and of the rule of law … desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions … thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world etc." The Preamble evidently promotes a balance between "universalism" (common European values and principles) and "particularism" (the history, the culture and traditions of member states) in the system which needs more integration, more participation and democracy, more effectiveness and, consequently, more unity.[5] This main intention is further developed in "Common provisions" of TEU: "This Treaty marks a new stage in the

"The Basic Law at 60 – Identity and Change," *German Law Journal*, 2010, vol. 11(1), p. 33.

[5] See about the "philosophy of balance" between European and national values and principles: A. Zs. Varga, "Rule of Law and Constitutional Identities: Concurring or Complementary European Values," in S. Granata-Menghini, Z. Caga Tanyar (eds.), *Venice Commission. Thirty-Year Quest for Democracy through Law 1990–2020*, Lund 2020, pp. 703–716.

process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen" (Article 1, para. 2); "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" (Article 2); "In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States" (Article 4, para. 1); "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including 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" (para. 2); "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."

European identity is formed by the principles and values of the modern European constitutionality such as a state of rights (rule of law), separation of powers, judicial independence, constitutional and international legal guarantees of human rights, etc. Those are, in fact, legacies of great civil revolutions that remained foundations of a modern national state even in a modified framework. If we can talk about a touchstone of European identity, then it would be the principle of the "unity in diversity". In other words, it means that European standards and European values, of which so much is said, are not given solutions in advance, nor can we discuss them as abstract categories not taking into account the legal and political culture of a political community. Therefore, for example, judicial independence is an indisputable value that is being accomplished by different constitutional means and mechanisms but their effectiveness depends on how a constitution-maker

and law-maker managed to find a good measure for the given society. After all, this is nothing new. If it had been different, it would create a paradoxical situation in which each European country that shares a European constitutional identity must have the same constitutional solutions. The richness and the experience of the life of a constitution would be reduced to some European constitutional "form" that should be simply "filled out".

Let us develop this statement further on the mentioned example of judicial independence. Judicial independence is primarily defined as the absence of the influences of political authorities and any kind of politics on exercising judiciary. Judges pass judgments based on the objective laws that nowadays are not just a law code. They also include constitution and international legal norms – ratified international treaties, even generally accepted principles of international law. Even though it is indisputable that one of the basic institutional guarantees of judicial independence is the method of judicial selection, still there is no European model to fit all.[6] There is not even an acceptable model. There are certain guidelines, benchmarks, outlines that should be taken into consideration in constitutional engineering. The diversity between countries that were affirmed as the states of rights is regulated in such a way that in the majority of them the judicial council does not exist even though in theory it is considered to be the most appropriate solution. However, if the judicial council is entitled to elect judges, then their composition is very different – in some places, it is mainly composed of judges, in others, the number of representatives of judicial and political authorities is equal, while in some other places the majority are political representatives. Therefore, judicial independence is not guaranteed by the same structure and jurisdiction of the judicial council in two different states, but is guaranteed by the one that suits the legal and political culture of the state the most. Once again we must emphasize. If it had been different, national constitutions would not

[6] Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, CDL-AD(2010)004, https://rm.coe.int/1680700a63, pp. 6–8.

be needed. A big European constitutional charter would need to be adopted and it would contain principles and solutions applicable to all European countries. In fact, two constitutional charters would be needed – one for stable (older) democracies and the other for unstable (young democracies). There is no point in wasting time explaining further how absurd such an idea is. Hence, there should be no major disagreement between the national and European constitutional identity. National constitutional identity of every European country would actually be European constitutional identity that specific national values and circumstances are "grafted" onto and that determine the state organization (simple or compounded state), forms of government (monarchy or republic), types of government (parliamentary system with a strong or weak head of state), territorial organization (one or more levels of a local government, as well as potential existence of territorial autonomy), etc.

European constitutional identity could be nothing more than just a "picture frame" or a legal framework as defined by the modern legal vocabulary. This legal framework is made of principles and values that we mentioned above, and a picture depends on their "creative evolution" in each country *per se*. There is no disagreement between the first European constitutional identity and national constitutional identity because they both suppose the rule of law. It is provided by different tools and mechanisms. For example, in some states, the rule of law is protected by constitutional judiciary, and in others, only by regular judiciary; in some states, constitutional judiciary is a part of the judiciary system, while in others, it is not; in some, there is a possibility on making a constitutional appeal on the protection of human rights, in others, it does not exist, etc.

We can conclude the following. The concept of the constitutional identity jeopardizes the tense division between European and national constitutional identity. This division is not only artificial but also opposed to the definition of a constitutional identity. If identity is the essence of the constitution, then a state cannot have two essences being two identities. It has only one identity, the one that produces and portrays its political and national being. This being must be expressed

through a culture of universal values such as rule of law, separation of powers, judicial independence, as well as tolerance, compromise, balance, etc.

Following the path of the unity of identity

For the reasons stated above, the need to establish harmony between two normative areas, the European and the national one, is just a misconception. The main idea is to have the principle of the unity of identity while respecting differences in a way that those differences (special features) reinforce the unity as long as the unity does not question the differences. The unity of identity is not just a legitimate base for the EU, but it is also a presumption of its survival and functionality. Not having a sufficient and real level of unity in the EU leads to having constant dilemmas regarding its longevity, its legal and political nature, the reason to exist and obvious lack of democratic institutions and decision processes within it. In other words, the EU must rest on decentralized unity of common principles and values, and not on imposed to a certain extent and a centralized principle of (almost) absolute primacy of the EU legislation over national legislation of member states.

Coming from a non-EU member state, Article 1 of the Constitution of Serbia from 2006 supports the thesis on the unity of constitutional identity: "The Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values." Maybe the constitutional legislator was not aware of the overall positive consequences of this kind of constitutional definition of a state. Most probably, referencing to European principles and values was only for declarative reasons. Legally and substantially Serbia is bound to respect European values and principles and make them an integral part of its own constitutional identity. Historical roots of this constitutional identity lay

in "traces" of the Declaration of the Rights of Man and of the Citizen from 1789, then in certainly the first written European constitution – the Polish Constitution from 1791, but also in the first Serbian Constitution "Candlemas Constitution" (the "Sretenje Constitution") from 1835. This constitutional identity contains the modern process of internationalization of the constitutional law, being both legal through a direct application of widely accepted rules of the international law and affirmed international agreements in the Constitution (Article 16 of the Constitution), and also factual through a legal and moral duty to respect opinions and suggestions of the Venice Commission. Therefore, European identity is present in the core of the modern Serbia being a constitutional state even though it is not an EU member state. What does it prove if not that constitutional identity is a unity of European and national identity?

It is another thing how much the Constitution of Serbia from 2006 managed to implement this concept into most of its provisions. In this regard, it succeeded in some aspects by expanding jurisdiction of the Constitutional Court and giving it the right to decide on constitutional appeals and in this way become the last national "judicial" level to have a direct communication with the European Court of Human Rights in Strasbourg, while in other aspects it differs from constitutional provisions regarding the so-called partisan imperative mandate or the "trial mandate" of judges elected for the first time for a judicial position that we shall discuss further on.

To conclude, when it comes to the thesis of the unity of constitutional identity, although we are very aware that it is difficult, and sometimes even impossible, to completely "harmonize" the EU law and national laws, we absolutely stand for the principle of unity of European and national constitutional identity. From the EU point of view, that unity is reflected in the common system of values and principles, which are not originally European, but are of national origin, or more precisely, they originate from the common European heritage. However, with the evolution from national to legal identity (end of the 19th and the first half of the 20th century), and later in the process of internationalization of constitutional law (first human

rights in the second half of the 20th century), they became common European values and principles. From the point of view of the national order, these principles and values remain a "dead letter" if they lose their national legal basis. In this endeavor the key role is not only the written constitutional norm, but also the unwritten constitutional law that is the right that comes from the jurisprudence of European constitutional courts.[7]

Often found in the "gap" between the primacy of European law and the requirement to preserve the dignity of the national legal order, they strive to unite these two into a unity. Thus, for example, the Constitutional Court of Serbia has developed several formulations that show not only the identity of rights guaranteed by the Constitution and the European Convention on Human Rights, but also the obvious efforts of the Constitutional Court not to jeopardize its own constitutional position and role of human rights defender.[8]

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[7] See the overview of the newest practice of national constitutional courts as well as European courts: T. Drinóczi, "Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach," *German Law Journal* 2020, vol. 21, pp. 106–112.

[8] For example, "the Constitutional Court finds that in a situation when the judgment is challenged by the constitutional appeal due to the violation of the right to fair trial from Article 32 paragraph 1 of the Constitution awarding compensation for non-material damage caused by the violation of the right to trial within a reasonable time and determined due to the impossibility to collect a legally-awarded claim from the employer – the debtor that is a company with exclusive or majority of social or public capital, the alleged violation of the guaranteed right must be examined by applying the decisions of the European Court expressed in *Stankovic v. Serbia*. In this regard, in the mentioned Constitutional Court case, the assessment of the awarded amount of compensation for non-material damage is not instantiation of the Constitutional Court, but is a mechanism to ensure that guaranteed rights are interpreted in accordance with European Court as an international institution that oversees their implementation, etc." (Decision Už – 6218/2018.)

"On the Trail" of Modern Constitutional Identity of Serbia

Sources

Although opponents of the concept of constitutional identity emphasize its vagueness, it seems that certain sources of constitutional identity deserve the right attention such as: 1) national and European constitutional history (national and European constitutional heritage); 2) interpretation of the constitution, and especially of constitutional principles and values by the constitutional court, as well as a "dialogue" between the constitutional court and supranational courts such as the European Court of Human Rights and the European Court of Justice (for the EU member states); 3) internationalization of constitutional law as a process that especially contributes to the affirmation of the thesis of the unity of identity. The constitutional doctrine can be added (although not everywhere and not equally) as an "additional source" that is a tool for joining the action of all the above factors into a single unity.

Constitutional doctrine – description of foreign models and an uncompleted concept

There are numerous factors that take part in the creation of a national constitutional identity. This is, among other things, a constitutional doctrine. In Serbia, this is not the case for now. Constitutional identity has been written about sporadically and no doubt insufficiently to set a clear direction in theory for the future constitutional legislator when building a modern constitutional identity. Serbian authors are familiar with the works of modern world theoreticians of constitutional identity, especially Michel Rosenfeld.[9] However, there was no more than just

[9] Particularly these works: J.G. Jacobson, *Constitutional Identity*, Cambridge 2010; M. Rosenfeld, *The Identity of the Constitutional Subject – Selfhood, Citizenship, Culture and Community*, London 2010; Rosenfeld, "Constitutional

a description or some attempt to determine who is the constitutional government ("Who are we?") and how a new constitution should be adopted in order for it to exercise its legitimate function.[10] However, this is not enough to determine reliably what the constitutive elements of the modern constitutional identity of Serbia are. Questions that are open: territory and borders (Kosovo and Metohija), political identity (with or without Kosovo, European path for the EU membership or for adopting real European values and principles – democracy, rule of law, human rights), territorial decentralization (whether the political autonomy of Vojvodina is an integral part of a modern constitutional identity or is it a legal construction of socialist constitutionalism),[11] types of government (a pure parliamentary system or a more consistent semi-presidential system), judicial independence and its main institutional guarantees (election and termination of judicial office, composition and constitutional role of the High Court Council, position and role of the Judicial Academy), etc.

The Constitutional Court – why is it quiet?

The Constitutional Court of Serbia, the second and, in fact, potentially the first creator of the constitutional identity, did not deal with this issue almost at all.[12] Part of the justification lies in the fact that Serbia is not yet a member of the EU, and that the effect of the supremacy of

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Identity," in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, pp. 756–776.

[10] M. Jovanović, "O ustavnom identitetu – slučaj Srbije," in M. Podunavac (ed.), *Ustav i demokratija u procesu tranzicije*, Beograd 2011, pp. 9–26.

[11] See: D. Simović, "Da li je teritorijalna autonomija Vojvodine deo ustavnog identiteta Republike Srbije," *Zbornik radova Pravnog fakulteta u Novom Sadu*, 2019, vol. 3, pp. 803–832.

[12] See: T. Korhecz, "Ustavna revizija i manjinska prava – u kojoj meri je reviziona vlast slobodna da menja posebna prava manjina u Ustavu Republike Srbije," in E. Šarčević, D. Simović (eds.), *Reviziona vlast u Srbiji – proceduralni aspekti ustavnih promena*, Sarajevo 2017, p. 123.

the EU law over national law cannot be felt yet. However, identity issues have been on the Constitutional Court's "agenda" for the past ten years approximately – general re-election of judges and rough violation of the permanence of judicial office, the First Brussels Agreement, statutory "expansion" of the territorial autonomy of Vojvodina outside the borders established by the Constitution, etc. Apart from the last mentioned issue, the Constitutional Court was in general refusing the jurisdiction to serve meritorious decisions and, thus, missed a good opportunity to at least try to develop the doctrine of national constitutional identity. The term "constitutional identity" appears in several individual opinions in these cases. The authors of these individual opinions were professors of constitutional law (Olivera Vučić, Dragan Stojanović) or those judges who were also engaged in theory (Bosa Nenadić), which indicates the connection between the constitutional doctrine and the concept of constitutional identity. For legal practitioners, constitutional identity is an illusion, a legal construct that cannot be found in the Constitution nor has its own constitutional basis.

Probably the Constitutional Court missed the best opportunity to establish the foundations of the concept of constitutional identity in 2013 when a proposal to assess the constitutionality and legality of the "First Agreement of Principles Governing the Normalization of Relations" signed by the Government of the Republic of Serbia and the self-declared Government of Kosovo Albanians (also known as the "First Brussels Agreement") was submitted. Briefly, the Constitutional Court assessed that this agreement is not considered an international agreement or a legal act in general, but that it is a political act. Given its political nature, this act cannot be subject to constitutional review. Therefore, the Constitutional Court declared itself incompetent and refused this proposal for the assessment of constitutionality and legality, even a year and a half after the submission of the proposal. In her separate statement on the decision (conclusion) of the Constitutional Court, Judge of the Constitutional Court and Professor of Constitutional Law, Olivera Vučić, pointed out that the task of the Constitutional Court in this particular case was "to deal with the issue of Serbia's constitutional identity and while dealing with it, it would deal with matters of our

southern province Kosovo and Metohija as one of the central features of that identity." Even though Judge Vučić did not determine what the constitutional identity would represent in her opinion, she undoubtedly determined one element of its content – the constitutional (legal) status of Kosovo and Metohija. From a few concluding sentences in this individual opinion, it can be presumed that Judge Vučić derived the constitutional identity from the concept of loyalty to the Constitution: "The Constitution is a guideline for every Constitutional Court, even this one in Serbia. Having read it carefully, it is easy to establish that the Constitution of the Republic of Serbia is only mentioned and barely quoted, while a systematic and dedicated analysis of those norms that were directly related to the issue of the Autonomous Province of Kosovo and Metohija was completely missing. It is quite justified to ask why a more important place in the explanation of the decision is given, for example, to the UN Charter than to the Constitution of the Republic of Serbia. Why is the current Constitution, both qualitatively and quantitatively neglected and discarded, why is it treated as less important for this constitutional dispute than some other acts, such as the Constitutional Framework for Provisional Self-Government in Kosovo, etc."[13]

Six years later, the Constitutional Court chose a different path when deciding on several initiatives submitted to assess the constitutionality of the Decision (I presume the capital D here is intentional?) on declaring a state of emergency due to the COVID-19 pandemic. The court did not qualify the decision to declare a state of emergency as a political, but as a legal act *sui generis* by which the state moves from a regular constitutional state to an irregular constitutional state and its main feature is the possibility to derogate from certain constitutionally guaranteed human rights in order to protect the right to life of citizens and the right to life of the state. Although it rejected the initiatives for assessing the constitutionality of the mentioned decision, the Constitutional Court did not miss the opportunity to

[13] Dissenting opinion of Judge Olivera Vučić in the Brussels Agreement Case, IUo-247/2013.

define the elements of the constitutional court doctrine on the state of emergency.[14] Addressing issues that are tightly related to sovereignty, the Court announced the possibility of paying attention to the concept of constitutional identity in the near future.

In the normative control procedure, the Constitutional Court rarely and sporadically refers to the positions of the European Court of Human Rights, however, they are present in almost every decision of the Constitutional Court when deciding on constitutional appeals. At the beginning selectively and timidly, and today in a way that shows a high level of self-confidence when it comes to understanding the practice of the European Court of Human Rights, the Constitutional Court of Serbia treats the standpoints of this court not only as formally and legally binding but also as main argumentative bases in meritorious decisions on constitutional appeals.[15] Therefore, the European Convention on Human Rights has neither constitutional nor supra-constitutional force as some authors claim,[16] but it has sufficient legal force. It is a supra-legal judicial force (according to the Constitution of Serbia, all ratified international treaties are subordinate to the Constitution, and also superior to laws of the Parliament, Art. 194 of the Constitution of Serbia). Its binding application increasingly contributes to the constitutionalization of European values and principles, that is, the translation of the normative value of Article 1 of the Serbian Constitution into legal reality.

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[14] Ruling of the Constitutional Court of 21 May 2020, IUo-42/2020.

[15] See in the examples in jurisprudence of Constitutional Court of Serbia: M. Nastić, "ECHR and National Constitutional Courts," *Zbornik radova Pravnog fakulteta u Nišu* 2015, vol. 71, pp. 212–216.

[16] T. Šurlan, "Revizija Ustava Republike Srbije u svetlosti internacionalizacije ustavnog prava," in Šarčević, Simović, *Reviziona*, p. 173.

Two historical constitutions

According to Ratko Marković, "Serbia is a country that has its own constitutional identity nothing less important for its overall national identity than other European countries with the greatest constitutional traditions, such as France and Germany," while "in Serbian constitutions, especially those from the 19th century, there are provisions that are in effect even though nowadays they are no longer binding to anyone because the constitutions they are part of ceased long ago."[17] Therefore, to a question where the constitutional identity lies, Marković says it lies in exemplary provisions of old 19th-century Serbian constitutions, the same ones that are binding even nowadays due to the extraordinary solutions they offer rather than by their legal force.

The modern constitutional identity of Serbia should be searched for in its constitutional past, and especially in the two best constitutions – the Constitution of the Kingdom of Serbia from 1888 and the Constitution of the Republic of Serbia from 1990. Maybe this statement is too strong because these constitutions lack some of the key features of a good constitution. However, they certainly contain "traits" of that constitutional identity.

The imbalance was the main weakness of the Constitution from 1888. This Constitution failed at finding and establishing the right balance between meeting the requests for modernity and the needs of Serbian society at that time. On the one hand, the provisions in this Constitution represent the highest reaches of a then constitutional science, but, on the other hand, they also represent the constitutional discontinuity, constitutionality based on making compilations or experiments, as well as tendencies in creating constitutional delusions. Even though this constitution failed at the main task of modern constitutionality, which is finding and keeping the constitutional balance; still its content is full of "traces" necessary for conceptualizing the modern constitutional identity of Serbia. They can be found in the

[17] R. Marković, "Ustavnost Srbijina," in *Spomenica akademiku Gaši Mijanoviću*, Banja Luka 2011, p. 14.

provisions related to the position of the Parliament; the free mandate of Parliament members; judicial independence; strong and developed local governments, etc. Even more than 130 years later those are still fundamental constitutional questions that Serbian constitution framers must answer: 1) How to empower the position and the role of a body representing the electorate? 2) What is the best type of government and especially what is the role of a head of state in this system? 3) How to find the right balance between the freedom of thought of electorate representatives and their inevitable connection to the political party they actually "owe" their representative mandate to; in other words, how to "empower" the principle of a free mandate, which is an old but still current and needed principle, in order to persist in a regime of political party dominance? 4) How to define a judicial independence in order to serve the justice and within a reasonable deadline as well as how to increase its reputation among citizens and in the society? 5) What is the right measure for territorial decentralization of Serbia? on the one hand, what is the right scope of original local government authorizations and what should its structure be like? on the other hand, should territorial autonomy exist at all and, if it is undoubtedly a part of a Serbian constitutional identity, how should it be defined for Vojvodina and how for Kosovo and Metohija?

The Constitution of Serbia from 1990 was adopted at the time and with a tendency to finally solve the question of identity. As written by Professor Miodrag Jovičić, through the entire constitutional history, "Serbian citizens had to express and prove their identity by creating and defending their own country, as well as by conquering and exercising rights of organising the system on their own. None of the fights were easy because they happened under the hardest historical circumstances."[18] Such circumstances were also present at the time when the Constitution of Serbia from 1990 was adopted. This Constitution was created in discrepancies between a tendency for a complete rupture with the old socio-political system and establishing grounds

[18] M. Jovičić, "Kakve nam poruke upućuje ustavna istorija Srbije," *Anali Pravnog fakulteta u Beogradu*, 1989, vol. 5, p. 562.

of a new socio-democratic order on the one hand, and maintaining the deceptive or some kind of a relationship with the common state on the other. It strived for, or at least created, the deceptive joining of what was incompatible – choosing statehood to protect its territorial integrity and constitutional dignity damaged by the resolutions of the SFRY Constitution from 1974 on the one hand, and maintaining the common state that was created more than 70 years ago thanks to the military merits of the Kingdom of Serbia. Therefore, the Constitution from 1990 had to tackle certain questions related to identity, to open and address them in the content itself, but could not answer almost any of them with objectivity. It is not the fault of either the constitution writer or of the formal constitution-maker, but of political and historical circumstances that could not provide the right constitutional moment. However, there are for sure some "traces" of the modern constitutional identity of Serbia in this Constitution.

First of all, it was a completely new constitution content-wise. The procedure for creating a constitution had to be new and democratic. Conditions for implementing such a procedure that would indicate a new constitutional fundamental nature and not just meet the formal requirements were not met. Therefore, from an objective point of view, even if that Constitution had been adopted by some constitutional assembly formed in a rushed way, its democratic legitimacy and civil potential would have remained disputable. Nevertheless, thirty years later, it is clear that Serbia needs a new constitution. To become manifest of a new constitutional identity, this constitution would have to be adopted by the new original procedure with the mandatory consent given by the citizens on a referendum. Later on, this constitution not only would not have to be changed according to such a procedure, but it would be enough, even for the most important provisions, if a qualified majority of the members of Parliament in a "regular" Parliament would give their opinion on it.

Secondly, the Constitution from 1990 defined fundamental principles and values correctly, that is basic elements of the constitutional identity: the rule of law, civil democracy, and the social role of a state. Unlike the current Constitution, this Constitution understood better

why it is important that Serbia as a multinational country, where traditionally there is not much balance between the nation and national minorities, is defined as a civil state and not a "state of Serbian people and other citizens" even though this difference can be perceived as more formal and symbolic than fundamental and real.

Thirdly, the Constitution from 1990 remained more as a constitutional declaration of constitutional principles and values than as a clear and credible strategic plan for accomplishing and protecting them. It might be the most obvious in the provisions related to territorial autonomy that were "lifeless" as they represented an attempt to return to the state that must have been known to be irreversible. Tending to complete its protective role, the Constitution was too narrow and rigid, thereby being almost unchangeable, in the period when it had to be exactly extensive, flexible, and easy to change because of the changes in the content and structure that Serbian society had to go through, regardless of the Kosovo question. The message that this Constitution sends is that there must be openness, flexibility, and compromise to the highest level in order to potentially solve the political question related to identity – the Kosovo question. For Kosovo and Metohija to remain physical, and above all a spiritual and institutional centre of the Serbian political and constitutional identity, the new Constitution must be based on fundamental, historical, and, at this moment, still an unimaginable agreement between the Serbian nation and Kosovo Albanians. Hence, as much as the new Constitution of Serbia is needed, it must not exist if it were based on this fundamental, historical compromise.

Finally, the 1990 Serbian Constitution and the Constitution of 1888 are written in a beautiful Serbian language and clear style. This should be also the quality of the modern constitutional identity of Serbia. No foreign influences, globalization, and "internationalization" can be reasons for the national constitution-maker to "spoil" the Serbian language and use foreign words and formulations. Serbia has enough 'treasure' in its previous constitutions, as well as in the 1990 Constitution to destroy its constitutional identity and use ready-made sentences

and phrases from international legal acts, no matter how important and exemplary these acts are.[19]

The Venice Commission – the Guardian of Common legal heritage and the key factor of the internationalization of national constitutional law

The Venice Commission plays a key role in bringing Serbia closer to European values and principles, as well as to those expressed in Articles 2, 4 and 6 of the EU Treaty and their implementation in legal reality. The relationship with the Venice Commission was established in January 2001, when the Federal Republic of Yugoslavia, composed of Serbia and Montenegro, obtained the status of an associate member.[20]

The Venice Commission is an authoritative guardian of European principles and values, or more precisely – of European constitutional heritage.[21] Resistance to its role in the process of constitutional changes in Serbia, which is no longer only factual, but also legal, because it is based on Article 1 (European principles and values) and 16 of the Constitution (internationalization of constitutional law), comes from the so-called constitutional traditionalists. They see the role of the Venice Commission as an unacceptable interference into the "sovereign will" of the constitution-maker and an obstacle to building a constitutional order based on a national constitutional identity. Their position is based on the dualism of European and national constitutional identity, which, as we have already shown, is an outdated and unacceptable concept.

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[19] See more in detail about the historical constitutions as the sources of national constitutional identity: V. Petrov, "Ponovno rađanje liberalno-demokratske ustavnosti u Srbiji i ustavni identitet – uz tri decenije od donošenja Ustava Srbije iz 1990," *Arhiv za pravne i društvene nauke*, 2020, vol. 4, pp. 27–32.

[20] For more, see in detail: V. Petrov, M. Prelić, "Contribution of the Venice Commission to the Constitutional Reform in Serbia with Special Reference to the Judiciary," in Granata-Menghini, Caga Tanyar, *Venice Commission*, pp. 547–567.

[21] See more in detail, e.g.: C. Grabenwarter, "Standard-Setting in the Spirit of the European Constitutional Heritage," in Granata-Menghini, Caga Tanyar, *Venice Commission*, pp. 257–279.

National constitutional identity can be built and developed only on the principle of unity of constitutional identity. National constitutional identity is a European identity in a national way. These are European principles and values to which national political and cultural peculiarities are "grafted" onto. This is also the main message delivered by the common provision of the EU Treaty.

In the construction of national constitutional identity, the role of the Venice Commission is necessary and useful. The most referenced opinion of the Venice Commission concerning Serbia so far, the Opinion on the Constitution of Serbia (2007),[22] shows in fact a high degree of agreement between the opinion of this body and local constitutional doctrine both in terms of general remarks on the quality of the constitution and in terms of some specific solutions, for example, those on the judiciary, the so-called partisan imperative mandate and excessive influence of political parties on the exercise of power or those on the unjustified complexity of the procedure for revision of the Constitution.

> It is evident that the success on the road of the future constitutional reform will depend on finding a balance between abstractly understood European values and principles and their normative elaboration that will correspond to specific socio-political circumstances of the country. After all, *a flexible approach* and *finding a balance* are perhaps the main messages the Commission has been sending to national states over the past 30 years. After all, the essence of modern constitutional democracy lies in those words.[23]

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[22] Venice Commission, *Opinion on the Constitution of Serbia*, CDL-AD(2007)04, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004 (accessed 20 March 2021).

[23] V. Petrov, M. Prelić, "Contribution of the Venice Commission," p. 567.

Conclusion – Unity Instead of Concurrence of Identities

Therefore, from the state point of view and national interest of Serbia, the principle of the unity of the constitutional identity is important for adopting a new, truly modern, and, at the same time, European and national constitution. It should be a Constitution that will derive its particular constitutional solutions from the common denominator of two sources – European heritage and national constitutional history. In this regard, in the coming period, Serbia will especially benefit from the exchange of experiences and good practice with constitutional institutions, especially national courts and constitutional courts of the EU countries that are not ready to crush their national identity for the sake of some abstract, contentless and devaluated, quasi-European constitutionality, which does not meet the two basic requirements of a modern political community – democracy and efficiency.

Without finding the right balance between democracy and efficiency, the political community or community that aspires to be such (the EU) will not have the life-giving capacity. The COVID-19 pandemic reminded us of this old "lesson" of a political life. The constitutional right to life as a fundamental right of the individual, but also the sovereign right of the state, can be effectively defended at the supranational level only when consistently respecting the old formula of "unity in diversity". This formula, so obvious in its simplicity, and so complex in its realization, is still far from the real life of the EU, and even from what can be foreseen in the near future.

Maja Nastić

Amending the Constitution of Serbia: Searching for Balance Between National Constitutional Identity and European Identity

Introduction

The European Union, so far, has shown a strong and direct impact on the constitutional law of the states, including member states as well as the states that are in the process of pre-accession to the Union. During the decades of the existence of this international organization of a *sui generis* nature, it has been shown that states have been obliged to adapt and amend their constitutional provisions to the modifications taking place within the community of European states. Changes to the Constitution have been applied for many years to ensure the EU law's effectiveness in the Member States' national legal orders. This tendency is perceptible in all EU member states' constitutions, both the founding states ("old" member states) and the newly-admitted countries.

Two types of constitutional revisions have been noticed in the development so far. The first type refers to the European Union's legal orgin specificity and its recognition in domestic law. These are modifications that arose from the need to regulate the issues of entrusting the European Union's sovereign rights and relationship between the EU and national law (integrative clause), changes resulting from the corpus of so-called European citizenship. This type of change is universal and applies to all countries, both in the founding countries and those who later joined the Union. The second type of revision refers to adjusting the individual constitutional system to common standards defined at the EU level. This type of change, accordingly, will vary from country to country. Those are constitutional issues that have arisen during the

screening process and in negotiations with the EU. Constitutional change can be achived either by changing the constitutional document's explicit wording or changing the meaning of the constitution while leaving the constitutional text unaltered.[1] In the process of accession to the EU, the states were ready to give up part of their sovereignty and the primacy of supranational legal standards, which is reflected through the constitutional revision. The legitimation of the transfer of sovereignty may be grounded on different reasons. It may stem from the substantive prosperity that EU citizens get from the EU, the efficiency and problem-solving capacity of the EU institutional system, and its capacity to respond to challenges of globalization.[2]

The European Union's constitutional impact can be recognized in the activation of national constitutional identity. This phenomenon especially evident after adopting the Treaty of Lisbon (2007), which amended the Treaty on European Union and the Treaty establishing the European Community. The Treaty of Lisbon emphasized the value dimension of the EU. The Union aims to promote peace, its values and its people's well-being (Article 2). Democracy, the rule of law, respect for human rights, along with peace, security, sustainable development of the Earth, solidarity, mutual respect among people represent the value foundation of the EU and each member state and the state on the road to the EU. National constitutional identity codified for the first time in Article 4(2) in the EU Treaty. But, the Treaty of Lisbon primarily provided the obligation to respect "the national identities of the Member States and the organization of their public authorities at national, regional and local levels."[3] In brief, the Treaty of Lisbon gave a remarkable contribution to the enrichment of the legal, and more precisely, constitutional-meaning of the identity clause by weakening

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[1] C. Karlsson, K. Galic, "Constitutional Change in Light of European Union Membership: Trends and Trajcetories in the New Member State," *East European Politics*, 2016, vol. 32(4), p. 446.

[2] M. Belov, "The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europenization of Legal Orders of EU Member States," *Perspectives on Federalism*, 2017, vol. 9(2), p. 77.

[3] Charter of Fundamental Rights of the EU preamble, OJ C 83/389, 30.3.2010, p. 391.

sociological and historical references of the clause.[4] The idea of national constitutional identity has been shaped in the case law of national constitutional courts. It could be defined as a "third way of judicial review" within the national legal order.[5] We can say this is a phase of modern constitutionalism in which the protection of national constitutional identity tends to prevail over international instances or where the protection of national constitutional identity becomes an integral part of the new phase of European integration.[6] Along with the strengthening of the concept of national constitutional identity, the constitutional identity of the EU is developing.

The Republic of Serbia was recognized as a potential candidate for EU membership during the Thessaloniki European Council Summit in 2003. Serbia formally applied in 2009. In March 2012, Serbia was granted EU candidate status. In September 2013, a Stabilisation and Association Agreement between the EU and Serbia entered into force. To become a member of the EU, Serbia has to meet the criteria expected of each member state. Regarding the EU's founding values that include the rule of law and respect for human rights, Serbia should conduct constitutional reform to strengthen the judiciary's independence. Constitutions' revision will be considered in the context to preserve the national constitutional identity and find the balance between the national constitutional identity and the European identity. We will try to answer the question of whether there are any provisions in the Constitution of Serbia that express the national constitutional identity, and how do they affect the revision of the constitution. Then, whether the axiological standards of the EU threaten the constitutional identity of Serbia and what are the perspectives of the constitutional

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[4] P. Faraguna, "Constitutional Identity in the EU – a Shield or a Sword," *German Law Journal*, 2017, vol. 18(7), p. 1620.

[5] D. Lustig, J.H.H. Weiler, "Judicial Review in the Contemporary World," *International Journal of Constitutional Law*, 2018, vol. 16(2), p. 315.

[6] M. Galimerti, S. Ninatti, "Constitutional Resistance to EU Law: The Courts and Test of Constitutional Identity Conflict," *Pravni zapisi*, 2020, vol. 2, p. 451.

identity of Serbia in the era of an accelerated process of integration and globalization.

Our starting point in this paper is that Serbia's constitutional identity is insufficiently developed in the current circumstances, but it is necessary to build it. In that sense, regarding the experience of the EU members, an active role of the Constitutional Court of Serbia is expected. The announced changes to the Constitution of Serbia concerning the judiciary are not part of the identity core of Serbia and should be implemented to harmonize our constitutional solutions with the achieved international standards.

In this regard, the first chapter will be about the national constitutional identity, its importance in the relations between the Member States and the European Union, then Serbia's constitutional identity and its potential impact on constitutional revision. At the same time, we will connect Serbia's national constitutional identity with the constitutional identity of Central European states, who joined the EU at the beginning of the 21st century.

The EU constitutional identity and national constitutional identity

First, we will try to answer what constitutes a constitutional identity and then determine its meaning at the EU level. The constitutional identity has been subjected to numerous theoretical understandings. Rosenfeld[7] admitted that constitutional identity was an essentially contested concept, and he recognized the three distinct general meanings. Firstly, there is an identity that derives from having the constitution; secondly, the content of the constitution provides specific elements of identity; and thirdly, the context in which a constitution operates. The constitutional identity does not arise based on any constitution.

[7] M. Rosenfeld, "Constitutional Identity," in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional law*, Oxford 2012, p. 762.

The fact that a country has a constitution as the highest legal act in the formal legal sense does not mean that it still has the constitutional identity. Thus, the emphasis is placed not only on identity but also on the constitution in a sense *garantiste constitutions*, which limit arbitrary government and protect fundamental rights and freedoms.

Constitutional identity refers to the set of values, principles and guidelines which define "meta-politics". It could be understood as a normative framework that summarizes what is common to all, something worth formalizing with the constitution and providing special protection. The constitutional identity consists of individual autonomy, equal freedom for all members of the political community, tolerance and pluralism, human dignity and social justice. These principles are institutionalized as fundamental rights, the rule of law, people's sovereignty, separation of powers and minority protection. Constitutional identity is not like mathematical identity; continuity and stability are critical to any rational understanding of constitutional identity, but it is also contingently changeable.[8] The constitutional identity is not formed once and for all by adopting the constitution; this is a dynamic process in which an important role is played by interpreting constitutional provisions and all forms of subsequent constitutional revision.

The notion of constitutional identity builds on the value dimension of the constitution in a general sense. The constitution is adopted in a certain social context and reflects the value and ideological judgments of a given society. Although the constitution takes effect in the present, constitutional norms reflect value assessment according to the past. However, they also contain program principles about the future, which are also value-oriented. The value dimension of the constitution is essential for its legitimacy and application in practice. It is an important precondition for identifying with the constitution and the constitution's perception as immanent to a particular political community. The absence of a generally accepted value dimension of the constitution may make it the act that creates divisions in society

[8] G.J. Jacobsohn, "Constitutional Identity," *The Review of Politics*, 2006, vol. 68, p. 3.

instead of homogenizing it. The constitution's power to shape the political community as a community of values is of crucial importance.

Following certain characteristics generated by the written constitution, it is possible to speak of different models or forms of constitutional identities. Rosenfeld recognized the seven distinct constitutional models. These are the German, the French, the American, the British, the Spanish, the European, and the post-colonial model. The German constitutional model is based on *ethnos* and is connected with a common language, culture, ethnicity, religion etc. The French constitutional model is built upon the *demos,* and it is connected with the nation-state. The American constitutional model is closer to the French, but the crucial difference is its transformation over time. Rosenfeld spoke about the British constitutional model, which is connected with its long tradition of immanent constitutionalism. When discussing the constitutional identity in Eastern Europe, the Spanish model is the most relevant. This model sets the framework for a multi-ethnic polity. The second important feature of this model is its incorporation of transnational EU norms as part of its recasting the relationship between the Spanish nation and the Spanish state.[9]

The European Transnational constitutional model is tailored according to the constitutionalism in the EU. The main difference between this model and nation-state models arises from the different approaches to the particular elements, such as *demos* or *ethnos*. The EU appears to lack a sufficient common *ethnos* or identity, and its institutions may well hinder the development of workable *demos*.[10] Therefore, Rosenfeld suggested the European model should find its own way to balance between *demos* and *ethnos*.

The forerunner of the European constitutional identity, we could find in the notion of a constitutional tradition common to the EU member states, which was included in the foundational documents of the EU and the jurisprudence of the ECJ. The "identity clause" was

[9] Rosenfeld, "Constitutional Identity," p. 764.
[10] Ibid., p. 68.

first introduced by the 1992 Treaty of Maastricht.[11] It unequivocally states that the Union shall respect the national identities of its Member States, whose system of government is founded on the principles of democracy. The Union shall respect fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. They result from the Member State's constitutional traditions, as general principles of Community law (Article F(1)). This meaning of the national identity of the Member States was linked with their democratic system of governments as independent states. In the Treaty of Amsterdam, Article 6(3) TEU stated that the Union was founded on liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law common to the Member States. The Union should respect fundamental rights guaranteed by the ECHRwhich result from the constitutional traditions common to the Member States, as general principles of Community law. The Union should respect the national identities of its Member States.

Speaking about common constitutional traditions is helpful in two ways. It allows us to draw some positive lessons for the interpretation of constitutional identity. Concurrently, it shows why the concept of constitutional tradition is not useful and why it should be replaced by the concept such as identity.[12] The core of European constitutional identity is the values that are considered universal and can be detected in a number of constitutional systems. Sadurski[13] tried to draw a list of such fundamental values. He recognized those ingredients of the European constitutional identity: a fundamental role of the reason in public life, the individual liberty, the idea of toleration, the idea of democracy, positive functions of the state, protecting of democracy against anti-democratic view and forces, minority rights and secularity of the state. Europe connected by common history and civilization has been dominated by the commitment of the member states of the

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[11] E. Cloots, E., "National Identity, Constitutional Identity, and Sovereignty in the EU," *Netherlands Journal of Legal Philosophy*, 2016, vol. 45(2), p. 84.

[12] W. Sadurski, "European Constitutional Identity?" *Working Paper LAW*, 2006, no. 33 (accessed 20 March 2021).

[13] Ibid.

EU to the principles of freedom, democracy, respect for human rights and fundamental freedoms, and the rule of law. The nation is no more understood as a historical, spiritual and cultural phenomenon; it is rather accepted the understanding of the nation based on democracy, the rule of law and human rights.

The process of European integration governs the development of European constitutional identity. The enlargement of the EU to Eastern and South-Eastern Europe required changes to the EU's founding treaties, which affected the European constitutional identity. A special place belongs to the Treaty of Lisbon, which symbolized the new stage in European integration. As stated in the Preamble to this Treaty, the EU drawing inspiration from the cultural, religious and humanist inheritance of Europe, developping the universal values of the inviolable and inalienable rights of the human persons, freedom, democracy, equality and the rule of law confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law. Of crucial importance is Article 4(2) where it is stated that the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government, it shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. This article does not define the national identity, but it provides guidelines for recognizing its elements. The Treaty of Lisbon gave an exceptional contribution to enhancing the legal, or, more precisely, the constitutional meaning of the identity clause, diminishing sociological and historical references of the clause.[14]

The identity clause protects a Member State's national identity. The notion of national identity in the Lisbon Treaty is linked to the fundamental political and constitutional structures, separating this notion from the cultural, historical and linguistic aspects of identity. It is common to use the terms "national identity" and "constitutional

[14] Faraguna, "Constitutional Identity," p. 1620.

identity" at the same time and with the same meaning as they refer to the same thing. National identity is, thus, equated with constitutional identity; we can say that it is actually a matter of constitutional identities as a strengthened version of national identities.

The concept of constitutional identity refers to the identity of the member states and is different from the constitutional identity of the European Union. Namely, the main pillars of the EU's constitutional identity are the principles of the primacy of the EU law and their direct effect. The member states have accepted them, and they have a strong impact on national legal systems. The national identity in Article 4(2) TEU should be observed as basic moral principles that demand a multinational political community to esteem the national identity. But the supranational and national conceptions of constitutional identity seem to be connected.[15] There may be considerable overlap between a Member State's constitutional identity and its national identity as reflected in its fundamental structures.[16]

Constitutional identity is a stimulus for developing supportive normative ideologies at the European and national levels, by constitutional theory and even by the constitutional courts during judicial dialogue with the CJEU[17]. In recent years, the concept of national constitutional identity has become an important point on which relations between member states and the EU are built. The constitutional identity is not just one of the national specifics to which, if necessary, the state has to refer in order to derogate the obligations it has based on membership in the European Union. It is about the core of the constitution, its inviolable core, and fundamental values that have to be respected and keep the advantage in relation to EU law.

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15 Ibid., p. 1624.
16 Cloots, "National Identity," p. 93.
17 Belov, "The Functions," p. 88.

The role of the national constitutional courts in shaping national constitutional identity

We should mention the growing tendency among national constitutional courts to shape an idea of national constitutional identity. It is also observed as a "counter-concept" to EU constitutional identity[18] or as a "third way of judicial review" within legal orders[19] that is a stage of contemporary constitutionalism where the protection of national constitutional identity tends to prevail over international instances. Constitutional courts use the term "constitutional identity" to designate the set of fundamental values and principles typical for a certain legal system.

German concept of *Verfassungsidentität* or *identität der Verfassung* is based on the distinction between original constituent power (or in French terms *pouvoir constituant originaire*) and derived constitutent power (or *pouvoir constituant dérivé*). Original constituent power exists prior to the constitution, and it is constitution-making power. The derived constituent power is the power to amend the constitution. It is limited and cannot infringe or change the core of the fundamental constitutional principles, *Verfassungsidentität*.[20] Those are eternity clauses (*Ewigkeitsklausel*) of Article 79(3) *Grundgesetz* (GG), which stated that amendments to the Basic Law (GG) affecting the division of the Federation into states (*Länder*), their participation in principle in the legislative process, or the principles laid down in Article 1 (human dignity, human rights) and 20 (constitutional principles-right of resistance) should be inadmissible. These principles have to be respected

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[18] R. Uitz, "National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades," 2016, https://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades (accessed 10 March 2021).

[19] Lustig, Weiler, "Judicial Review," p. 315.

[20] M. Claes, M., J.H. Reestman, "The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case," *German Law Journal*, 2015, vol. 16(4), p. 921.

in the case of amending the constitution and when the competencies are transferred to the EU.

We can identify three main steps that contribute to the development of the concept of constitutional identity.[21] In the first step, Article 79(3) GG is regarded as an expression of the general idea that constitutional amendment should not touch upon the "basic choices of the constituent power, the identity, (and) the core of the constitution".[22]In the second step, the German Constitutional Court (*Bundesverfassungsgerich*) uses the notion of constitutional identity in order to develop restrictions on the domestic application of European secondary law, and develop general limits on the transfer of sovereignty rights to the European level. Finally, in the well-known Lisbon judgment, the Constitutional Court connected the constitutional identity, Article 79(3) GG and the distinction between constituent power and constituted power derived from democratic principle.[23] The concept of constitutional identity developed by the German Constitutional Court is the inherent concept of the GG; it is conceived as "the fundamental architecture, the constructive structure" of the GG.[24] In terms of European integration, it served to constitute a limit on the domestic application of European law and a limit on the transfer of sovereign rights to the European Union.

The German Constitutional Court made a clear distinction between the EU's duty to respect national identity under Article 4(2) TEU and the duty of the German institutions to protect German constitutional identity. Article 4(2) TEU is based on the concept of national identity, which does not correspond to the concept of constitutional identity within the meaning of Article 79(3) GG but reaches far beyond.[25] The duty to respect national identity under Article 4(2) may be balanced against "rights conferred by Union law." In contrast, the duty

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[21] M. Polzin, "Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law," *International Journal of Constitutional Law*, 2016, vol. 14, p. 425.

[22] Ibid.

[23] Ibid, p. 429.

[24] BVerfG, 2 BvR 197/83, para. 375.

[25] BVerfG, 2 BvR 2728/13, para 29.

to protect German constitutional identity is absolute and may "not be balanced against other legal intersts."[26] At the same time, the Constitutional Court suggests that "national identity" as protected under Article 4(2) TEU is different from constitutional identity as protected under Article 79(3) GG (932). Still, they go "hand in hand."

The term "constitutional identity" is not found in the valid French Constitution, nor could this term be found in the earlier constitutions. For Michel Troper, constitutional identity results from a process of extraction of certain principles which can be posited as essential and which protect the integrity of the constitution in cases in which it confronts threats that might weaken its vital bond to the people or nation which it is meant to serve.[27] The constitutional identity is situated inside the constitution; in terms of European integration, its function is to make possible a cogent determination of what is and what is not essential in an EU member state constitution.[28]

The French Constitutional Council played a significant role in shaping constitutional identity (*identité constitutionnelle de la France*). Its understanding is somewhat different, but like German constitutional identity, it functions as a limit to the applicability of secondary EU law.[29] In its struggle to limit the supremacy of European law, the Constitutional Council formed the concept of French constitutional identity. It acknowledged constitutional identity as a limitation to the principle of undconditional primacy of EU legislation.[30] Of special importance is the Decision no. 2006-540 DC of 7 July 2006, when the Constitutional Council decided that the transposition of EU directives cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto. No matter how far its primacy and its direct effect go, European law cannot bring into question an integral part of the constitutional identity and what is essential for the Republic. The content of the constitutional

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[26] Ibid.
[27] Rosenfeld, "Constitutional Identity," p. 676.
[28] Claes, Reestman, "The Protection," p. 934.
[29] Ibid.
[30] Judgment 2004-505 DC of 19 November 2004.

identity of France can be found in the principles that make up the French contribution to the general theory of state and law. It refers to those French constitutional rules and principles specific to France, i.e. protected in the French legal order but not also in the EU's legal order.[31] The definition of the persons entitled to vote in French political elections in Article 3 of the Constitution and the definition of the criteria for access to public functions in Article 6 of the Declaration of 1789, the republic principles of *laïcité*, the prohibition to give specific rights to ethnic, linguistic and other minorities could be offered as examples of identity.[32]

The Spanish Constitutional Court (*Tribunal Constitutucional de Espaňa*) did not develop the concept of national identity as the German and French courts did. It recognized certain fundamental principles to regulate the relations between the Union and the member states (principle of attribution of competencies, the principle of loyal cooperation, principal of primacy of the Law of the Union, the principle of respect for the national identity of the States).[33] The national identity of the states involved their basic constitutional structures, and it is founded on the values that are to be found in the base of the constitutions of states.[34] The Spanish Constitutional Court, in its jurisprudence, dealt with the role and significance of EU law, and the principle of the primacy of EU law. Regarding the primacy of EU law, the Tribunal observed that the European legal order was constructed upon common values of the EU member states' constitutions and their constitutional tradition. In its Declaration, the Court stated that the constitution is no longer the framework of validity of Community legislation, but rather the Treaty itself, which carried out the sovereign operation of transfer of the exercise of competencies resulting from the former, although

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[31] Claes, Reestman, "The Protection," p. 952.

[32] J.H. Reestman, "The Franco-German Constitutional Divide. Reflections on National and Constitutional Identity," *European Constitutional Law Review*, 2009, vol. 5, p. 388.

[33] Declaration 1-2004, https://www.tribunalconstitucional.es/Resoluciones-Traducidas/Declaration%201-2004.pdf (accessed 18 March 2021).

[34] Ibid.

the constitution required that the legislation, accepted as a result of the transfer, be compatible with its basic values and principles.

The whole constitutional identity issue has a special significance for the states belonging to Central and Eastern Europe, the former socialist states. These states are still searching for their constitutional identity, and they are constantly in the phase of building stable political and constitutional institutions. The similarity of the constitutional problems that arise may provide a route to institutionalized co-operation between those constitutional courts. Constitutional identity is one of the most important issues that national constitutional courts are confronted with.

The role of the Polish Constitutional Court (*Trybunał Konstytucyjny*, TK) is emphasized here because of its active role in shaping constitutional identity. The term "constitutional identity" (*tożsamość konstytucyjna*) does not appear in the text of the Constitution of Poland;[35] the term "identity" appears in the expression "Nation's identity"[36] as well as "religious identity" and "cultural identity" of national and ethnic minorities.[37] If we connect between the mentioned articles of the Constitution and its Preamble, we can conclude that the term "national identity" is broader than the notion of cultural identity, but cultural identity is the source of national identity. On the other hand, the Constitutional Court is inclined to understand the national identity in a broader sense, thus, understanding the nation in terms of the political and cultural community. It used the word "identity" in the following expressions: "legislative identity of a statute",[38] "constitutional identity of the court",[39] "national identity",[40] "constitutional identity of the

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[35] A. Śledzińska-Simon, M. Michal Ziółkowski, M., "Constitutional Identity in Poland," in Ch. Calliess, G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge 2019, p. 245.

[36] Article 6, Polish Constitution.

[37] Article 35(2), Polish Constitution.

[38] TK judgment of 21 September 2015, K 28/13.

[39] TK judgment of 22 October 2013, SK 14/13 (costs of legal representation in cassation proceedings).

[40] K 32/09; TK judgment of 23 March 2006, K 4/06 (media law).

Republic".[41] In general, the Tribunal has used the term "identity" in three meanings.[42] According to the first meaning, identity is a symbol of equivalence. In that sense, it was used to indicate the "subjective" and "objective" identity of constitutional complaints, as well as to explain the meaning of equal rights for all entities. In the second meaning, identity outlines the scope of competence. In the third sense, identity is synonymous with the essence of a right, which defines its identity.[43] The Tribunal used the term "constitutional identity" both in the context of internal and external issues. Regarding the external meaning, the constitutional identity expresses a contemporary understanding of national sovereignty, the sovereignty of the Polish state. But, the Constitutional Tribunal did not use the term "constitutional identity" in decisions concerning the compatibility of international agreements with the Constitution. For this reason, it could be argued that the Polish Constitutional Tribunal has developed the concept of constitutional identity in relations with the EU in order to determine the extent of competencies that can be transferred to European institutions. At the same time, one could recognize that those decisions of the Polish Tribunal were influenced by the jurisprudence of the constitutional courts of some of the old member states and Germany in particular.[44]

In its decision from 2005 concerning the European Arrest Warrant, the Polish Constitutional Tribunal raised several questions connecting with the legal nature of the third pillar legislation in domestic legal systems and its relationship with national constitutions.[45] The Tribunal

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[41] K 32/09, K 33/11.

[42] Śledzińska-Simon, Michał Ziółkowski, "Constitutional Identity," p. 247.

[43] TK judgment of 22 October 2001, SK 16/01. See also TK judgments of 28 April 2009, P 22/07; of 12 January 2000, P 11/98.

[44] A. Lazowski, "Constitutional Tribunal on the Surrender of Polish Citizens under the European Arrest Warrant. Decision of 27 April 2005," *European Constitutional Law Review*, 2005, vol. 1, p. 581.

[45] "Acts issued under the third pillar of the EU (similarly as under the second pillar) may be classified as pertaining to derivative EU law (rather than Community law). Differences in relation to acts of the first pillar result from the different features of the particular pillars of the Union: whereas the first pillar is based on the so-called Community method, assuming the existence of competencies of EC institutions as pertaining to an international organisation, the second and

recognized the obligation to implement the Council Framework Decision 2002/584/JHA of 13 June 2002 on the Europen Arrest Warrant as a constitutional requirement stemming from Article 9 of the Constitution. Its enactment does not automatically guarantee the material conformity of the provisions of derivative EU law and legislative acts implementing them to the national law with the Constitution.

The Constitutional Tribunal is aware of the impact that its decisions have from the point of view of constitutional values and principles, as well as the consequence of the judgment for the sovereignty of the state and its constitutional identity.[46] In its judgment of 24 November 2010, having considered the Treaty of Lisbon's consistency with the Constitution, the Constitutional Tribunal presented its view about constitutional identity. Namely, provisions of the Preamble, Article 2,[47] Article 4,[48] Article 5,[49] Article 8,[50] Article 90,[51] Article 104(2),[52] and Article 126(1)[53] constitute the state's constitutional identity. The provisions of the Preamble are concerning the position of Poland in the

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third pillars are based on intergovernmental cooperation amongst the Member States."

[46] Judgment of the Polish Constitutional Tribunal, K 32/09.

[47] "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice."

[48] "1. Supreme power in the Republic of Poland shall be vested in the Nation. 2. The Nation shall exercise such power directly or through their representatives."

[49] "The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development."

[50] "1. The Constitution of Poland shall be the supreme law of the Republic of Poland. 2. The provisions of the Constitution shall apply directly unless the Constitution provides otherwise."

[51] "1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institutions the competence of organs of State authority in relation to certain matters…"

[52] "Deputies, before the commencement of the performance of the mandate, shall take the (following) oath in the presence of the Sejm…"

[53] The President of the Republic shall ensure observance of the Constitution, safeguard the sovereignty and security of the State as well inviolability and integrity of its territory.

contemporary world. The basic constitutional principles indicated in the Preamble are democracy, respect for the individual's rights, cooperation between the public powers, social dialogue as well as the principle of subsidiarity.

> Therefore, constitutional identity is a concept which determines the scope of "excluding – from the competence to confer competences – the matter which constitutes … the heart of the matter, i.e. are fundamental to the basis of the political system of a given state", the conferral of which would not be possible pursuant to Article 90 of the Constitution.[54]

The identity of the state relies on the fundamental principles of the constitution, including particular the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and prohibition to confer the power to amend the constitution and the competence to determine competences.[55]

The Constitutional Tribunal considered the concept of the national identity as an equivalent concept of constitutional identity in the primary EU law. The constitutional identity persists in near relation to the concept of national identity, which also includes tradition and culture.[56]

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[54] K 32/09.

[55] K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, p. 284.

[56] "The values being expressed in the Constitution and the Treaty of Lisbon determine the axiological identity of Poland and the European Union. The draft of economic, social and political systems contained in the Treaty, which stipulated the respect for dignity and freedom of the individual, as well as respect for the national identity of the Member States, is fully consistent with the basic values of the Constitution, confirmed in the Preamble of the Constitution, which includes the indication of historical, traditional and cultural context that determines national identity, which is respected in the EU within the meaning of Article 4 (2) of the Treaty on European Union."

The Treaty of Lisbon was the subject of constitutional review in the proceeding before the Czech Constitutional Court (*Ústavní soud České republiky*). In its judgment of 26 November 2008, the Czech Constitutional Court concluded that the Lisbon Treaty and the Charter of Fundamental rights are not in conflict with the Czech constitutional order. The Court stressed that the transfer of powers of bodies of the Czech Republic under Article 10 of the Constitution to an international organization could not go so far as to violate the very essence of the Republic as a democratic State governed by the rule of law, founded on respect for the rights and freedoms of human beings and citizens, and to establish a change of the essential requirements of a democratic state governed by the rule of law.[57] The Treaty of Lisbon is reviewed concerning the formal attributes of a state set out in Article 1 para. 1 of the Constitution.[58] It is stressed that the material core of the Constitution is the essential requirement of a democratic, law-based state recognized in Article 9(2). The Constitution's identity expressed in this article is sufficient to endure that a complete transformation of values in the constitutional system can not arise in the Czech Republic. The theory of immanent limits guaranteeing the identity of the Constitution is sufficient to ensure that complete transformation of values in the constitutional system can not occur in the Czech Republic. There are unwritten limits for amending the Constitution; amendments and expansion of the constitutional order are consistent with the material core of the Constitution if systematically consistent development of the Czech Republic is guaranteed and if the value system on which the Constitution as a whole rests is not overreached.[59]

In the judgment of 12 July 2010, the Constitutional Court of Hungary (*Magyarország Alkotmánybíróság*) referred to the issue of conformity of the Treaty of Lisbon to the Hungarian Constitution. In December 2016, the Hungarian Constitutional Court was the first in Europe to establish in a decision with a binding force on everyone

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[57] Czech Constitutional Court, 2008/11/26 – Pl. ÚS 19/08: Treaty of Lisbon I.

[58] "The Czech Republic is a sovereign, unitary and democratic state governed by the rule of law."

[59] Czech Constitutional Court, 2008/11/26 – Pl. ÚS 19/08: Treaty of Lisbon I.

that the safeguarding of our national identity can only be achieved in the EU in the framework of dialogue with each other. This way, the Constitutional Court endorsed safeguarding both Hungarian and European identities.[60]

The Constitutional Court of Hungary established that within its own scope of competencies, based on relevant petition, in exceptional cases and as a resort of *ultimo ration*, i.e. along with paying respect to the constitutional dialogue between the Member state, it can examine whether exercising competencies based on Article E (2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental rights or the sovereignty and the constitutional self-identity of Hungary.[61] The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case. It is not a list of static and closed values; its components are constitutional values generally accepted today such as freedoms, the division of powers, republic as a form of government, respect of autonomies under public law, the freedom of religion, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living in Hungary.[62]

Some scholars argued that these references have nothing to do with the Hungarian Constitution or constitutional identity, and they rather served to legitimize the government's intention not to take part in the EU's joint solutions to the refugee crisis.[63] It promotes national constitutional identity but does not accept the constitutional discipline demanded by the European legal order.[64] It is made to avoid the

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[60] http://hunconcourt.hu/kozlemeny/tamas-sulyok-the-hungarian-quota-decision-is-a-pioneer-step-in-europe-fundamental-rights-and-the-protection-of-national-identity-are-in-the-focus.

[61] Decision 22/2016 (XII.5.) AB on the Interpretation of Article E) (2) of the Fundamental law of the Constitutional court of Hungary.

[62] Ibid.

[63] G. Halmai, "Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law," *Review of Central and East European Law*, 2018, vol. 43, p. 25.

[64] Ibid., p. 41.

disintegration of the EU as a valued community. Hungarian interpretation of constitutional identity is so vague that it can be considered as an attempt at granting a *carte blanche* type of derogation to the executive and the legislative from Hungary's obligation under EU law.[65]

The Croatian Constitution does not explicitly state that some of its provisions or parts should be considered exceptional from possible change. Although, many Croatian theorists concluded by teleological and systematic interpretation of the Constitution, certain provisions could be considered permanent and unchanging. Actually, "eternity clauses" can be found in the Croatian Constitution. The constitutional identity of the Republic of Croatia refers to the structural principles contained in the constitution itself. It is an obligation to respect human dignity (right to life, prohibition of torture, cruel or degrading treatment, conduct or punishment), the principle of the rule of law, and the principles of a free democratic order.[66] Constitutional identity is inherently defined in the provision on the absolute limit for restricting the application of the Constitution of the Republic of Croatia, that is Article 17(3) of the Constitution.

The corpus of mentioned rights, which cannot be changed even in the case of an imminent threat to the state's existence, constitute the material core of the Croatian Constitution. The purpose of the provisions that constitute constitutional identity is to make it difficult to tactically amend the Constitution for the purpose of daily politics performed by the current parliamentary majority. Therefore, the constitutional identity of the Republic of Croatia does not depend on its understanding and comprehension of the Constitution by the Croatian Parliament when it adopts constitutional changes.[67]

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[65] D. Kochenov, P. Bárd, "Rule of Law Crisis in the New Member States of the EU. The Pitfalls of Overemphasising Enforcement," *RECONNECT Working Paper* 1, July 2018, https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf (accessed 15 March 2021).

[66] B. Kostadinov, "Ustavniidentitet," in A. Bačić (ed.), *Dvadeseta obljetnica Ustava Republike Hrvatske*, Zagreb 2011, p. 320.

[67] Ibid., p. 321.

The Croatian Constitutional Court (*Ustavni sud Republike Hrvatske*) also made a significant contribution to shaping the constitutional identity. This Court marked in its jurisprudence the structural foundation of the Croatian constitution recognized in Article 3,[68] equality of national minorities,[69] respect for the language and script of the national minority and the guarantee of entrepreneurial and market freedom (Article 49(1)). The catalogue of these norms is not closed and the Constitutional Court is supplementing it from case to case, so over time, it intensified the use of "constitutional identity" in the teleological interpretation of the Constitution[70]. Identity is also used in the dissenting opinion of the judges of the Constitutional Court. We believe that constitutional identity is the ideal candidate for the consistent dam of the inviolable core of Croatian constitutionality in the European community of nations.[71]

Serbia on the road to the European Union: the necessity of constitutional revision

The Delegation of the European Commission in Belgrade was established in the former Socialist Federal Republic of Yugoslavia (SFRY) in 1982, of which the Republic of Serbia was a pArticle It followed after

[68] "Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conversation of nature and the enivironment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution."

[69] Judgments of the Constitutional Court U-I-3597/2010, U-I-692/2011, U-I-898/2011 and U-I-994/2011, of 29 July 2011.

[70] A. Horvat Vuković, "U ime Ustava-materijalne granice promjene ustava," *Zbornik Pravnog fakulteta u Zagrebu*, 2005, vol. 65(3–4), p. 261.

[71] Ibid.

the signing of co-operation agreements between the SFRY and the European Economic Community (EEC).[72]

As an important strategic goal, Serbia's accession to the European Union, was formulated soon after the political changes that took place on 5 October, 2000. Then, Serbia took a decisive step to ending with political and economic isolation and recognized the necessity of harmonizing its political and legal system with the standards of the EU. Since 2002, institutional changes have been undertaken and the administration's work within the ministries has been adjusted to these needs. The process of Serbia's accession to the EU officially began in 2008. Namely, the Stabilization and Association Agreement (SAA) and interim agreement on trade and trade-related issues were signed in Luxembourg on 29 April 2008. Serbia applied for EU membership on 22 December 2009. The European Council confirmed Serbia as a candidate country on 1 March 2012. The EU–Serbia Stabilization and Associate Agreement entered into force on 1 September 2013. Signing this Agreement, Serbia took on two most important obligations: establishing the free trade zone and harmonizing legislation with EU law. The first intergovernmental conference between Serbia and the EU was held in Brussels on 21 January 2014, which marked the beginning of accession negotiations at the political level. By October 2020, Serbia had opened 18 of 35 chapters; two of them were temporarily closed. The eurointegration process requires substantial and fundamental changes in the judiciary, anti-corruption system and the protection of fundamental rights, both at the normative and implementation level. In Serbia's accession to the EU, it is reached at the point when it is expected to amend the Constitution.

Serbia has been expected to make several types of constitutional changes on the path to joining the European Union. The first type of amendment refers to those questions arising from the need to regulate some sovereign rights of the Republic of Serbia to EU institutions.

[72] http://europa.rs/serbia-and-the-eu/?lang=en (accessed 25 March 2021).

Namely, the Constitution of Serbia recognizes international relations[73] as one of the basic constitutional principles. However, the Constitution of Serbia clearly shows the absence of the clause of integration. Keeping in mind that the essential feature of this clause is to regulate the transfer of sovereignty from the nation-state to the EU, it will be inevitable to change the Constitution. The second type of changes refers to those resulting from the need to regulate the issue of rights arising from the domain of European citizenship. The third type of changes refers to changes in the judiciary part to ensure its independence. The fourth type of changes could refer to the strengthening of guarantees of the rights of national minorities on the territory of the Republic of Serbia.[74] The issue of possible amending to the Serbian Constitution may stem from a possible dialogue on the normalization of relations between Serbia and Kosovo, but it cannot say whether such changes will be necessary.

At the moment, on the constitutional agenda is the need to boost constitutional guarantees of judicial independence in Serbia as provided by Action Plan for Chapter 23.[75] Concerning this issue, the National Judicial Reform Strategy for the period 2013–2018 has identified the need of amending the Constitution in the part which deals with the interference of legislative and executive powers in the process of appointment and dismissal of judges, court presidents, public prosecutors and deputy public prosecutors, elected members of the High Judicial Council and State Prosecutorial Council, and the need for pressing the role and status of Judicial Academy, as a mechanism for entry to the judiciary.[76]

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[73] Article 16: "The foreign policy of the Republic of Serbia shall be based on generally-accepted principles and rules of international law.Generally-accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. Ratified international treaties must be in accordance with the Constitution."

[74] V. Međak, "Does the Serbian Constitution Need to be Amended in the EU Accession Process?" in V. Međak (ed.), *Changing the Constitution on the way to the European Union*, European Movement in Serbia, Belgrade 2017, p. 19.

[75] https://www.pars.rs/images/dokumenta/Poglavlje-23/Revised-AP23.pdf (accessed 25 March 2021).

[76] Republic of Serbia negotiation group for chapter 23: Action plan for chapter 23, April 2016.

The Serbian Constitution and legislative framework leave room for undue political influence over the judiciary.[77] Besides, the broad discretionary powers of court presidents and heads of prosecution offices over the work of individual judges and deputy prosecutors, respectively, could affect their independence and impartiality.[78] After that, in January 2018, the Ministry of Justice presented the working text of the amendment to the Constitution of Serbia. Although very critically received by the scientific and professional public, the draft amendment was sent to the Venice Commission for opinion. The High Judicial Council, as an authority which is, pursuant to the Constitution of the Republic of Serbia, autonomous and independent and guarantees autonomy and independence of courts and judges, has on its sessions held on 25 January 2018 and on 13 February 2018, considered the working draft of the Ministry of Justice amendments to the Constitution. In line with its competencies, the High Judicial Council adopted "The Opinion and Suggestions of the High Judicial Council to the Working Draft of the Ministry of Justice Amendments to the Constitution of the Republic of Serbia".[79]

The Venice Commission adopted at its 115th Plenary Session (held on 22–23 June 2018) opinion on the draft amendments to the constitutional provisions on the judiciary. In general, the draft amendments contain a number of important and welcome principles that are fundamental in any democratic state.[80] At the same time, the Venice Commission made the recommendations concerning the composition of the HJC and the role of the National Assembly, composition of the HPC and the role of the National Assembly, dissolution of the HJC, dismissal for incompetence, method to ensure the uniform application of laws and provisions about public prosecutors and deputy public prosecutors. The provisions of the draft should be reviewed and amended as recommended in this

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[77] European Commission Serbia Report in 2018, p.14, https://ec.europa.eu/neighbourhood-enlargement/system/files/ 2019-05/20180417-serbia-report.pdf (accessed 22 March 2021).

[78] Ibid.

[79] https://vss.sud.rs/sites/default/files/attachments/ENG_Ustav.pdf.

[80] CDl-AD (2018) 011.

opinion. This informal procedure of revision of the Constitution, which was (unauthorized) managed by the Ministry of Justice, received a formal outline in November 2018. The government submitted a proposal to the National Assembly to amend the Constitution. But, the whole process of constitutional reform was put on hold until the parliamentary elections were held in June 2020. The newly-elected government submitted (again) the same initiative for amending the Constitution to the National Assembly on 4 December 2020. The National Assembly on its plenary session held on 7 June 2021 adopted the proposol to amend the Constitution by a two-thirds majority.

It was originally envisaged to make these amendments by the end of 2017. The revised Action Plan for Chapter 23 contains a new deadline: end of 2021. But, having in mind the dynamics of current constitutional reform, it is probable that there will be a shift again. This shows the extent to which constitutional changes are not taken seriously enough.

The revision procedure of the Constitution of Serbia

The current Serbian Constitution was adopted on the referendum held on 28–29 October and proclaimed at the National Assembly session held on 8 November 2006. The Constitution of the Republic of Serbia lays down a complex constitutional amendment procedure, wherefore it falls in the group of so-called rigid constitutions. Namely, the Serbian Constitution establishes the revision procedure in Part IX, adhering to the rules that each constitution should regulate its changes. The Constitution does not contain an *expressis verbis* clause of eternity. The only prohibition against amending the Constitution regards the time of the state of war or emergency. Such a restriction is legitimate and is in line with the requirements of modern constitutionalism.

The procedure for amending the Constitution consists of two phases. The first phase includes the submission and adoption of proposals for amending the Constitution, and the second phase involves the drafting

and adoption of an act amending the Constitution. The first phase begins with the submission of a proposal to amend the Constitution. This proposal may be submitted by at least one-third of the total number of members of parliament, the president of the Republic, the government and at least 150,000 voters.[81] Each proposer has an independent authority to initiate the procedure, and each is of the same rank.[82] Comparatively speaking, the circle of the authorized proposer is broadly set. Proposals for the amendment of the Constitution should be submitted in writing with an explanation of the proposal.[83] Then, the competent committee (Committee on Constitutional Questions) should examine the formal correctness of the proposal, or itis submitted by a proposer authorized by the Constitution and in a prescribed form. The National Assembly will debate about the proposal for amending the Constitution at its first sitting and no earlier than 30 days after submitting it.[84] A proposal to amend the Constitution shall be adopted by a two-thirds majority of the total number of members of parliament. The Constitution regulates two possible situations. If the required majority of votes has not been achieved, the amending of the Constitution according to the submitted proposal's issues, which has not been adopted, shall not be considered in the following twelve months. In the case that the National Assembly adopts the proposal for amending the Constitution, an act amending the Constitution shall be drafted, that is, considered.[85]

Then, the second phase of the amending procedure begins. The Committee on Constitutional Questions should prepare the amendment of the Constitution and the draft of the constitutional law for the implementation of the constitutional amendments to the Speaker of the National Assembly. Proposals for the amending of the Constitution and the constitutional law to implementthe amendments to the

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[81] Article 203(1), Constitution of Serbia.

[82] V. Petrov, "Ustvotvorne i revizione procedure u postkomunističkoj Srbijibilans i pogled unapred," in E. Šarčević, D. Simović (eds.), *Reviziona vlast u Srbiji: proceduralni aspekti ustavnih promena*, Sarajevo 2017, p. 25.

[83] Article 142(1), Rules of procedure.

[84] Article 143(1), Rules of procedure.

[85] Article 203(4), Constitution of Serbia.

Constitution should be considered at a sitting of the National Assembly. The National Assembly should adopt an act on amending the Constitution by a two-thirds majority of the MP's total number. Conducting a republic referendum is required when the amendment of the Constitution pertains to the preamble of the Constitution, principles of the Constitution, human and minority rights and freedoms, the system of authority, the proclamation of the state of war and emergency, derogation from human and minority rights in the state of emergency or war or the proceedings of the amendment.[86] When it is amending the remaining part of the Constitution, a referendum is not mandatory; it is sufficient for the decision to be adopted by a two-thirds majority in the National Assembly. According to this easier revision procedure, only about 50 (of 206) provisions of the Constitution are changed. Those are the economic system and public finances (Articles 82–96), competencies of the Republic of Serbia (Article 97), the Constitutional Court (Articles 166–175) and constitutionality and legality (Articles 194–199).

The Constitutional Revision procedure should have a symbolic function because it could help identify the values that are not so emphasized but are located between the constitutional text lines.[87] However, observed on the example of the Constitution of Serbia, such a function of the revision authority does not come to the fore. The division of provisions of the Constitution into those amending according to the more difficult, on one side, and those amending according to the easier procedure, on the other side, is hard to explain. Separating more than three-quarters of the constitutional text as norms of a higher constitutional rank, the constitution maker failed to identify the basic core or identity of the Constitution.[88]

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[86] Article 203(7), Constitution of Serbia.

[87] S. Holmes, C. Sustain, "The Politics of Constitutional Revision in Eastern Europe," in Sanford Levinson (ed.), *Responding to Imprefection: The Theory and Practice of Constitutional Amendmen*t, Princenton University 1995, p. 279.

[88] D. Simović, "Ustavna rigidnost i aporije revizione vlasti u Republici Srbiji," in E. Šarčević, D. Simović (eds.), *Reviziona vlast u Srbiji: proceduralni aspekti ustavnih promena*, Sarajevo 2017, p. 82.

When it is about the citizens' role in the constitutional amendment process, we should emphasize several points. Firstly, the Constitution of Serbia (2006) underlines at the outset the role of the citizens. Sovereignty is vested in citizens who exercise it through referenda, people's initiative, and freely-elected representatives.[89] People's initiative authorizes a certain part of the electorate to initiate the Constitutional amendment procedure. The initiative must be submitted by at least 150,000 voters, as we mentioned earlier. This makes the role of citizens more difficult than it was in the previous Constitution (1990). Realization of these rights is additionally hampered by short deadlines and additional obligation of initiators.

The role of citizens in the amending procedure is more prominent when it comes to the referendum. The Constitution of Serbia requires a mandatory referendum for most of its parts. However, in contrast to the 1990 Constitution, the 2006 Constitution does ameliorate a citizen's position regarding the percentage of votes needed for adopting of an amendment in the referendum. The amendment to the Constitution shall be adopted if most of voters who participated in the referendum voted in favour of the amendment. These solutions have weakened the citizens' position in terms of their direct participation in the Constitutional amendment procedure.

The constitutional identity of Serbia

We will try to answer how the announced amendment of the Constitution can affect the constitutional identity and how to achieve a balance between European and national constitutional identity. In the context of the topic we are dealing with, we want to answer whether the current Constitution of Serbia formulates its identity and how it refers to this concept.

[89] Article 2 of the Constitution of Serbia.

We should say at the beginning that Serbia is a country with a rich constitutional history. The idea of constitutionality in Serbia is two centuries old, and it was developed in parallel with the struggle for national liberation and the creation of an independent Serbian state. Serbia got its first Constitution in 1835 (the "Sretenje" Constitution), when neither much larger nor much more important European states had their own constitutions. Before gaining formal independence at the Berlin Congress (1878), Serbia had two more constitutions: "Turkish" (1838) and the 1869 "Governors" Constitution. In 1888, Serbia obtained the most democratic constitution ever in its history as an independent state.[90] It is also known as the "Radical" Constitution. Then, Serbia got the *Octroyed* Constitution in 1901, the 1903 Constitution soon replaced it. By adopting the 1903 Constitution (in effect, just a slightly altered 1888 Constitution), Serbia became a modern parliamentary state. The Constitution was passed without the monarch's participation and is considered one of the most liberal of contemporary European constitutions. On December 1, 1918, the Act of Unification created the Kingdom of Serbs, Croats and Slovenes, which was later called the "Kingdom of Yugoslavia". After the Second World War, socialist constitutionalism developed in the Socialist Federal Republic of Yugoslavia, of which Serbia was a part, as well as in other Eastern and Central European countries.

In the early 1990s, socialism disintegrated, and so did Yugoslavia. After the disintegration of Yugoslavia, Serbia, together with the Republic of Montenegro, joined in a common federal state. However, Serbia adopted a new Constitution in 1990 while Yugoslavia still formally existed. This Constitution was called "Milosevic's Constitution" and was marked as a constitution tailored to the dictator.[91] Political changes in 2000 created a favourable climate for the adoption of the new constitution. Instead of adopting a new constitution within a reasonable time that would break with the authoritarian past, that did not happen.

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[90] S. Stojičić, "Ustav bez procedure ili procedura bez ustava: jedna istorijska paralela," *Zbornik radova Pravnog fakulteta*, vol. 46, 2005, p. 34.

[91] Petrov, "Ustvotvorne i revizione procedure," p. 14.

This Constitution gained a new dimension of enforcement. This is in line with the well-known aspect that the Constitution in Serbia was and remained an instrument of politics and not an instrument that limits and directs politics. When those who pass the constitution perceive this act as a political instrument, the revision procedure does not ensure the highest value of modern constitutionality but served a purely political purpose – to be in power as long as possible.[92]

Serbia adopted a new Constitution on November 8 and it is called the "Mitrovdan Constitution". After the Republic of Montenegro withdrew from the common state in May 2006, a new constitutional moment occurred. Paradoxically, by this Act of Montenegro, Serbia regained its independence, immersed in a common state for a century. But, Serbia could adopt a new long-awaited Constitution after the compromise between the most vital political parties was reached. The National Assembly of Serbia adopted a draft constitution, which was then put to a republican referendum, which was held on 28–29 October 2006. The Mitrovdan Constitution was adopted according to the revision procedure established by the 1990 Constitution. In this sense, the 2006 Constitution is a constitution of continuity. Keeping in mind the political climate that accompanied the adoption of this Constitution, it should have confirmed Serbia's territorial integrity and guaranteed substantial autonomy for Kosovo and Metohija. However, this projected constitutional arrangement was at odds with the actual state of affairs at the time of adoption. We can not help feeling that the Mitrovdan Constitution was adopted as an interim solution, and that will inevitably be amended or altered in the process of Serbia's accession to the European Union.

The Constitution of Serbia does not contain the eternity clause. There is no explicit provision in the Constitution that some parts are exempt from changes, but could such a conclusion be reached by teleological and systematic interpretation of the Constitution? Can we talk about the implicit eternity clause? Although constitutional identity cannot be equated with the explicit or implicit eternity clause, there is

[92] Ibid., p. 15.

a significant connection between them. What undoubtedly connects the eternity clause and constitutional identity is the material legal restriction in amending the Constitution.

The constitutional identity of Serbia is not profiled. There is no consensus in constitutional theory on elements that make up the core of the constitution, fundamental values, that is, in terms of constitutional identity, nor can we rely on the case-law of the Constitutional Court of Serbia. This Court, in its previous jurisprudence, has not defined constitutional identity nor has it dealt with this issue at all. Since neither the constitutional theory, nor the Constitutional Court has significantly contributed to shaping the core of the Constitution, nor to determine the elements of the constitutional identity of Serbia, there is a need to address the constitutional text. The creation of the constitutional identity is certainly not supported by the fact that the Constitution of Serbia was shaken at the time of its adoption, and the issue of its amending was opened almost simultaneously with its adoption. The numerous shortcomings of this highest legal act were presented immediately after its adoption. Instead of becoming an act around which the citizens will gather, expressing their consent to the new foundations of political power, the Constitution has become "an apple of discord" and a place of division along numerous lines.[93] Contrary to expectations, this Consitution is still in force, intact and unchanged even after almost a decade and half ofits implementation.

In discovering the possible elements of Serbia's constitutional identity, we will start from the Preamble, which recognizes the multiethnic character of Serbia and establishes the equality of all citizens. In previous years, this part of the Constitution aroused attention because of the parts of Kosovo and Metohija. Proponents of the new constitutional reality point out that with the unilateral declaration of Kosovo's independence and the adoption of the Constitution of Kosovo, Serbia lost its sovereignty on the territory of Kosovo.[94] They claim that the

[93] V. Pavićević, V. Dzamić, "Ustavna revizija u Srbiji: aspekti i moguća rešenja," *Evropski pokret u Srbiji*, Beograd 2012, p. 4.

[94] V. Petrov, M. Stanković, *Ustavno pravo*, Beograd 2020, p. 48.

Preamble is a constitutional fiction and does not correspond to reality. The opposing opinion stated the Preamble as confirmation of international law embodied in the UN Security Council Resolution 1244. It is the last barrier to Kosovo's unilateral secession and the establishment of full sovereignty over part of the territory that belongs to Serbia under international law and the Constitution. An undefined concept of substantial autonomy may respond to the two sides' irreconcilable demands in the dispute between official Belgrade and Pristina.

After the Preamble, the Constitution determines constitutional principles. Given their content, we could distinguish three types of rules: general principles, principles relating to human and minority rights, and constitutional provision relating to the formal characteristics of the state.The rule of law, division of power, the sovereignty of citizens, political pluralism, the secularity of the state, the right of citizens to provincial autonomy and local self-government and prohibition of the conflict of interests belong to the first type of principles. The set of principles related to human and minority rights includes guaranteeing gender equality, protecting citizens and Serbs abroad, protecting national minorities and protecting foreign nationals. Among the principles of the Constitution are provisions on the formal characteristics of the state. These are provisions on the definition of the Republic, state symbols (coat of arms, flag and national anthem), territory and border, capital city, as well as provisions about international relations.

The Constitution begins with a provision that defines the state of Serbia, determines its character, states the basic principles on which Serbia is based as a political community and a constitutional state. According to the form of government organization, Serbia is the Republic. The national, not the civil state, is the basis of the constitutional definition of Serbia. The Republic of Serbia is a state of Serbian people and all citizens who live in it. This indicates the fact that Serbia is a multinational state. The Constitution cites the rule of law, social justice, principles of civil democracy, human and minority rights and freedoms as fundamental principles. In the context of European integration, it is essential to mention that the Constitution's first article

confirms that the Republic of Serbia is also committed to European principles and values.

Relying on Michel Rosenfeld's concept of constitutional identity, it could be identified by two issues. The first question is the territory taken as a reference for the construction of a specific constitutional identity of a political community. Although Rosenfeld does not explicitly consider it, it occurs in practically every situation where a territorially concentrated group challenges the legitimacy of the political community itself.[95] Serbia is facing the most radical form of that action – the unilaterally declared independence of Kosovo. Due to the unresolved previous territorial issue, Serbia's constitutional identity coexists with Kosovo's constitutional identity.[96] The second issue concerns the particular preferential policy towards the Serbs living abroad with the kin state. The phenomenon of the kin state is one of the specifics of the Eastern European space. This policy can have implications for the construction of a stable constitutional identity of the given political communities.

The active attitude of the state towards its citizens is reflected and realized in the field of protection of their rights and their relations with the kin state. Simultaneously, members of national minorities have a right to undisturbed relations and cooperation with their compatriots outside the territory of the Republic of Serbia.[97] National minorities are guaranteed particular individual and collective rights in addition to the rights guaranteed to all citizens by the Constitution. Those are the prohibition of discrimination against national minorities, equality in administering public affairs, prohibition of forced assimilation, right to preservation of specificity, right to association and cooperation with compatriots and developing the spirit of tolerance.[98]

Regarding the judiciary system, the Constitution declares that judicial power is unique on the territory of the Republic of Serbia. Courts

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[95] M. Jovanović, "O ustavnomidentitetu-slučaj Srbije," in M. Podunavac (ed.), *Ustav i demokratija u procesu transformacije*, Beograd 2011, p. 11.

[96] Ibid.

[97] Article 80(3), Constitution of Serbia.

[98] Article 75–81, Constitution of Serbia.

are separated and independent in their work and perform their duties following the Constitution, law and other general acts, when stipulated by the Law, generally-accepted rules of international law and ratified international contracts. The hearing before the court is public, but it may be restricted only in accordance with the Constitution. Judges and jurors participate in a trial in the manner stipulated by the law.[99]

In modern democracies, the need for judicial independence is a constitutional need; its purpose is to protect citizens from the arbitrary use of power and enable disputes. The independence of the judiciary is at the core of the rule of law. The significance of this principle should be observed in the context of the division and limitation of power, and the protection of human rights. The judiciary's independence is the "ultimate value" of the rule of law, but its "instrumental value", which refers to the request to ensure rights and freedoms, is of particular importance.[100] In performing their judicial function, a judge is independent and responsible only to the Constitution and the law. Any influence on a judge while performing their judicial function is prohibited.[101]

The manner of electing judges is the "backbone of institutional guarantees of judicial independence" and should be regulated by the Constitution.[102] The Constitution of Serbia makes a difference between the election of the judge for the first time and the election of permanent judges. The National Assembly elects, on the proposal of the High Judicial Council, a judge who is elected to the post of judge for the first time. The tenure of office of a judge who is elected to the post of judge shall last three years.[103] The National Assembly has a decisive role during the first election of the judges. This solution enables the direct influence of the political authorities and devaluates the principle of the permanence of the judicial function. The first election of a judge is in fact the probationary period of three years, after which the judge

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[99] Article 142, Constitution of Serbia.

[100] I. Pejić, "Konstitucionalizacija sudske nezavisnosti: uporedno i iskustvo Srbije," *Zbornik radova Pravnog fakulteta u Nišu*, 2014, vol. 68, pp. 157–174.

[101] Article 149, Constitution of Serbia.

[102] Pejić, "Konstitucionalizacija sudske nezavisnosti," p. 161.

[103] Article 147(1–2), Constitution of Serbia.

may be elected to a permanent judicial office. The positive side of this solution is that it ensures that unprofessional and unworthy persons are removed from the judiciary. However, there is no doubt that this probationary period introduces uncertainty in the performance of the judicial function and might lead to cooperation and obedience innappropriate to judicial function. In accordance with the law, the High Judicial Council elects judges to the post of permanent judges, in that or other courts. In addition, the High Judicial Council decides on the election of judges who hold the post of permanent judges to other or higher courts.[104] The High Judicial Council is the independent and autonomous body that should provide for and guarantee the independence and autonomy of courts and judges.

Judicial reform in Serbia: how it affects the constitutional identity

We will observe the announced amending of the Constitution in the part concerning the judicial system in the context of preserving the national constitutional identity. But, before that, it is necessary to answer a few basic questions. Firstly, do unambiguous standards of judicial independence exist, and if so, do they bind all European countries equally? The legal framework of an independent judiciary can be viewed from the perspective of international documents. At the universal level, the Basic Principles on the Independence of the Judiciary should be mentioned.[105] Those are independence of the judiciary, freedom of expression and association, qualifications, selection and training, conditions of service and tenure, professional secrecy and immunity, discipline, suspension and removal. These principles

[104] Article 147(3–4), Constitution of Serbia.

[105] Adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan, 26 August–6 September 1985, and endorsed by General Assembly resolutions 49/32 of 29 Nov. 1985 and 40/146 of 13 Dec. 1985.

were formulated to assist the Member States in their task of securing and promoting the independence of the judiciary. Regarding the independence of the judiciary, it shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.[106]

The independence of the judiciary is also observed in international law in the context of guarantees of the right to a fair trial. The International Covenant on Civil and Political Rights (ICCPR) stipulates that everyone has the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. All persons shall be equal before the courts and tribunals. The ECHR also views the independence of the judiciary within the framework of guarantees of the rights to a fair trial. According to Article 6, everyone is entitled to a fair and public hearing by an independent and impartial tribunal, determining of theircivil rights and obligations or of any criminal charge against them. The purpose of the judiciary's independence is to guarantee to every person the fundamental right to have his/her case decided in a fair trial, solely on legal grounds and without undue influence. The independence of individual judges is protected by the independence of the judiciary as a whole.

In its Rule of Law Checklist in the context of access to justice, the Venice Commission recognized the necessity of independence of the judiciary, independence of individual judges and impartiality of the judiciary.[107]

ECHR points out that the right to a fair trial, of which the right to a hearing before an independent tribunal is its essential component.

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[106] https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx (accessed 22 March 2021).

[107] Rule of Law checklist, adopted by the Venice Commission at its 106th Plenary Session CDL-AD (2016)007 rev.

To determine the independence of the tribunal, it should regard the manner of appointment of its members and the duration of their term of office.[108] To comply with the requirements of Article 6 concerning the independence of the judiciary, the court must be considered independent of the executive and the legislature in each of the three stages of the proceedings – during the investigation, the trial and during the sentencing.

The Venice Commission's position is also important in individual opinions on draft constitutions and acts amending the Constitution and judicial law. We should mention the recommendations of the Committee of Ministers of the Council of Europe, also. The most authoritative text is Recommendation (94)12 of the Committee of Ministers of the Council of Europe on Independence, Efficiency and Judges' Role.

The sources of standards about the judicial system offer a wide range of acceptable solutions that candidate countries should incorporate into their legal system. However, the freedom of choice within the mentioned scale is not complete and is not equal for all candidate countries. We can see a certain selectivity in the approach that the Venice Commission often uses as a criterion for classifying candidate countries into one of two qualitative groups, based on the existence of the obligation of a particular country to meet all (or specific) standards as a prerequisite for EU membership. In this sense, the Venice Commission has repeatedly made a distinction between traditional and young democracies. New democracies have not yet had the opportunity to develop those traditions that can prevent abuses, so it is necessary to prescribe explicit constitutional or legal provisions as a form of protective measure to prevent political abuse in the process of appointing judges. Therefore, at least in new democracies, explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the judges' appointment.[109]

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[108] Case *Lauko v Slovakia* (2 Sept. 1998).

[109] Judicial appointment report adopted by the Venice Commission at its 70th Plenary Session (CDL-AD (2007)028).

The process of constitutional revision in Serbia has so far been conducted under the Venice Commission's strict supervision, to which the government has largely contributed with its constant address to the Commission. The government addressed the Venice Commission not only for advisory opinions or desirable constitutional solutions, but they also recognized the final arbiter's role and verifier of the constitutional revision.[110] The opinions of foreign legal experts, references to European *acquis communautaire*, values, established standards, as well as best constitutional practise, wherever possible, should be viewed from the point of view of expediency concerning our constitutional reality, tradition, our needs and our opportunities to maintain the authority and constitutional identity. Freedom of constitutional formation should be maintained wherever possible and expedient, and strict and excessive imitation of foreign role models and acceptance of well-intentioned advice should be reduced to the right measure.

This is especially evident if we place the provisions on the judiciary in a historical context. Namely, the first Serbian Constitution (1835) explicitly separated three government branches: legislative, executive and judicial. The judicial branch established as the independent. It was stated that in pronouncing judgment, a judge did not depend on anyone in Serbia but the Serbian Code; no lower or higher power in Serbia had the right to deter him from this or command him to rule differently than the laws prescribed.[111] There were three court instances: district courts, the Great Court and the State Council. The 1838 Turkish Constitution maintained three mandatory instances and the complete separation of the judicial power from the other branches of government.[112] The evolution of the guarantees of independence was continued by the Governor's Constitution of 1869, which emphasized that the court was independent in administering justice and did not stand under

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[110] D. Stojanović, "Osvrt na Radni tekst amandmana o sudskoj vlasti na Ustav Republike Srbije," in *Svedočanstvo pripreme za promenu Ustava od 2006. Godine I struka*, Beograd 2018, p. 6.

[111] https://www.vk.sud.rs/en/history-judiciary-serbia.

[112] Ibid.

any authority other than law.[113] Furthermore, in the 1888 and 1903 Constitutions, guarantees of judicial independence go well beyond the guarantees provided for by other constitutions of that epoch, and they correspond to the contemporary standards of judicial independence and accountability.[114] It is difficult to deny that we could not always boast of consistency when it comes to the application of these guarantees.

Our impression is that the above-mentioned constitutional revision regarding the judiciary system should not have to be implemented when the text of the 2006 Constitution had been more carefully prepared, and the Venice Commission's recommendations had been taken into account even then. The Venice Commission in "Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia" had identified some provisions that require greater clarity and suggested changes. The Commission expressed its concern about the National Assembly's role in the judicial appointment and dismissals even then. In the Commission's view, a probationary period is not in line with European standards protecting judicial independence.[115] The main concerns about the role of the National Assembly in the election of judges are again present in the Opinion on Draft Constitution. Combined with the general reappointment of all judges following into the entry into force of the Constitution provided for in the Constitutional Law on Implementation of the Constitution, this creates a real threat of control of the judicial system by political parties. The respective provisions of the Constitution will have to be amended.[116]

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[113] Article 109 of the 1869 Constitution.

[114] T. Marinković, T., "Jemstva sudijske nezavisnosti u ustavima Kneževine i Kraljevine Srbije," *Anali Pravnog fakulteta u Beogradu*, 2010, vol. 2, p. 162.

[115] Opinion adopted by the Commission at its 64th plenary session.

[116] Opinion on the Constitution of Serbia adopted by the Commission at its 70th plenary session CDL-AD (2007)004.

Concluding remarks

Serbia's constitutional identity is not sufficiently developed, but by joining the European Union, the Republic of Serbia can receive an incentive to develop a constitutional identity. Building and preserving national identity can be even more important by joining the EU. Constitutional identity can represent a consistent dam of the inviolable core of Serbian constitutionality in the European community of nations. But, in that sense, determining the insurmountable border in supranational integrations should be among the priorities of the Constitutional Court. This Court, as the guardian and interpreter of the Constitution, is expected to play a major role in shaping Serbia's constitutional identity. As we could see, constitutional courts of the Member States, considered the national constitution, represented the state's sovereignty of fundamental significance at the present stage of European integration. There is no doubt that the constitutional judiciary played a significant role in the context of the protection of the member states' constitutional identity, simultaneously affected the identity of the EU.

In the context of the announced constitutional amendments in the judicial system, we do not recognize the possibility of endangering the national constitutional identity. International standards regarding the independence and impartially of the judicial system are broad enough to leave significant room for maneuverfor constitutional solutions to be aligned with them. Building a national constitutional identity should be a starting point on Serbia's path to the EU with less imitation and search for a response to its own development and transition complexes respecting the European identity. After all, Serbia may have in mind the experience of many Central and Eastern European Countries, which were once part of the socialist world, which are now full members of the EU.

Marek Šmid

European Union Law and the Legal Norms Governing Constitutional Identity: Protection of Freedom of Religion and Conscience in the International Treaties Concluded between the Slovak Republic and the Holy See

Introduction

Bilateral international treaties concluded by the Holy See with states or other subjects of international law are generally accepted as part of public international law and there are no serious technical objections to them. At the same time, however, these treaties remain the subject of a number of valid questions. The differences in the perception of the treaties concluded with the Holy See can be well traced in particular at the legislative stage of these treaties. Neutral positions are generally not found in such processes.[1] How can these positions be identified and what questions are most frequently asked in the context of bilateral treaties with the Holy See?

The basis of the argumentation of the supporters of this type of regulation of mutual relations is the view that the Catholic Church, as well as other churches and religious organizations registered in Slovakia, are a benefit to the population living in a certain territory of the state,[2] the population has democratically declared in a census or by living in

[1] More on this reasoning can be found in the article: B.S. Gregory, "The Other Confessional History: On Secular Bias in the Study of Religion," *History and Theory*, Thematic Issue 45, December 2006, pp. 132–149.

[2] As a contribution to the development of European civilization, see J. Ratzinger, *Európa. Jej základy v súčasnosti a v budúcnosti*, Trnava 2005.

practice towards these entities[3] and expressed a desire for them to be protected and developed. This legitimizes them to advocate on behalf of these residents to the state and demand a legal adjustment of their status and activities so that they can pursue their goal.

The basis of the arguments of the opponents of this type of regulation for mutual relations can be described as opposing positions. According to them, churches historically have not been and currently are not beneficial to the population settled in a given state territory, their main objective being to maintain the *status quo* of their influence in order to create the illusion of justifying their existence and to maintain their claim to financial support from the state. Where inter-church relations or relations between believers and non-believers are concerned, they are of a discriminatory nature.

The approach to the legislative process in the case of bilateral treaties with the Holy See, their interpretation and implementation, is conditioned by individual perspectives on fundamental existential issues and secondarily by social awareness.

"Neutrality" in this area can mean, e.g. prohibiting rules of conduct based on religion and suppressing freedom of religion as a fundamental human right. As a *forum externum* of freedom of religion and freedom of conscience, any public expression of thought, religion and conscience, with the exception of the justifiably excluded extremes, is part of them. Of course, on the other hand, the principle of separation of church and state, properly applied, is one of the foundations of a just social order.

In connection with the negotiation of treaties with the Holy See, questions usually arise as to whether, from the point of view of public international law, a state can agree to enter as a party into a treaty with the Holy See at all. It is important to ask what the purpose of such a treaty is and what impact it will have on the status and rights of other churches and religious organizations and non-believers, as well as how to view

[3] Interesting in this respect are the conclusions of the seminar "Freedom of Religion and the Principles of Self-Government of Religious Institutions" held in Vienna on 8–10 July 2005 at the Austrian Ministry of Foreign Affairs and the University of Vienna.

the penetration of canon law into the existing legal order. The question of mutual balancing of rights and obligations under the agreement is also often raised. The political implications are also important, in particular the foreign policy implications.

The ability to conclude treaties is a sign of the Holy See's international legal personality. The treaty base of the Holy See is available to researchers in this area. This area raises questions of a discretionary nature, but also questions concerning the subject matter of agreements, their legal nature under international law, typology, name, form, registration, publication, procedural conditions for creation, termination and amendment, interpretation and enforcement, including questions of direct application and priority. The position of these agreements in the system of constitutional and international or EU protection of human rights also raises questions. Another area of interest is the mutual reception of law in the relationship between civil and canon law.

As it is a treaty, the viewpoint is mainly concerned with international law. The contractual obligations of the Slovak Republic, the Holy See and other churches and religious organizations under the concluded basic treaties with regard to the further legislative process have not yet been fully fulfilled, which means that this topic is directly relevant for Slovakia as well, in particular with regard to the interpretation of the provisions of the Basic Treaty and the possible regulation of relations in the area of protection of freedom of conscience or financial relationships.[4] The priority is the relationship of these agreements

[4] M. Šmid, *Základná zmluva medzi Slovenskou republiku a Svätou stolicou s komentárom*, Lúč, Conference of Bishops of Slovakia, Bratislava 2001, p. 137; M. Šmid, "Svätá stolica ako osobitný subjekt medzinárodného práva: zmluvné vzťahy so štátmi," *Slovak Society for International Law at the Slovak Academy of Sciences, Studies and materials*, 2003, no. 9, p. 54; M. Šmid, C. Vasi, "Základná zmluva medzi Slovenskou republikou a Svätou stolicou: nedotknuteľnosť spovedného tajomstva a zvereného tajomstva," *Legal Gazette* 53, 2001, no. 4, pp. 451–63; M. Šmid, C. Vasil, "International Agreements between the Holy See and States: An Occasion to Study Mutual Relations of Two Legal Systems," in M. Šmid, C. Vasil (eds.), *Relazioni internazionali giuridiche bilaterali tra la Santa Sede e gli Stati: esperienze e prospettive*, Rome 12–13 December 2001, Vatican 2003, pp. 327–359 (author's contribution: 50%); M. Šmid, "On the Essence and the Meaning of Freedom of Conscience and Freedom of Religion…," in M. Moravčíková (ed.),

to constitutional law and international law, with the legal personality of the Holy See as the starting point for this relationship.

International legal personality of the Holy See as a premise for the correlation of international treaties concluded by the Holy See with Slovak constitutional law, international law and European Union law

The relative nature of international legal personality requires an answer to the question of whether and to what extent the Holy See, the Vatican City State and the Catholic Church are also subjects of international law.

In the context of public international law, the Holy See is defined as a *sui generis* subject of international law with limited personality, capable of entering into international legal relations governed by international law, in particular of concluding international treaties, having passive and active legal capacity, being a member of international organizations and incurring international legal liability. The internal law of most countries and canon law take a similar position.

The Vatican City State can be generally described as a separate international legal entity that exhibits all the characteristics of statehood in terms of international law, national law and canon law. The presence of some features of this statehood is debatable.

The Catholic Church is, from the point of view of public international law, a supranational, universal, organized non-governmental organization of the Christian faithful, based on the religious principles of Christianity, which, although it has legal personality under both internal law and canon law, has no competence to enter into international legal relations governed by international law.

Výhrada vo svedomí, Bratislava 2007, pp. 384–434; M. Šmid, *Protection of Religious Freedom in the Slovak Republic: Bilateral Agreements Concluded between the State and the Holy See*, materials from the international conference "La Slovacchia e la Santa Sede nel XX secolo," Rome, 24 November 2005, collected by J. Dravecký, M. Brtko, Vatican 2008.

The current international legal status of the Holy See, the Vatican City State and the Catholic Church is most precisely defined and confirmed by the system of three international treaties concluded between the Holy See and the Kingdom of Italy (1861–1946) in 1929 and modified by the agreement between the Holy See and the Italian Republic concluded in 1984 (in force since 1985), known as the Lateran Treaties. The Lateran Treaties consist of the Treaty of Conciliation, which defines the status of the Vatican City State, the Financial Convention, which regulates compensation for the historically confiscated properties of the Holy See, and the Concordat, which regulates the legal relationship between the Catholic Church and the Italian Republic.

Article 2 of the first Lateran Treaty explicitly recognised the internal and international sovereignty (independence and autonomy) of the Holy See. At the same time, Italy agreed with the Holy See on the creation of the Vatican City State in Rome as a necessary condition for the exercise of the Holy See's sovereignty over the new national territory in which it exercises its authority. At the same time, the Holy See became the owner of all real estate located in the Vatican City State. It is a particular functional relationship – the creation of territorial, financial, civil and other material conditions for the new state entity to exercise another dimension defined in the teachings of the Catholic Church and canon law – the spiritual sovereignty of the Pope. This role of the Vatican City State according to the Lateran Pacts only underlines (rather than conditions) the legal international subjectivity of the Holy See, which is based on other facts already mentioned.

For ideological, cultural or political reasons, some states debate the question of the international legal personality of the Holy See and adapt the organization of their bilateral international legal relations accordingly. However, the issue of the Holy See's legal international personality does not seem to be the real reason for a particular arrangement of legal relations, but rather an argumentative device. This is the case with the Russian Federation, which has "relations of a particular nature" with the Holy See (a mission headed by an ambassador). Furthermore, China, for example, does not have any diplomatic relations with the Holy See. The Holy See maintains both passive and active diplomatic

relations with Taiwan (at the level of *chargé d'affaires* since 1971, when the People's Republic of China became a member of the United Nations after China), which is essentially seen as a negative by China, which considers Taiwan to be a part of its territory. Negotiations are currently taking place on this matter, which are dominated on the one hand by questions of human rights and the status of Catholics in China, and on the other, by questions of Chinese national identity and independence. In the United States, the subjectivity of the Holy See has also been debated in the past, both in the context of the dramatically evolving American concept of the relationship between the state and churches and religious organizations and in relation to the US position on the status of the Holy See in the United Nations. One side of this debate believed that only a state (the Vatican City State) could be a subject of international law, and that consequently the Holy See was only its statutory body. However, the United States now fully recognizes the Holy See as a separate subject of international law.

A legal definition of the term "Holy See" (Polish: *Stolica Apostolska*, French: *Le Saint-Siége*, Spanish/Italian: *La Santa Sede*, German: *Der Heilige Stuhl*, Portuguese: *A Santa Sé*, Czech: *Svatý stolec*; also called the "See of Rome" or "Apostolic See") is not found directly in international law and can only be found in canon law.[5] "The term Holy See or Apostolic See is understood in this Code not only to mean the High Priest of Rome but also, unless the nature of things or the context indicates otherwise, the Secretariat of State, the Council for the Public Affairs of the Church and other institutions of the Roman Curia." This definition implies that the Holy See is an entity that includes both the Pope and the Roman Curia, i.e. the various organs through which the Pope exercises his authority and fulfils his tasks in the mission of the Church. However, the nature of the case or the context, i.e. the particular circumstances, including legislation and the like, may suggest

[5] Canon 361 of the 1983 Code of Canon Law (*Codex Iuris Canonici*) and in Canon 48 of the 1990 Code of the Catholic Eastern Churches (*Codex Canonum Ecclesiarum Orientalium*), which contains a similar definition.

that the term *Holy See* should be interpreted solely as equivalent to the Pope, the Bishop of Rome.

It follows that, on the basis of international practice, through the reception of the norms of canon law in international law, there is no basis for the allegation that the Vatican City State does not bear all the characteristics of statehood by virtue of the exercise of sovereignty by the Holy See, as another subject of public international law, over its territory. It is merely an internal redistribution of powers and terminology used in the Catholic Church and international law.

The term "Catholic Church" must also be strictly distinguished from the term "Holy See". The Catholic Church can be defined as a religious organization of believing individuals that is of a universal and supranational nature. According to Canon 204 §1 of the Code of Canon Law, "the Christian faithful are those who, inasmuch as they have been incorporated in Christ through baptism, have been constituted as the people of God. For this reason, made sharers in their own way in Christ's priestly, prophetic, and royal function, they are called to exercise the mission which God has entrusted to the Church to fulfil in the world, in accord with the condition proper to each." According to Canon 204 §2, "this Church, constituted and organized in this world as a society, subsists in the Catholic Church governed by the successor of Peter and the bishops in communion with him." Similar definitions are found in Canon 7 §1 and §2 of the Code of the Eastern Catholic Churches. Under canon law, the Holy See and the Catholic Church are two separate entities. According to Canon 113 of the Code of Canon Law, "the Catholic Church and the Apostolic See have the character of a moral person by divine ordinance itself." Although the term "moral person" is closer related to theological attributes and theoretically does not exclude the international legal personality of the Catholic Church in international law, it is not directly used (except in the delegation of the Holy See) and, therefore, it cannot be documented that an international legal rule has arisen in this regard. This principle is also taken into account when drafting treaties with the Holy See.

Furthermore, the Catholic Church, which is a *sui generis* specific supranational association of natural persons, is not defined by territory,

population and functions held by the state, nor by the attributes held by international organizations, nor by the attributes held by contemporary supranational organizations. Moreover, the reason for the existence of the Catholic Church, its orientation and the entire structure of its organization are based on the spiritual dimension.

From the point of view of the teaching of the Catholic Church and canon law, the Pope exercises sovereignty with regard to *ius tractandi* and *ius legationis*. For example, according to Canon 362 of the Code of Canon Law, diplomats of the Holy See are not sent by it but explicitly by the Pope as his legates, e.g. in the rank of Apostolic Nuncio. The Holy See enters into treaties with states on behalf of the Pope as a party to said agreements. It is also referred to as the *legal embodiment of the office of the Pope*.

From the perspective of public international law, the Holy See is always a party to treaties. It has both a passive and an active right of legation. It can be argued that in these cases (adopting the perspective of canon law) the Holy See acts on behalf of the Pope and does so as a collegial body, with the Pope ratifying treaties as its statutory body.

Sui generis subjects of international law have primarily three features in common: they acquired their personality as a result of specific historical circumstances; they do not have a territory of their own, or if they do have a territory, it belongs to another subject of international law; their legal personality is not full but limited.[6]

The international legal personality of the Holy See can be broadly described as limited, secondary, primary, long-range, permanent, having absolute normative capacity and objective. Looking at the scope of the Holy See's legal international personality, it can be concluded that

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[6] A. Cassese, *Diritto internazionale*, Bologna 2006, p. 140. The dissertation also draws on some other monographic works in the field of public international law, which provide information on international legal personality in general, both of the state and of other subjects of international law in particular: I. Seidl-Hohenveldern, *Mezinárodní právo veřejné*, Munich 2006; I. Brownlie, *Principles of Public International Law*, Oxford 2003; A. Aust, *Handbook of International Law*, Cambridge 2005; M.D. Evans, *International Law*, Oxford 2006; H.M. Kindred, *International Law: Chiefly as Interpreted and Applied in Canada*, Toronto 1993 (on the Anglo-American legal system).

it encompasses a rather broad spectrum of features. In terms of public international law, these include in particular the exercise of the right of legation, i.e. sending and receiving of diplomatic representatives and establishment of missions; right of obligation, i.e. the right to conclude treaties (including international legal liability for the fulfilment of obligations under treaties); membership of international organizations; and the exercise of immunity from jurisdiction. The Holy See currently has formal diplomatic relations with 176 countries, as well as with the European Union and the Sovereign Military Order of Malta. It maintains special relations with the Russian Federation and the Palestine Liberation Organisation. At the Holy See, 69 countries have diplomatic representation directly in Rome; this year they will be joined by Australia's resident ambassador, the representative of a member of the British Commonwealth.[7] The Holy See maintains 179 permanent diplomatic missions abroad, 73 of which are non-resident. The Holy See does not have diplomatic relations with 17 countries. These are the Islamic states (Afghanistan, Saudi Arabia, Brunei, Comoros, Malaysia, Maldives, Mauritania, Oman, Somalia), a group of Asian states (People's Republic of China, Democratic People's Republic of Korea, Laos, Cambodia) as well as Bhutan, Botswana, Myanmar and Tuvalu. The Holy See is party to many multilateral treaties, mainly of a humanitarian nature. To date, it has concluded 143 international treaties with 39 countries around the world, 14 of which are Member States of the European Union. About 70% of these states entered into treaties with the Holy See after the Second Vatican Council, i.e. in the second half of the 20th century, which accounts for about half of all treaties concluded. In this context, it may be noted that bilateral treaties to which the Holy See is a party are sometimes inaccurately referred to as concordats or concordat-type agreements. The Holy See is a member or observer of international organizations, which is also one of the manifestations

[7] In this context, attention is drawn to two publications on the diplomatic activity of the Holy See: A. Sodano, *La Santa Sede nella comunita internazionale*, Rome 2003; and G. Vedovato, "La diplomazia dei valori. Il ruolo internazionale della Santa Sede," *Rivista di studi politici internazionali*, 2001, vol. 68(270), pp. 163–195.

of its subjectivity. This paper discusses this condition in more detail in the following chapters. The Holy See also bears international legal responsibility and is subject to the rules of immunity from jurisdiction of states and their bodies.[8] The subjects of international law are dynamic and do not always have the same legal nature or scope of rights and obligations.[9] One can compare, for example, developments in the creation of numerous international organizations, changes in the understanding of human rights, etc.

One interesting political decision was the US debate on the status of the Holy See at the UN. According to the relevant resolution,[10]

- whereas the Holy See is the governing authority of the sovereign state of Vatican City;[11]
- whereas the Holy See has an internationally recognized legal personality that allows it to enter into treaties as the juridical equal of a state and to send and receive diplomatic representatives;
- whereas the diplomatic history of the Holy See began over 1,600 years ago, during the 4th century A.D., and the Holy See currently has formal diplomatic relations with 169 nations, including the United States, and maintains 179 permanent diplomatic missions abroad;
- whereas, although the Holy See was an active participant in a wide range of United Nations activities since 1946

[8] Effective invocation, for example, of Article 11 of the 1929 Treaty of Conciliation under the Lateran Pacts, which provides for judicial and other immunities of jurisdiction of the Holy See against the Italian Republic in the 1982 Marcinkus case (the Vatican Bank, as the central organ of the Catholic Church, and its officials – in this case its former director – enjoy immunity from jurisdiction against the Italian Republic).

[9] The distinction between the legal nature of the subjects of international law and the scope of their rights and obligations is aptly analyzed, for example, in the 1949 Advisory Opinion of the International Court of Justice, *Compensation for Damage Involved in Service to the United Nations*.

[10] House Concurrent Resolution 253, 11 July 2000, vote: 416 in favour, 1 against.

[11] This assessment reflects the American legal concept of the Holy See as the statutory organ of the sovereign Vatican City State.

and was eligible to become a member state of the United Nations, it chose instead to become a non-member state with Permanent Observer status over 35 years ago, in 1964;

– whereas, unlike the governments of other geographically small countries such as Monaco, Nauru, San Marino, and Liechtenstein, the Holy See does not possess a vote in the General Assembly of the United Nations;
– whereas, according to a July 1998 assessment by the United States Department of State, "the United States values the Holy See's significant contributions to international peace and human rights";
– whereas during the past year certain organizations that oppose the views of the Holy See regarding the sanctity of human life and the value of the family as the basic unit of society have initiated an organized effort to pressure the United Nations to remove the Permanent Observer status of the Holy See; and
– whereas the removal of the Holy See's Permanent Observer status would constitute an expulsion of the Holy See from the United Nations as a state participant …

[T]he Congress:

– commends the Holy See for its strong commitment to fundamental human rights, including the protection of innocent human life both before and after birth, during its 36 years as a Permanent Observer at the United Nations;
– strongly objects to any effort to expel the Holy See from the United Nations as a state participant by removing its status as a non-member state Permanent Observer;
– believes that any degradation of the status accorded to the Holy See at the United Nations would seriously damage the credibility of the United Nations by demonstrating that its rules of participation are manipulable for

ideological reasons rather than being rooted in neutral principles and objective facts of sovereignty; and
– expresses the concern that any such degradation of the status accorded to the Holy See would seriously damage relations between the United Nations and member states that find in the Holy See a moral and ethical presence with which they can work effectively in pursuing humanitarian approaches to international problems.

The Holy See's status as Permanent Observer at the United Nations is of particular importance. Since 2002, when the Swiss Confederation became a member of the UN, it is the only entity in the UN with this status, with strictly defined competences. The participation of the Holy See in the work of the United Nations is mainly established by two documents: the resolution of the General Assembly of July 2004 on the participation of the Holy See in the work of the United Nations[12] and the interpretative note to this resolution issued by the Secretary-General of the United Nations in August 2004.[13] From the point of view of the matter of subjectivity of the Holy See, this is a significant confirmation of its status by the decision of the most important organization in the world. This is justified by its importance in strengthening the role and revitalizing the activities of the UN. This status is based on a number of special rights and privileges, including: the right to participate in general debates in the General Assembly; the right to be included in the list of speakers in the agenda of each plenary session of the General Assembly (without prejudice to the primacy of states); the right to speak, respond, disseminate statements of the Holy See in the General Assembly as well as in UN conferences as official documents, propose and co-sponsor draft resolutions and decisions that concern the Holy See, or raise procedural objections. However, the Holy See does not have voting rights or the right to propose candidates for election in the General

[12] UN General Assembly Resolution 58/314 (A/RES/58/314), dated 16 July 2004.
[13] UN General Assembly No. 58/871 (A/58/871), dated 16 August 2004.

Assembly. It does, however, have these rights in UN conferences and is not restricted in nominating and electing judges to the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (including its own nominations), which is also among the essential features of legal international personality.

International relations of the Slovak Republic as party to treaties concluded with the Holy See

The Slovak Republic has so far concluded the following treaties with the Holy See:

1. Basic treaty between the Slovak Republic and the Holy See, published in the Collection of Laws of the Slovak Republic under No. 326/2001 Coll.
2. Treaty between the Slovak Republic and the Holy See on the spiritual ministry of Catholic believers in the armed forces and armed corps of the Slovak Republic, published in the Collection of Laws of the Slovak Republic under No. 648/2002 Coll.
3. Treaty between the Slovak Republic and the Holy See on Catholic education, published in the Collection of Laws of the Slovak Republic under No. 394/2004 Coll.

Respecting the principle of equality of registered churches and religious organizations, the Slovak Republic, following the conclusion of these treaties, concluded the following parallel national agreements with other religious entities:

1. Agreement between the Slovak Republic and registered churches and religious organizations, published in the Collection of Laws of the Slovak Republic under No. 250/2002 Coll.
2. Agreement between the Slovak Republic and registered churches and religious organizations on religious education, published in the Collection of Laws of the Slovak Republic under No. 395/2004 Coll.

3. Agreement between the Slovak Republic and registered churches and religious organizations on performing pastoral care for believers in Armed Forces and Armed Units of the Slovak Republic, published in the Journal of Laws of the Slovak Republic under No. 270/2005 Coll.

The object of regulation of the various treaties with the Holy See is not stable. However, to illustrate, let us consider the example of the Basic Treaty between the Slovak Republic and the Holy See, concluded in 2000, which is sufficiently illustrative in its scope. This treaty contains a set of rules governing:

- principles in the spirit of which the Basic Treaty shall be interpreted. In the preamble to the Treaty, both parties recognized the importance of protecting freedom of religion, the significant mission of the Catholic Church in Slovak history, as well as its current role in the social, moral and cultural spheres. Both sides also declared their attachment to the spiritual heritage of Cyril and Methodius, and recognized the contribution of Slovak citizens to the development of the Catholic Church. The preamble also expresses the profoundest meaning of the Basic Treaty: the will to contribute to the common spiritual and material well-being of human beings as well as the common good;
- the legal status of the parties to the treaty;
- the basic obligations of the parties to the treaty;
- taking decisions in establishing the legal order and territorial structure as well as in establishing legal entities of the Catholic Church;
- freedom of contact with the Catholic Church;
- the inviolability of holy places;
- making decisions on personnel matters relating to ecclesiastical offices and functions;[14]
- raising a conscientious objection;

[14] R. Gyuri, V. Žofčinová, *Postavenie cirkví a náboženských spoločností v oblasti pracovného práva*, Institute for State–Church Relations Yearbook 2007, compiled by M. Moravčíková, E. Valová, Bratislava 2008, pp. 157–166.

- protection of the seal of confessions;
- public holidays;
- marriage and divorce;
- protection of marriage and the family;
- childcare;
- upbringing and education;[15]
- pastoral care in the armed forces;
- pastoral care for the Christian faithful sent to remand centres and correctional centres to serve their sentences of imprisonment;
- pastoral care in state institutions;
- the status of religious institutions;
- the rights of the Catholic Church with regard to social information media;
- the property rights of the Catholic Church;
- future regulation of the financial security of the Catholic Church by a treaty;
- protection of cultural monuments;
- the diplomatic representations of the parties to the treaty;
- the manner in which disputed issues of interpretation or performance are to be resolved;
- the validity of the treaty;
- amendments and additions to the treaty.

The two basic treaties imply a commitment by the parties to conclude two further pairs of treaties governing the areas of funding and protection of conscience. There has been a lively debate on both types of agreement, but the drafts have not been adopted yet.

So far, no case in the ordinary or constitutional judiciary has required the direct application of these agreements. Their principles

[15] On the situation in Slovak church education we recommend articles by R. Gyuri, *Cirkvi a ich právne postavenie v školstve*, Institute for State–Church Relations Yearbook 2007, compiled by M. Moravčíková, E. Valová, Bratislava 2008, pp. 123–140, and W. Wieshaider, *Szkolnictwo kościelne na Słowacji*, Institute for State-Church Relations Yearbook 2007, compiled by M. Moravčíková, E. Valová, Bratislava 2008, pp. 140–166.

are fully respected in the Slovak Republic and have been implemented in the national legal order.[16]

A constitutional and legal perspective on bilateral treaties with the Holy See

One of the objections concerning the compatibility of treaties concluded with the Holy See and other specific churches or religious organizations is the qualification of their conclusion as a violation of constitutional norms, in particular concerning the so-called religious neutrality of the state. This objection also pertains to other issues in its core, e.g. with regard to equality, concerning the regulation of legal relations with religious entities, e.g. state systems for the registration of churches (Slovakia, Czech Republic, Romania, Austria), which create a special status only for certain entities, or tax exemptions for churches and religious organizations operating in the European Union (objection of the European Commission to the law in Spain or Italy).

These issues can be considered from several perspectives: there may be a concept of indirectly supporting the status of certain religious entities by means of them fulfilling certain legal conditions for providing this support (e.g. acting as non-profit organizations of public utility) or substituting their activities for tasks that the state is obliged to provide (e.g. teaching in religious schools). Finally, there is the model of experimentally-verified long-term public utility of a church or religious organization and its contribution to national identity, development and order, which, for example, is also applied in the Slovak Republic with

[16] For a comprehensive view of the relations of churches and religious organizations with the state in the Slovak Republic, we recommend a number of numerous publications and the current website of the Institute for State–Church Relations at the Ministry of Culture of the Slovak Republic (Director Dr Michaela Moravčíková). Also contributing to the matter is the monograph by M. Čeplíková, Štát*, cirkvi a právo na Slovensku. História a súčasnosť*, Košice 2005.

regard to the system of registration of religious entities. In particular, the last of these three approaches raises the question of the religious neutrality of the state.

Above all, it must be based on the realities of the region and on democratic principles, with respect to minority rights. From a democratic point of view, the state may legitimately favour certain entities if it takes into account their particular public utility, especially if this is the view of the majority of the population. After all, the state also supports non-religious entities, given their overall utility. The state must not be deprived of the possibility of variability in decision-making in this area, as it would not be able to allocate values efficiently and correctly. The issue must be reduced to the prohibition of discrimination against minorities. Again, the reality of the situation needs to be identified.

In Slovakia, for example, the spectrum of 18 registered churches and religious organizations includes all current religious entities that meet the criteria of utility for the country, defined generally rather than individually. If other entities also meet these conditions, they will be legally registered and will have the same status in terms of entering into and applying agreements with the state. Thus, the neutrality of the state does not mean the impossibility of legally supporting certain groups that are positively active within it, just as it does not mean the impossibility of suppressing groups that are negatively active.

A similar situation exists with regard to the protection of fundamental human rights, ensuring the stability of the state's legal order and the principle of equality. The Constitution of the Slovak Republic, with regard to freedom of conscience and religion, almost copies the International Covenant on Civil and Political Rights (which does not use the term "faith"), transforming the Universal Declaration of Human Rights into a legal position (using the terms "freedom of conscience" and "freedom of religion", but not using the terms "religion" and "faith") and the European Convention for the Protection of Human Rights and Fundamental Freedoms (which also uses the terms "religion" and "belief", but does not use the term "faith"). The Constitution allows for the possibility of restricting by law the conditions for the exercise of freedom of religion if this is a measure necessary in

a democratic society to protect public order, public health and morals or the rights and freedoms of others. No one shall be harmed, favoured or disadvantaged because of the guarantee of religious freedom. Moreover, a law that imposes restrictions on freedom of religion also has its limits, namely the conditions set out in the Constitution. In addition to these conditions of legal restriction under the Constitution, restrictions on religious freedom must be applied equally in all cases that meet the established conditions. Furthermore, when restricting freedom of religion, its nature and purpose must be borne in mind, and restrictions may only be used for a specific purpose. According to this concept of freedom of religion, the phenomenon of religion is not clearly attributable to those human manifestations that are exclusively private. On the contrary, the fourth sentence of Article 24(1) of the Constitution of the Slovak Republic legally protects public religious expression, which according to constitutional norms may be legally restricted within the constitutional limits of such expression.

Article 24(3) of the Constitution of the Slovak Republic can be understood as a provision on the separation of church and state, which is a clear manifestation of state neutrality. Since it is a matter of including institutional freedom of religion in the system of fundamental rights, this article should be understood as a manifestation of the collective rights of actively-religious citizens, as evidenced by the wording of § 5 of Act No. 308/1991 Coll. on freedom of religion and on the status of churches and religious organizations, which can be regarded as the legal source of the legal regulation of freedom of conscience and religion.

With regard to treaties with the Holy See, it should be added that treaties by which states are bound are generally a means of interpreting their constitutions, as is the case, for example, in the Slovak Republic. On the other hand, the constitutions of states are legal norms with a higher legal force than treaties and contain restrictive mechanisms that guarantee the stability of the national legal order. Moreover, treaties usually explicitly refer to and rely on constitutional norms, and if not explicitly, then implicitly. In the case of the Slovak Republic, for example, attention should be drawn to Article 12(2) of the Constitution

of the Slovak Republic, which is interpreted to mean that other individuals may not be harmed, favoured or disadvantaged because of the establishment and exercise of guarantees in the area of freedom of religion and conscience.

The moral formation of the population is automatically an essential part of the activities of any historic (traditional) church or religious organization. The right to carry out activities in this sense is a well-known constitutional (Article 24 of the Constitution of the Slovak Republic) and statutory right in the Slovak Republic (Act No. 308/1991 Coll.) and also means the existence of the possibility for everyone to offer their own alternative to morality. Furthermore, obstruction of the activities of a church or religious organization would be a violation of the constitutional principle expressed in Article 2(3) of the Constitution of the Slovak Republic, according to which everyone may carry out acts not prohibited by law. Nothing which might directly or indirectly affect the activities and rights of other churches or religious organizations which enjoy the right to act on the basis of other legal norms shall, therefore, be subject to the regulation of the relations of one church or religious organization.

In this context, the Slovak constitutional model of the status of marriage, which is understandably a sensitive area of the country's legal order, can be cited as an example of the correlation of legal systems and sectors. This section of the paper features a comparison of a bilateral treaty with the Holy See with constitutional law, international law and EU law in this regard. At the same time, a conclusive analysis is not necessary, as the conclusions within this correlation are obvious if one considers the key issue, which is undoubtedly the definition of "marriage" and the resulting definition of "family".

The basic treaty between the Slovak Republic and the Holy See (No. 326/2001 Coll.) regulates the institution of marriage, the custody of children and the rights of parents in the upbringing of children as follows:

> Article 10 sec. 1. Marriage concluded according to canon law which also fulfils the conditions of marriage provided

> for by the law of the Slovak Republic has the same legal status and effects on the territory of the Slovak Republic as a marriage concluded in civil form. The state registration of marriages concluded on the basis of canon law and their entry into the marriage register is governed by the law of the Slovak Republic.
>
> Article 11. The Parties shall cooperate with a view to protecting and promoting marriage and the family resulting therefrom.
>
> Article 12 sec. 1. The care and upbringing of children is the right and duty of parents. If, for serious reasons, parents cannot exercise this right, it will be transferred to other persons or institutions for institutional or protective education on the basis of a decision of the competent court of the Slovak Republic. Sec. 2. Parents as well as other persons and institutions referred to in sec. 1 have the right to raise their children in accordance with the faith and morals of the Catholic Church.
>
> Article 13 sec. 7. Persons of the Catholic faith have the right to implement their beliefs in the process of upbringing in the area of education for family life in accordance with the principles of Christian ethics. This is without prejudice to the obligations of these persons as laid down in the legal order of the Slovak Republic in the field of education and training.

The Constitution of the Slovak Republic (No. 460/1992 Coll.) in Article 41 states:

> (1) Marriage, parenthood and the family are protected by law. Special protection shall be provided for children and adolescents.…

(4) The care and upbringing of children is the right of parents; children have the right to parental education and care. Parental rights can be restricted and minor children can only be separated from their parents against their will by a court decision based on the law.…
(6) Details of the rights under sec. 1 to 5 are determined by the law.

The Act on the Family (No. 36/2005 Coll.) states:

Article 1. Marriage is the union of a man and a woman. The society shall comprehensively protect this unique union and support its welfare. Husband and wife are equal in rights and duties. The main purpose of marriage is to start a family and proper upbringing of children.

Article 2. The family, founded by marriage, is the basic unit of society. Society shall protect all forms of family in every respect.

Article 3. Parenthood is the mission of a woman and a man, which is highly valued by society. Society shall not only ensure protection but also the necessary care for parenthood, in particular through material support for parents and assistance in exercising parental rights and responsibilities.

Article 4. Parents have the right to raise their children according to their own religious and philosophical convictions and the duty to provide a peaceful and safe environment for the family.
§ 1
(1) Marriage is a union between a man and a woman that arises as a result of their voluntary and free decision to marry after fulfilling the conditions set out in this Act.

> (2) The purpose of marriage is to create a harmonious and lasting union that will ensure the proper upbringing of children.
> (3) A man and a woman who wish to marry (hereinafter referred to as "spouses") must know each other's character and health beforehand.

International Covenant on Civil and Political Rights (No. 23/1976 Coll.) provides in Article 23:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

Convention on the Rights of the Child (No. 104/1991 Coll.) provides in Article 18(1):

> States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

European Convention for the Protection of Human Rights and Fundamental Freedoms (No. 209/1992 Coll.) provides in Article 12 that "men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right;" and in Article 2 that "no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right

of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The Charter of Fundamental Rights of the European Union (2010/C 83/02) provides in Article 9: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

A European Union law perspective on bilateral treaties with the Holy See[17]

Following the adoption of the Treaty of Lisbon, another in a chain of founding treaties also relevant to the status of churches and religious organizations in the European Union, i.e. the Single European Act of 1986, the Treaty on European Union of 1992, the Treaty of Amsterdam of 1997 and the Treaty of Nice of 2001, the various factual aspects of the status of churches and religious organizations and their rights and obligations, as well as the legal possibilities and restrictions on their activities and those of their practitioners or members, can be more easily and clearly defined in the primary law system, including directly from the founding treaties, in particular the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), and from the Charter of Fundamental Rights of the European Union (CFR), as supplemented by the published Explanations relating

[17] This section uses as its main source of European Union law the texts of the Official Journal of the European Union (OJ) 2016/C 202/01, namely the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, the Protocols, the Annexes to the Treaty on the Functioning of the European Union, the Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, the Concordance Tables and 2016/C 202/02 Charter of Fundamental Rights of the European Union, binding for Slovakia of 1 December 2009, available at https://eur-lex.europa.eu/legal-content/SK/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=SK.

to the CFR.[18] According to Article 2 TEU, the European Union is founded "… on the values of respect for human dignity, freedom,… and respect for human rights…."

The issue of human rights falls essentially within the competence of the Member States of the Union.[19] The Member States may, therefore, adopt national legislation and conclude treaties in this field. The Court of Justice of the European Union has competence in the field of human rights only when it is exercising Union law.

As regards the relationship between treaties and European law, it should be added in general terms that a Member State of the Union which concludes a treaty after its accession to the Community is required to ensure that that treaty is compatible with the *acquis communautaire*. This follows from the obligation of the Member States of the Union set out in Article 4(3) TEU according to which they shall assist the Union in carrying out its tasks and shall not take any measures which could jeopardize the fulfilment of the Union's objectives. This obligation is also confirmed by the case law of the Court of Justice of the European Communities.[20] However, the Slovak Republic concluded the Basic Treaty with the Holy See before signing the Treaty of Accession and, therefore, had no such obligation. In accordance with Article 351 TEU, its provisions shall not affect the rights and obligations arising from treaties concluded by the acceding States before the date of their accession. Given the competences of the Union and the Member States, there should, therefore, be no conflict between treaties concluded between states and churches and religious organizations.

Fundamental human rights and freedoms, including freedom of conscience and freedom of religion, are at the heart of the general legal principles of the European Communities. Fundamental human rights

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[18] Consolidated version of the Treaty on European Union, OJ C115/13-45, 9.5.2008; consolidated version of the Treaty on the Functioning of the European Union, OJ C115/47-199, 9.5.2008; Charter of Fundamental Rights of the European Union, OJ 2007/C 303/1-16, 14.12.2007; Explanations relating to the Charter of Fundamental Rights of the European Union, OJ 2007/C 303/17-35, 14.12.2007.

[19] Article 17 of the Treaty on the Functioning of the European Union, Article 4(1) of the Treaty on European Union.

[20] Judgements of the Court of Justice in cases C-433/03 or C-266/03.

as general principles of EU law have been present in it since the very beginning of the primary law document, Article 6 TEU.[21] Of course, special protection of fundamental rights in the area of freedom of religion and conscience is provided by the CFR.

The Charter of Fundamental Rights of the European Union states in Article 10:

> Everyone has the right to freedom of thought, conscience and religion, that this right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance; and that the right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

The right to conscientious objection is not included as a fundamental right among the rights guaranteed by the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. It can therefore be concluded that this provision goes further than the Partnership Convention of the Council of Europe and institutionalizes the conscientious objection institution, which is also included in Article 7 of the Basic Treaty between the Slovak Republic and the Holy See. However, this provision also gives the EU Member States the right to define the scope of this right in their national legal orders (including in treaties to which they are parties). The Charter seeks to ensure that the Union's institutions respect fundamental rights, and the Charter applies to the Member States only when they are exercising their competences. It is, therefore, not a question of establishing a catalogue of human rights within the meaning of the Council of Europe's

[21] Under Article 6(3), "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

catalogue of rights contained within the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Explanations relating to the CFR[22] show that the Union, through the Charter and its incorporation into a binding legal instrument, has reaffirmed a system of protection of rights based on the constitutional traditions of the Member States and their obligations under international law. With regard to the protection of the right to conscientious objection, the Explanatory Notes state that this right *corresponds to national constitutional traditions and to the development of national legislation on this issue*. This also clarifies the institution of the right to conscientious objection in the European Union, which undoubtedly creates a precondition for the exercise of freedom of conscience and religion as a fundamental human right in accordance with the constitutional traditions of the EU Member States. The institution of the right to conscientious objection must be seen as a means of exercising freedom of conscience, which is a fundamental human right.

In general, the following can be considered as core areas of legislation relating to the above-mentioned issues, in addition to Article 10 of the Charter:

1. Rules relating to the competences of the European Union (Article 5 TEU).
2. Rules relating to the status of churches and religious organizations in the European Union (Article 22 CFR and Article 17 TFEU).
3. Anti-discrimination measures in the European Union (Article 19 TFEU).
4. The powers of the Court of Justice of the European Union with regard to the protection of human rights (Article 267 TFEU).
5. The rules of interpretation of the CFR (Article 6 TEU and Article 51 and 54 CFR).
6. Principles concerning the relationship between the CFR and the constitutional law of the Member States and instruments

[22] OJ 2007/C 303/02, https://eur-lex.europa.eu/legal-content/SK/TXT/PDF/?uri=CELEX:32007X1214(01)&from=SK.

of international law, in particular bilateral agreements between States and churches and religious organizations (Article 53 CFR, Article 6 TEU, and Article 351 TFEU).

7. The rules on the interrelation between the CFR and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6 TEU and Article 52 CFR).

A particular factor actively interfering in the area of human rights protected by treaty with the Holy See, in particular freedom of religion and conscience, is the case law of the judicial bodies of the Council of Europe and the European Union. Both the European Court of Human Rights and the Court of Justice of the European Union currently rule on the protection of freedom of religion and freedom of conscience in accordance with the principle of national discretion, i.e. respecting the law of the country concerned. Of course, in their judgements the courts invariably apply the provisions and principles of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. However, they shall respect the competences and thus the legal regulations of individual Member States in the aforementioned areas, including both the norms and the application of the law as found, in particular, in the judgements of the constitutional courts or supreme courts, and shall take individual decisions in accordance therewith. They are guided by the principle of subsidiarity. Decisions concerning the same type and circumstances of cases are, therefore, very divergent or even contradictory.

However, in the event of a certain common direction in the decision-making process of the Member States, this very principle may lead to a situation in which the majority of the EU Member States have positions in the legal order that are opposite to those of the individual states taking the decisions on the matter. This may lead to international and EU judicial bodies making decisions that respect the legal or even constitutional traditions of the majority of EU states, and the country whose case is being decided will not be able to take a position on sensitive issues, especially those involving ethical elements.

Contradictions may also arise from decisions of the European Union authorities themselves. For example, the recent European Parliament

resolution on the situation of sexual and reproductive health and rights in the EU in the frame of women's health[23] has raised some doubts about the future compatibility of European Union law with the Constitution of the Slovak Republic, but also with treaties concluded between the Slovak Republic and the Holy See and treaties concluded between the Slovak Republic and other churches and religious organizations. The text of the adopted European Parliament resolution (letter L) also contains this proposal: "Sexual health is fundamental to the overall health and well-being of individuals, couples and families, in addition to the social and economic development of communities and countries, and whereas access to health, including SRH, is a human right; whereas providing some form of sexuality and health education is already mandatory in the majority of Member States."

Incompatibility with the Constitution and treaties may, therefore, result from the application of this European Parliament report to the legislative sphere. By promoting the idea of creating a new human right – the right to abortion – the report violates the concept of the Constitution of the Slovak Republic and the accepted international obligations in the area of freedom of conscience and freedom of expression contained in Article 7 of the above-mentioned treaties.

On 17 June 2021, shortly before the adoption of this European Parliament resolution, the National Council of the Slovak Republic adopted a resolution drawing attention to Article 168 TFEU on public health, with particular reference to Article 7 thereof, which states that Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care. Therefore, the National Council of the Slovak Republic considers that this act violates the principle of subsidiarity and exceeds the competence of the European Parliament. The future will tell whether the non-legislative act of the

[23] European Parliament resolution of June 24, 2021 on the situation of sexual and reproductive health and rights in the EU in the frame of women's health (2020/2215(INI)).

European Parliament will be implemented in European Union law in legislative form; however, this is likely.

Conclusions

Bilateral treaties concluded by the Holy See with states and other subjects of international law are an instrument for stabilizing the mutual relations of the Holy See, as well as the Catholic Church, with individual states through international law. These treaties are undoubtedly a more stable legal instrument than any unilateral acts, not excluding constitutional norms. It should also be noted that the normative legal status of one of the churches or religious organizations is recognized by Slovak constitutional law, as well as by European Union law and international law, as a binding norm for all churches and religious organizations that have the same legal status in relation to the state (registered churches and religious organizations).

Based on an analysis of the relationship of these treaties with other legal systems, it can be concluded that these treaties are compatible with the constitutional law of the Slovak Republic, as well as with the law of the European Union, which binds the Slovak Republic.

The activism of the European Union and its Member States on ethical issues can be viewed from a different perspective, as evidenced by the recent adoption of the European Parliament resolution on the sexual and reproductive health situation and rights in the EU in the frame of women's health. This is a trend of change in the legal order of the European Union which may give rise to, and is already giving rise to, serious doubts, including in a broader spectrum. At their core is the principle of subsidiarity and, thus, constitutional identity.

It is also advisable to take into account the fact that the treaties in question copy canon law to a certain extent; however, its validity does not pose a problem for the legal order of the state in the context of a treaty, since the starting point for the creation of these treaties is

the constitution of the state and, moreover, the individual provisions provide for compliance with the legal order of the state.

I would like to also mention the pandemic situation in Slovakia and worldwide. In Slovakia, the state of emergency and curfews or restrictions on freedom of movement raise questions about whether it is right to prevent people from actively participating in worship and traveling to provide or receive spiritual services in order to protect themselves from the virus. A student of mine gave an interesting answer to my question about what branch of science should be rapidly established these days: *integrated epidemiology*. I understood that he was not concerned with precision of expression, but with the idea. We keep talking about physical health and material resources. Sure, it is a necessary topic to tackle. But our life does not end there, and even its essential conditions do not end there. We are three-dimensional: physical, mental and spiritual. If we disregard all three components of our being, none of them function fully and we usually do not feel fulfilled, which is not good for our physical health and immune system. Maybe fear, addictions, depression, sadness, aggression have a green light under pandemic conditions, but also altruism and helpfulness. It depends on the inner attitude of each individual. A person's personal beliefs are vitally and ultimately medically important to them and are not just a side distraction.

The importance of religion in relation to politics and law is undoubtedly growing today, and this can be observed not only at the level of governments, but also at the level of international organizations. However, this fact is often disputed. Consideration should be given to linking already converging principles by creating a common basic framework of starting points within the Organisation for Security and Co-operation in Europe (particularly the question of the principles of mutual tolerance, harmonization of Member States' positions and their cooperation), the Council of Europe (the question of the regional context of the human rights system, particularly within the framework of the Convention for the Protection of Human Rights and Fundamental Freedoms), the United Nations (questions related to the universal global security perspective and the human rights framework,

in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the European Union (implementation of the principles of primary European Union law, including the Charter of Fundamental Rights of the European Union).

Emiliya Siderova

The Rule of Law, National Constitutional Identity and Constitutional Reform in Bulgaria

The rule of law and the supremacy of the Constitution are the basis of any legal country. They originated as an ideological basis on the eve and in the course of the great revolutions more than 200 years ago. The great European thinkers discuss the "European idea" and the political future of the European continent. Henri de Saint-Simon sees Europe as the European United States, apparently influenced by the results of the American Revolution. The federalist idea has not faded away today, and is present mostly in scientific discussions. This direction of development of a United Europe largely undermines the necessary agreement in the course of the debate on the "Constitution of the European Union". Today, as a temporary substitute, acts the Lisbon Treaty but in it are enough cautiously and moderately settled relationships between the European institutions and the national Member States of the European Union.

The most significant difference in the preconditions for the possible borrowing of the federal form in a United Europe is rooted in the history of the nation-states. As a principle, European countries are the fruit of national liberation movements, bloody clashes, radical social upheavals, in the course of which nations are established to receive as a culmination of their statehood. That is why the problems of national and state sovereignty are especially sensitive in Europe, in some respects – an explosive zone. With all the already-proven positive consequences of European unification and the emerging tendency to strengthen the role of the European institutions, there is a certain

(often invisible at first glance) limit of inviolability of national sovereignty. It is no coincidence that decisions in the European Council are taken by consensus.

A union like the European Union inevitably presupposes a community of goals and values, which is a guide for both European and national institutions. It is no accident that a country after being admitted to the European Union has to conduct reforms to synchronize its legislation with the established European principles. Such a reform was carried out in our country as well, both by updating the traditional legal acts and by adopting completely new ones, synchronized with primary and secondary laws of the European Union (EU) – regulations of the Constituent Treaties, European regulations, directives, decisions, general principles of EU law and the case law of the Court of Justice. This process was a kind of continuation of the radical renewal of the national legislation on the new constitutional basis, on the completely new Constitution of the Republic of Bulgaria adopted in 1991.

It has a special role in the process of synchronizing the legislation with the principles and norms of the EU the new text for our constitutional development of Article 5(4) of the new Constitution of the Republic of Bulgaria, which reads: "Any international treaty, which has been ratified according to a procedure established by the Constitution, which has been promulgated, and which has entered into force for the Republic of Bulgaria, shall be part of the domestic law of the country. Such a treaty shall take priority over any conflicting standards of domestic legislation." The effect of this constitutional text made it possible that even the country's accession to the European Union in 2007 did not require significant constitutional changes. At the same time, the experience already gained from the synchronization of legislation has shown and proven that the constitutional text has no automatic effect, although it sounds like this happens automatically with ratification. Many other factors play a role in the process of renewing the law in accordance with European norms: sustainable national traditions, the development of society, its structures and moods, the ratio of political forces in parliament, even the Bulgarian Orthodox Church. That is why this is not an automatic, but a constant and continuous, complex

and often internally contradictory process, in which, in the European regulatory framework, national peculiarities must be included.

In general, the Bulgarian National Assembly ratified the concluded international treaties, conventions and agreements under the European Union almost without any problems and they (by virtue of the cited constitutional text) became part of the domestic law. Perhaps it is more accurate to say that once the principles have been adopted, the long process of improving national legislation begins. The question of the operation of the principle of the rule of law in view of the independence of the Member States of the European Union, their own tradition and sovereignty, reflected in the Constitution, is now being raised with new force. EU law respects the constitutional identity of the Member States, expressed and defined by the national constitution, which is accepted as a fundamental principle in the Treaty of European Union (TEU) and has been confirmed in the case law of the Court of Justice. Constitutional identity, as a protective barrier to upholding the basic constitutional values and principles shared by individual states, is becoming increasingly important to guarantee national constitutional systems from possible derogations under the influence of decisions of supranational institutions or international acts. Its legitimate definition, the core of values recognized as the constitutional identity of the state, is upheld and defends by virtue of the original postulate of the supremacy of the Constitution under Article 5(1) of the Bulgarian Constitution and its guarantor – the Constitutional Court.

In the latest practice of the Bulgarian Constitutional Court,[1] on the occasion of establishing a contradiction of the law with Article 5(4) of the Constitution raised the issue of the difference between EU law and international law, as part of domestic law. There is an understanding that EU law is a supranational law and the Constitutional Court cannot assess whether there is a contradiction between an internal legislative norm and a union norm. In assessing the conformity of the challenged

[1] Decision no. 8 of 30 June 2020 on constitutional case no. 14/2019 of the Constitutional Court, http://www.constcourt.bg/bg/Acts/GetHtmlContent/5a778e21-9816-4641-914b-fcbbd23dfdc1.

norm of the law with the texts of the Constitution, the court carries out the due interpretation in accordance with EU law, but is not competent to rule on the conformity of a law with EU law. However, the court of the judiciary may, if it finds a conflict with EU law, leave unenforced any rule of domestic law, with the exception of constitutional norms, or to refer to the Court of Justice of the EU in order to be able to leave unenforced the Union legal norm, if it contradicts the constitutional identity of the Republic of Bulgaria.

In another ruling,[2] the Bulgarian Constitutional Court discussed the role of EU Member States as "sovereign states in a voluntary legal union". This decision was made following the determination of the legal nature of the mixed agreements concluded jointly by the EU and the Member States with a third country – this is the Comprehensive Economic and Trade Agreement (CETA) between the European Union and the Member States, of the one part, and Canada, of the another part. The Constitutional Court accepts that regardless of the global goals of the EU, reflected in Article 3(5) and 21 TEU, the external relations of the state belong to the solid core of sovereignty and in view of their powers, Member States must insist on being perceived as a necessary party to international agreements in which the EU enters. Therefore, when there is a strong opposition from Member States to the conclusion of an agreement as such by the EU alone, even if from a legal point of view it falls within the exclusive competence of the EU (according to the European Commission), the Council may *de facto* have no choice due to the political situation and this necessitates its conclusion as mixed. Then the Member States have the right of veto and the possibility to overcome the effect of the majority vote in the Council (Article 218(8) TFEU), in compliance with the constitutional order for ratification under Article 5(4) of the Bulgarian Constitution. Similar decisions related to the subject matter of the Bulgarian constitutional case were adopted by the Federal Constitutional Court

[2] Decision no. 7 of 17 April 2018 on constitutional case no. 7/2017 of the Constitutional Court, http://www.constcourt.bg/bg/Acts/GetHtmlContent/b685e2a1-362b-4b42-a429-0dc5e348b90c.

of Germany on 13 October 2016, which allowed Germany to unilaterally terminate the provisional application of the agreement, and by the Constitutional Council of France, which accepted that it does not contradict the French Constitution and paves the way for its ratification.

Regarding this decision of the Constitutional Court, the legal theory assumes that the possibility to refer to the national constitutional identity (for non-application of a contradictory Union legal norm) is practically very limited, as the national legislation on certain matters (e.g. Constitutional Court Act, Rules of Procedure and Activity of the National Assembly), there may be no Union regulation. However, this is completely real because legal matters that are not related with EU law are very few. At the same time, a new conception of the primacy of EU law, not yet perceived as leading, is gaining ground. The European Court of Justice imposes it on the historic case *Melloni*[3] that "nothing (including national constitutional identity) can impede the primacy, unity and effectiveness of EU law!" This demonstrates that the Court clearly emphasizes that it concerns even to constitutional norms: "by virtue of the principle of the primacy of European Union law, which is an essential feature of the legal order of the European Union, a Member State's reference to national law, even if constitutional, could not prejudice the operation of Union law on the territory of that State." Finally, it still accepts that the obligation to comply with EU law "also binds the constitutional judge, who must interpret any norm of the Constitution in accordance with the relevant EU Law – aside from the cases of a constitutional provision expressing the national constitutional identity."[4]

In recent times, outside EU law, as evidence of national sovereignty, constitutional identity and the supremacy of the Constitution, arose a case of refusal to ratify an international treaty. It is about Convention on the prevention and combating of violence against women and domestic violence, known as the Istanbul Convention of the Council of Europe (although it is not an EU institution, it is a political international

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[3] CJEU Judgment of 26 February 2013, Case *Melloni*, C-399/11, para. 60.

[4] A. Semov, *The Obligation for Interpretation of the Domestic Legal Norms in Compliance with the EU Law*, 25 January 2021, electronic edition (news.lex.bg).

organization of European countries, the so-called "Greater Europe" with 47 member states), which is also approved by the European Parliament. This is the first treaty in Europe to create a comprehensive legal framework to protect women in the wider context of achieving real equality between women and men, thus, recognizing violence against women as a form of discrimination.

The motives were related to several texts that contradict our Constitution. These texts caused widespread public dissatisfaction against the introduction of concepts incompatible with the Bulgarian public order and unknown in our national legal system such as "socially constructed roles", "gender", "gender equality", "gender-based violence", "gender identity", "gender-sensitive policies", "non-stereotyped gender roles", "gendered understanding of violence", "gender-based asylum claims", "gender-sensitive interpretation", "gender-sensitive reception procedures", "third sex", and "creating an opportunity to conclude same-sex marriages".

The term "gender/genre" is present in the Convention as a separate category different from "sex/sexe" as a biological entity. The Convention separates the biological and social dimensions of gender and goes beyond the view of the sexual binary of the human species. The Council of Europe promotes an understanding of people's ability to self-identify and to ensure on full legal recognition of gender reassignment. From this point of view, a biological man can have a woman's gender or *vice versa*. This leads to the possibility for the individual to choose at will a different "gender-based identity", which may not coincide with the biological one. This understanding expresses aspects of "gender ideology" – a collection of ideas and beliefs that biologically-determined gender characteristics are irrelevant, and only gender self-identification matters.

It came to the decision of the Constitutional Court,[5] which confirmed the supremacy of the sufficiently-unambiguous text: "Matrimony shall be a voluntary union between a man and a woman" (Article 46(1)

[5] Decision no. 13 of 27 July 2018 on constitutional case no. 3/2018 of the Constitutional Court, http://www.constcourt.bg/bg/Acts/GetHtmlContent/f278a156-9d25-412d-a064-6ffd6f997310.

of the Constitution of the Republic of Bulgaria) regarding the possible introduction of a considered modern and liberal view on this issue. A well-motivated opinion of the Bulgarian Orthodox Church was also published on the issue. With the definition of "sex" thus given in the Convention, the internal contradiction is obvious when comparing the declared in Article 1 of the Convention aims and its title "to prevent and combat violence against women". This two-layered meaning embedded in the concepts used does not in practice lead to gender equality, and erases the differences between them, whereby the principle of equality loses its meaning. Legal equality between the sexes is proclaimed at the constitutional level in Article 6(2) of the Constitution of the Republic of Bulgaria. Gender is among the explicitly established features on the basis of which privileges or restrictions in rights are not allowed. Equality does not mean equal treatment of the two sexes, but requires consideration of biological characteristics and differences between them. The Bulgarian constitutional text considers biological sex as a concept with a clear legal content. The social dimension in our Constitution does not create a social gender independent of the biological one, as provided for in the Convention.

Contrary to this constitutional understanding of gender as a biological category, the scope of the Convention deviates from its stated objectives of protecting women and opens up space for its contradictory application, which is contrary to the rule of law in the formal sense (Article 4(1) of the Constitution of the Republic of Bulgaria). The requirements of Article(3) of the Convention would require in the Republic of Bulgaria to establish procedures ensuring legal recognition of a sex other than the biological one, in violation of the Constitution. If society loses the ability to distinguish between a woman and a man, combating violence against women remains only a formal but unenforceable commitment. The principle of the rule of law has an established content, combining formal and material aspects. Today, in the European legal space, the understanding of the rule of law is widely shared, which includes both the principle of legal certainty – the formal element and the principle of material justice – the material element. The rule of law in the formal sense (the state of legal certainty) requires

that the content of legal concepts be clear and unambiguous. The order of legal certainty and predictability does not allow the existence of two parallel and mutually exclusive notions of "sex". Ratification of the Convention would lead to the introduction into the national legal order of a concept that is contrary to the constitutionally established.

It was accepted that the principle of the rule of law is the foundation of the established constitutional order. By observing the conformity of the international treaties concluded by the Republic of Bulgaria with the Constitution, the Constitutional Court guarantees the introduction in the national legal system of value achievements of the international community in preserving the core of values established in the Constitution.

In its practice, the Court of Justice also uses the principle of the rule of law as a comprehensive principle as a source of legal standards. Although it does not provide a comprehensive legal definition of its content, it interprets it as a principle that provides the foundation for an independent and effective judiciary to protect human rights and fundamental freedoms. Its content includes the basic principles of legal certainty, legitimate legal expectations and predictability, proportionality, based on the national constitutional traditions of the Member States. The Treaty of Lisbon, which enters into force the current TEU, preserves respect for the national identity of the Member States "inherent in their basic political and constitutional structures." To the fundamental principles of the rule of law are added the values of the Union, such as respect for human dignity, freedom, democracy, equality and respect for human rights, including the rights of persons belonging to minorities. European integration has been built on a set of fundamental values that are constantly being extended.

All these considerations give reason to ask the fundamental question how it relates the indisputable European principle of the *rule of law to the current law* influenced by the national peculiarities. In other words, what is the scope of the law, the supremacy of which must be guaranteed more and more comprehensively in the activity of the institutions and, most of all, of the judiciary, especially in the presence of contradictions between individual EU acts and/or international

treaties and the domestic law motivated by the national tradition and social development?

There is no doubt in the new Constitution of the Republic of Bulgaria that there is an intention of the Grand National Assembly to guarantee the establishment and the action of an independent judiciary. This determination was reflected in the radical negation of the inherited system and in the complex of new solutions, included and borrowed from the European constitutional experience. The constitutional decisions were grounded in universally valid principles of the political system for a democratic Europe and, above all, the principle of the separation of powers. A model of the judiciary was adopted in which three subsystems are included: courts, prosecuting magistracy, and investigating authorities, which is not unique only for Bulgaria. The provision for organizational and personnel functioning of its structures, including financial and technical, is assigned to the Supreme Judicial Council. It is the desire for a radical break with the inherited system that motivates to a great extent as if over-differentiation of the judiciary. If we summarize the spirit and letter of the constitutional text on the judiciary, we can conclude that the transition from total dependence on communism and unrestricted interference in justice by the ruling party and state bodies in the party-state, on the one hand, to independence, which borders on uncontrollability, on the other. Or, to put it mildly, to irresponsibility, which is limited to self-control through the three subsystems of the judiciary and through three-instance court proceedings in cases. While the National Assembly is constantly under the public control of the voters, and its acts can be suspended by the Constitutional Court. The Council of Ministers is subject to parliamentary control, and the Supreme Administrative Court in contradiction with the law may revoke its acts. The acts of the ministers are subject to repeal by the Council of Ministers for both illegality and irregularity, etc. Only the judiciary was left to self-control.

The illusion that a truly independent judiciary in a democratic and legal state, in the midst of a liberated, active civil society will, in itself, function flawlessly, sufficiently efficiently, fully and fairly will play a role in this. The expectations were that the guarantees for the independence

not only of the system as a whole, but also of the individual magistrates (immunity, tenure status, subservient only to the law, etc.) would also ensure party-political impartiality. As a result of all these factors – illusions, search for radically new solutions, underestimation of realities, expectations for automatic action of democratic principles, etc. – the principle of separation of powers was applied unilaterally. An important aspect of the principle has been overshadowed by the balancing and mutual deterrence of the authorities, without excluding the judiciary, for all its specifics, noted by Montesquieu.[6]

Both in the constitutional commission and in the plenary hall during the Grand National Assembly the clearly formulated proposals to reproduce the election of the "Big Three" in the judiciary by the parliament, as well as any possibility for parliamentary control over the operation of the three subsystems of the judiciary, were rejected as a denial of the previous regime. It was the radical change that motivated the creation of an authority such as the Supreme Judicial Council, in which the influence of the National Assembly should not have been decisive. In this regard, the Minister of Justice has been given the prestigious function of chairing the Supreme Judicial Council, but without the right to vote.

Since then, the Constitution of Bulgaria has been amended six times. The main direction of the constitutional changes is developing along two lines – one, along the line of the forthcoming accession of Bulgaria to the European Union, with a view to create a national constitutional framework for lasting legitimation of the legislative changes arising from European integration. The second concerns, in particular, Chapter Six ("The Judiciary"), with a view to increase its effectiveness in better protection of rights of citizens, while ensuring its independence, but without detaching itself from other state authorities/powers.

The first line of constitutional changes mainly includes several laconic texts on the powers of the National Assembly and the Council of Ministers on issues arising from the membership of the Republic of Bulgaria in the EU. Another important change is the lifting of the

[6] See in more detail: E. Siderova, *Structure of the Judiciary*, Varna 2012.

ban on acquisition of land ownership by foreigners and foreign legal entities, which can now happen under the conditions arising from the accession of the Republic of Bulgaria to the EU or under an international treaty under Article 5(4) of the Bulgarian Constitution, as well as by inheritance by law. European citizenship is a prerequisite for the creation of a new constitutional text, which complements the right to vote of Bulgarian citizens to participate in elections to the European Parliament and to local authorities.

With regard to the second line, the Constitutional Court has determined the future amendments to the Constitution, concentrated within the judiciary, which are aimed at restructuring, optimizing in terms of content and refining certain functions of its bodies, emphasizing or clarifying their powers or names, as well as their interaction with institutions of other authorities as possible, if they do not disturb the balance between the authorities and observe the basic principles on which the current constitutional model of the state is built.[7]

The purpose of the adopted constitutional changes is to improve the interaction between the bodies of the legislative, executive and judicial branches for counteracting crime and corruption, and to strengthen the control over the bodies of the judiciary. Guarantees are created for the independence of judges, prosecutors and investigating magistrates:

- To acquire the tenure status of immovability, the requirement for the required length from office as a judge, prosecutor or investigating magistrate is increased from three to five years and after appraisal is provided.Functional immunity (professional domain) was adopted, and to the criminal irresponsibility was added a civil one for their official actions thereof and for the acts decreed thereby, save where what is done shall constitute an intentional publicly-prosecutable offence, instead of the previous crime requirement to be heavy.

[7] Decision no. 3 of 5 July 2004 on constitutional Case no. 3/2003 and Decision no. 8 of 1 September 2005 on constitutional case no. 7/2005 of the Constitutional Court.

- Novelty is anticipating additional occasions for release from office, including the "Big Three" of the judiciary – President of the Supreme Court of Cassation, President of the Supreme Administrative Court and the Prosecutor General – in the case of a grave breach or systematic dereliction of the official duties, as well as actions damaging the prestige of the judiciary.
- In the pre-trial criminal proceedings, the constitutional powers of the prosecuting magistracy are expanded, and the investigating authorities are limited. Thus, at the constitutional level, it was decided that both the prosecuting magistracy and the investigating authorities may carry out investigation into criminal cases. And the overall control of the investigation and the exercise of supervision as to the legally conforming conduct of investigations shall be guided by the prosecuting magistracy. Through changes in the Code of Criminal Procedure, it was accepted that investigations are also carried out by executive authorities (investigative police officers from the system of the Ministry of Interior), and their competence is determined in the cases specified by law.
- At the constitutional level, direct interaction between the National Assembly and the judiciary is envisaged through the hearing and adoption by the Parliament of the annual reports of the Supreme Court of Cassation, of the Supreme Administrative Court and of the Prosecutor General, as submitted by the Supreme Judicial Council, on the application of the law and on the operation of the courts, the prosecuting magistracy and the investigating authorities. The National Assembly may also hear and adopt other reports by the Prosecutor General on the operation of the prosecuting magistracy on the application of the law, counteraction of crime and implementation of penal policy.[8]
- The interaction between the judiciary and the executiveauthority was framed by the creation of a new explicit text, which listed

[8] On the content of the reports see: Decision no. 6 of 6 June 2017 on constitutional case no. 15/2016 of the Constitutional Court.

the specific powers of the Minister of Justice as a liaison in the judiciary and in view of his function as presiding of the Supreme Judicial Council. It is about creating a constitutional opportunity for the Minister of Justice to propose a draft of a judiciary budget and lay the said draft before the Supreme Judicial Council; to be able to propose the appointment, promotion, demotion, transfer and release from office of judges, prosecutors and investigating magistrates; to participate in the organization of the qualification of judges, prosecutors and investigating magistrates, as well as to check the organization of the formation, the movement and the closing of cases. Such a division of powers by the Minister of Justice clearly remains on the necessary interaction and mutual deterrence of the authorities, initially overshadowed by the division to the point of building a "Chinese wall" between the judiciary and the executive. However, this text was later changed in view of the continuing criticism and concerns for interfering in the independence of the judiciary in implementation of its judicial activity. Two of the powers of the Minister of Justice have been revoked: one to manage the property of the judiciary, although the Constitutional Court has ruled that they do not constitute interference with the judiciary if it is governed in its interest and to satisfy its needs; and the second to check the organization of cases. This inspection was entrusted to the newly created authority for control in the judiciary – Inspectorate at the Supreme Judicial Council. Its main function is to examine the operation of the judicial authorities without affecting the independence of judges, jurors, prosecutors and investigating magistrates in the performance of the functions thereof. It is envisaged that the Inspectorate shall conduct checks for integrity and conflict of interest of judges, prosecutors and investigating magistrates, of the financial interest disclosure declarations thereof, as well as for ascertaining any actions damaging the prestige of the judiciary and such violating the independence of judges, prosecutors and investigating magistrates. An innovation is the enumeration of the powers of the Supreme Judicial

Council and the reasons for termination of office of an elected member and the completion of the mandate by another one chosen by the quota.

- The latest constitutional change of 2015 allowed (to an extent acceptable to the judiciary) the escalating dissatisfaction with the chosen model of the judiciary, which includes not only the court as the sole judicial authority, but also the prosecuting magistracy and the investigating authorities. Giving the status of magistrates to prosecutors and investigators is to ensure their independence from political factors and influence. The ambition, without denying the role of the prosecutor in the prosecution in a competitive process, but included in the judiciary and its gradual increase in powers, turned out to be a double-edged sword to protect the law. The decisive (judicial) authority in court proceedings is only the court. In adversarial proceedings (criminal, civil and administrative), the prosecutor has the capacity of a party with equal procedural rights with other parties, such as a lawyer. The prosecuting magistracy, for which the Constitution defines to be a part of the judiciary system, is not a judicial authority, insofar as it does not administer justice and its acts are subject to control by the court. In its functions and structure, the prosecuting magistracy is much closer to the political power than the judiciary (court) and will always raise doubts about the political influence on its activities.

Of course, after the interpretative decisions adopted by the Constitutional Court on the procedure for amending the Constitution of the Republic of Bulgaria, a drastic change such as the transfer of the prosecuting magistracy and the investigating authorities outside the judiciary can only happen by the Grand National Assembly. The interim decision, which is controversial whether it is also within the powers of the ordinary National Assembly, is within the existing administrative governing authority of the judiciary of the Supreme Judicial Council to establish a Plenum, a Judges Chamber and a Prosecutors Chamber. The aim is to distinguish between the determination of the personnel policy, the appraisal, the imposition of disciplinary sanctions and the

solution of issues for the organization of the activity of the respective system of judicial authorities, between the members of the judge's quota, on the one hand, respectively the prosecutorial and investigative, on the other. It was agreed that the Plenum, which includes all 25 members of the Supreme Judicial Council, should decide general issues for the three subsystems of the judiciary. For example, to adopt the draft budget of the judiciary, to administrate the real estate of the judiciary, to adopt the annual reports submitted to the National Assembly, to make motions to the President of the Republic for appointment and release of the "Big Three" from the judiciary, to address organizational matters common to the judiciary, etc. the Judges Chamber and the Prosecutors Chamber, each acting within its professional domain, shall perform their internal issues.

The question remained open for the high parliamentary quota in the election of members of the Supreme Judicial Council. By turning off the presidents of the Supreme Court of Cassation and of the Supreme Administrative Court and the Prosecutor General, appointed by the President of the Republic, eleven of the members are elected by the National Assembly, and the remaining eleven by the judiciary, by direct election of magistrates – 6 by judges, 4 by prosecutors, and 1 by investigating magistrates. Despite the criticisms and recommendations from the Venice Commission (officially the European Commission for Democracy through Law to the Council of Europe) to reduce the quota of the parliament and limit the influence of the legislature in the judiciary, the current policy is in favour of maintaining the *status quo*. It was accepted as a guarantee of non-interference of the National Assembly to elect each member of the Supreme Judicial Council separately by a qualified majority of 2/3 of all members of parliament, i.e. with a minimum of 160 votes. Six of them are members of the Judges Chamber and five of the Prosecutors Chamber.

Any constitutional model of the judiciary, even built on common principles, a European constitutional state has its own specifics, based on the historically accepted legal system, the peculiarities in the construction of the respective nation state, the meaningful practice and established experience. Solutions based on the universal principle of

separation of powers through which to seek fundamental independence to the rule of law of the judiciary are quite different. So not by accident in European assessments it is constantly repeated that concrete decisions must be our case, as long as they achieve the general goal – independence and efficiency of the judiciary.

The Cooperation and Verification Mechanism of the European Commission in Brussels was implemented upon Bulgaria's accession to the EU with a motive that the judiciary has not yet reached European levels of effectiveness, especially in the fight against high-level corruption, which continues despite progress made. Judicial reform is under review, with indicators for Bulgaria covering issues such as independence, professionalism, accountability and efficiency of the judiciary, and the fight against corruption and combat actions with organized crime. After 14 years of monitoring, the EC reports, which contained only findings, proved insufficiently effective and the EU reacted in a new way by introducing new mechanisms to respect the rule of law. With the new action plan adopted by the Commission in July 2019, the cooperation and verification mechanism did not end. It became part of the process of "strengthening the rule of law in the Union", which established an annual review cycle of the rule of law, covering all Member States.

Today's problems of Bulgaria, which are stated in the report of the European Commission, are not solved in the bill for the new constitution of the Republic of Bulgaria, submitted on 2 September 2020 on the initiative of 127 members of parliament to convene the Grand National Assembly. The assessment of the EU, the Council of Europe, the Venice Commission, as well as the majority of Bulgarian civil society is critical. The main guidelines are the lack of appropriate public discussion, the lack of contribution, and the most significant changes – those for the judiciary and the status of the Prosecutor General – again do not respond to the many recommendations of international institutions. The leading public opinion is that the bill does not respond to the ongoing debates on constitutional changes for many other significant problems and public needs related to the values of the Constitution. Parliament is expected to reject a proposal for a new constitution.

In the period of laying the foundations of a new constitutional state, the decision on the place and role of the prosecuting magistracy was accompanied by serious discussions. It was necessary to radically reject the coming not only from the times of totalitarian socialism, but even from the times of Stalin and Vishinsky, the role of the prosecuting magistracy and, above all, of the Prosecutor General as a kind of "sword of revolution" (Vishinsky). This notion, especially in the conditions of a one-party system, inevitably became an instrument of violence, the dominant one in the judiciary. It is no coincidence that even in the courtroom the prosecutor's place was on the podium next to the court panel, but with an additional chair that towers over everyone. The idea was banal that the court (as a principle) must follow the assessment of the crime and its view as necessary judgment.

The radical change in the philosophy of the criminal process is aimed at reaching the unconditionally inherited tendency, preserving the specifics of the role of the prosecuting magistracy – "shall ensure that legality is observed" (Article 127 of the current Constitution of the Republic of Bulgaria). In search of guarantees for the effectiveness of this role, both in the primordial text of the Constitution and in the series of subsequent amendments mentioned, contained exhaustively the forms and, in this connection, the limits of participation and influence of the prosecuting magistracy on the criminal process. The conception that the multi-party system, democratic forms of government and activity of civil society will guarantee the new role of the prosecuting magistracy, no less proving to be hasty and even illusory. The degree of immaturity of democratic governance inevitably affected the role of the prosecuting magistracy. Discussions on the necessary safeguards against degenerating its role from an effective guarantor of the rule of law into a political instrument continue. It is no coincidence that the public overwhelming last year concentrated its demands not only for the resignation of the prime minister and the government, but also of the Prosecutor General.

The interest itself for control over the actions of the Prosecutor General, through the introduction of the figure of the investigating Prosecutor General, initially found its answer in the Decision of the

Constitutional Court of 23 July 2020.[9] In it, the court decides that the constitutional power of the Attorney General to exercise supervision of legality and methodological guidance on the activities of all prosecutors is a guarantee for compliance with the requirement of legality. Its implementation by the Prosecutor General must be consistent with the functional independence granted to prosecutors in their work (e.g. investigation, prosecution of persons who have committed a crime, and prosecute criminal cases for publicly prosecutable offences) they shall be subservient only to the law. This constitutional imperative means that supervision for legality exercised by the Attorney General is only for proper application of material and procedural law in resolving issues on individual criminal proceedings. Outside its scope remains that side of the prosecutor's activity, which is based only on the free formation of the internal conviction of the prosecutor, built on the assessment of the authenticity of lawfully admitted, collected and verified evidence, from which he makes his factual ascertainments and conclusions on the issues included in the subject of proof. And the methodological guidance regarding the work of all prosecutors contains generally binding instructions to prosecutors on the approaches and rules, methods and actions, the use of which ensures effective and quality performance of the main task of the prosecuting magistracy in compliance with the rule of law – to be in full compliance with the Constitution and current laws. The Constitutional Court expressly held that it was inadmissible for the powers given to the Prosecutor General to protect the public interest to be used in their own interest. If they use them to influence the prosecuting magistracy in the course of the criminal proceedings, the procedural rules will be violated, and hence the substantive rights will not receive the proper constitutional protection. And when there is a signal against the Prosecutor General for a committed crime, on a general basis they are obliged to bear the consequences of the investigation or inspection, including the

[9] Decision no. 11 of July 23, 2020 on constitutional case no. 15/2019 of the Constitutional Court, http://www.constcourt.bg/bg/Acts/GetHtmlContent/c362dbb8-f9c3-4342-8658-9446a05ed8b4.

restriction in the exercise of their powers. However, this issue was raised eleven years ago by Decision no. 1108 of 5 November 2009 of the European Court of Human Rights in Strasbourg. It decrees that it was "practically impossible" to conduct an independent investigation against the Prosecutor General

> in view of the centralized structure of the Bulgarian prosecuting magistracy, based on the principle of subordination, its exclusive power to indict the perpetrators of criminal offences and procedural and institutional rules allowing full control by the Prosecutor General over any investigation in the country.

Despite the decision of the Constitutional Court that every prosecutor has the constitutional authority to investigate the Prosecutor General, under the pretext of implementing the EC recommendations on the responsibility of the Prosecutor General, at the end of February 2021, amendments to the Code of Criminal Procedure (CPC)[10] were adopted, creating the figure of "prosecutor in the investigation against the Prosecutor General or his deputy". This legislative decision met with great dissatisfaction in the Plenum of the Supreme Judicial Council, the Supreme Bar Council and in society as a whole, as well as regarding the manner of his election, his mandate, his real independence from the Prosecutor General, his powers at the time when the "prosecutor number 1" is not suspected of a crime, and in general for the need for such an authority, which is defined as self-serving. On this occasion, the representative of the Venice Commission stated that such a figure is not part of the world practice and described the decision to create it as "strange".

The response is not late either. On the day after the promulgation of the Law on addition to the Criminal Procedure Code, the President of the Republic, after re-voting the law with the exercise of the right

[10] Law for Supplementation of the Code of Criminal Procedure (SG, issue 86 of 2005), Prom. SG, issue 16 of February 23, 2021.

of veto, referred to the Constitutional Court with a request that the main texts of the law be declared unconstitutional. In his motives, he points out that the introduction of the Special Prosecutor in the investigation against the Prosecutor General or his deputy and the transfer of jurisdiction in these cases entirely to the Specialized Criminal Court "affect fundamental constitutional values such as the independence of prosecutors within the judiciary, the equality of citizens before the law and the prohibition of extraordinary courts." On 9 March 2021, the Constitutional Court admitted for consideration on the merits the request of the President of the Republic of Bulgaria to establish unconstitutionality under constitutional case no. 4/2021.[11] The examination of the initiated constitutional case is forthcoming. Now "ordinary" prosecutors do not have the power to investigate the Prosecutor General, and the "special" prosecutor cannot be elected until the ruling of the Constitutional Court.

Is it a coincidence that despite all the criticisms in the monitoring reports of the European Union regarding Bulgaria, there are practically no specific recommendations? The truth is that the structure itself of the judiciary in the various Member States is very specific, influenced by its own traditions and experience, and, therefore, there is no universal model.

Historically, European values of freedom, democracy and the protection of human rights have been at the heart of the rule of law. They distinguish in each country as concrete solutions, but they are pillars of European unification, integration and development. As values, they stand above everything, and legislation and law must be subordinated to them. Today, guarantees of the rule of law cannot be reduced to the role of specialized institutions. Our 30 years of experience as a state and society after the radical changes in the system of political power have shown that the principle of the rule of law cannot be isolated from the tendencies of general development. Any deviation from the constitutional order for the establishment of a democratic

[11] Determination of 9 March 2021 on constitutional case no. 4/2021of the Constitutional Court, http://www.constcourt.bg/bg/Cases/Details/589.

and social state inevitably becomes an obstacle to rights and the rule of law. The immaturity of democratic governance related naturally and the underdeveloped political and legal culture of both the government and the citizens, lead to phenomena and tendencies that are dangerous for the democratic state itself. Bulgaria is undergoing a constitutional reform to reflect the country's political development. Whether this will happen with the adoption of an entirely new Constitution or through constitutional amendments to the current one is a matter of in-depth, expert, comprehensive and broad discussion in society. The application of the rule of law is a *conditio sine qua non* for the whole system of state bodies, as well as for the society, its structures and for each individual citizen. It also contains the answer to the dispute over the primacy of EU law over national constitutional identity and the supremacy of the Constitution (following the example of the United Kingdom on the legal and real possibility of leaving the Union).

This year marks the 30th anniversary of the adoption of the Bulgarian Constitution of 12 July 1991. It is time to take stock of the adopted model, its improvement, the creation of an effective judiciary and search for a new place for the prosecuting magistracy, outside the system of the judiciary.

Peter Varga, Martin Bulla

Constitutional Identity of EU Member States in the Context of Slovak Jurisprudence

Introduction

The competences of the European Union cover many areas of law. Due to the fact that the basic principle of European Union (EU) functioning, even in the area of purely economic issues, is the support of supranational cooperation between the Member States and the private individuals, there must occur some tensions between EU law and national laws or the constitutional principles applicable in each Member State. In addition, after the Maastricht Treaty, the cooperation covers not just purely economic areas but also political areas that seem to be much more sensitive for the Member States. The complex settled case law of the Court of Justice of the EU (CJEU) articulates the imperative requirements of the economic freedoms. This may often be the area for tensions with the laws and constitutional principles of the Member States. The CJEU seeks to solve these tensions either in the preliminary ruling procedure or infringement procedures, however, always respecting the principles of EU law, including the primacy of EU law over national law.

The CJEU in its case law did not go into open conflict with constitutional identity of a Member State. However, the proportionality of the CJEU's interventions is under discussion, especially whether such interventions do not fall outside the scope of EU law.

In the very famous case *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*,[1] the Court of Justice qualified the medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, to be a service within the meaning of Article60 of the Treaty (now Article 57 TFEU). Irish courts considered assistance to pregnant women in Ireland to travel abroad to obtain abortions, *inter alia*, by informing them of the identity and location of a specific clinic or clinics where abortions are performed and how to contact such clinics, to be prohibited under Article 40.3.3 of the Irish Constitution.[2]

The Court of Justice further stated that it was not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information. The Court of Justice came to such conclusion because there was an absence of involvement of the clinics in question in the distribution of the said information.[3] The information activity was, therefore, considered only as freedom of expression and the freedom to receive and impart information. From this judgment it is, however, clear that the link between students associations and the possibility to accept the service of medical termination of pregnancy in another Member State was very tenuous.

The role of the CJEU seems to be difficult as it must find a balance and proportionality between the effective application of EU law and national specificity that has a constitutional character and to fulfil the requirement of Article 3(3) TEU to respect the rich cultural and linguistic diversity.

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[1] Judgment of the Court of October 4, 1991, Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* (ECLI:EU:C:1991:378).

[2] Ibid., point 5.

[3] Ibid., point 32.

The concept of national identity in EU law

The concept of national identity has become a very interesting issue not only for constitutional lawyers but also for lawyers dealing with EU law as it may bring the limits to political European integration and may limit further transfer of competences from the EU Member States on the EU. Article 4(2) TEU specifies that the EU shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. The term "national identity" seems to have an importance on the one hand but, on the other hand, this term is quite vague. A legitimate question thus is: What is national identity or what is the identity itself? National identity has been analyzed in several judgments of the CJEU and this concept has been used in several situations that included the funding sector,[4] linguistic regime,[5] citizenship, state aid, etc.

National identity and constitutional identity

In the case *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado*,[6] the Court of Justice confirmed that EU law does not preclude a measure adopted by a Member State such as the measure at issue in the main proceedings which requires television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for

[4] See Judgment of the Court of 4 March 2004, C-344/01, *Federal Republic of Germany v Commission of the European Communities* (ECLI:EU:C:2004:121).

[5] See Judgment of the General Court (Fifth Chamber) of 20 November 2008, T-185/05, *Italian Republic v European Commission* (ECLI:EU:T:2008:519).

[6] See Judgment of the Court (Second Chamber) of 5 March 2009, C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado* (ECLI: EU:C:2009:124).

television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State. The obligation of television operators to allocate a fixed percentage of their revenues to the financing of the Spanish film production was not in conflict with the EU directive and was not considered to be state aid for the Spanish film industry.

In this case, Advocate General Kokott[7] also argued that the approach of Member States to promote their national languages and official languages must be also recognized.[8] The EU shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and, at the same time, bringing the common cultural heritage to the fore. Respect for and promotion of the diversity of its cultures constitutes one of the Community's main preoccupations in all areas, including its legislation in the audio-visual services field; it is ultimately an expression of the European Union's respect for the national identities of its Member States.

In the *Michaniki*[9] case, the Court of Justice was dealing with public work contracts and the compatibility of Greek law (Article 14(9) of the Greek Constitution established an incompatibility not foreseen in the directive 93/37 to protect transparency and pluralism in the media). Advocate General Maduro[10] believes that the European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States. Thus, Article 6(3) of the Treaty on European Union (TEU) provides that "the Union shall respect the national identities of its Member States." The national identity concerned

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[7] Opinion of Advocate General Kokott delivered on 4 September 2008 (ECLI:EU:C:2008:468).

[8] Ibid., point 101.

[9] Judgment of the Court (Grand Chamber) of 16 December 2008, C-213/07, *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* (ECLI: EU:C:2008:731).

[10] Opinion of Advocate General Maduro delivered on 8 October 2008 (ECLI:EU:C:2008:544).

clearly includes the constitutional identity of the Member State that is confirmed by Article 4(2) TEU as amended by the Treaty of Lisbon. It appears, indeed, from the identical wording of those two instruments that the Union respects the "national identities [of Member States], inherent in their fundamental structures, political and constitutional."[11]

Advocate General Maduro reflected the conclusions of the case law of the CJEU that imposes on the European Union by the founding instruments to respect the national identity of the Member States, including at the level of their constitutions. He points out that the Member States may in certain cases assert the protection of their national identity in order to justify derogation from the application of the fundamental freedoms of movement and may rely on it as a legitimate and independent ground of derogation. Preservation of national and constitutional identity is a legitimate aim respected by EU law. The restriction must, however, fulfil the proportionality principle, i.e. it must be proportional to the safeguarded interest.

The definition of the "legitimate interest" may be developed by the Member States on their own in order to preserve their national constitutional identity. Such a definition cannot be unlimited, despite the Member States having broad discretion to define the content of their constitutional protection, reflecting their specific national features.

The extent of application of the constitutional identity of the Member States is not unlimited. It cannot be understood as an absolute obligation to defer to all national constitutional rules. National constitutions cannot be the way for the Member States to avoid application of EU law in their territories in specific fields.

Maduro points out that there must be a mutual balance, i.e. just as Community law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the Community legal order. The equality principle between the Member States must be ensured and this

[11] Ibid., point 31.

equality principle may also constitute a limit for the discretion of the Member States to define their constitutional identity.[12]

The term "constitutional identity" is widely used, even though there is no settled definition of this term. It is, therefore, used ambiguously and may be interpreted as constitutional tradition, protection of core values, religious identity, or cultural identity of the society and many others, often emphasized in the process of actual political or international development. José Luis Martí distinguishes two different ideas of constitutional identity: the *identity of the constitution* and the *identity of the people*.[13] He defines constitutional identity as something essential or even constitutive, something permanent or stable – if not directly immutable – in a constitution, which somehow relates to the essence of a particular political community[14] and is supposed to be the core of the constitution. This means that the core of the constitution is so fundamental for the country that it should be protected from change and preserved. The constitution is more than just a law. It is the fundamental law that defines the state and the whole political community. The change of essence of the constitution brings also the change of identity of the people.

Identity of the Slovak Constitution

The identity of the Slovak Constitution[15] should be explained as the identity that makes the Slovak Constitution unique and that characterizes

[12] Ibid., point 33.

[13] J.L. Marti, "Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People," in A. Sáiz Arnáiz, C. Alcoberro (eds.), *National Constitutional Identity and European Integration*, Antwerp 2013, pp. 17–36.

[14] Ibid., p. 19.

[15] Constitutional Act No. 460/1992 Coll. Constitution of the Slovak Republic, as amended by No. 244/1998 Coll., 9/1999 Coll., 90/2001 Coll., 90/2001 Coll., 140/2004 Coll., 323/2004 Coll., 323/2004 Coll., 463/2005 Coll., 92/2006 Coll., 210/2006 Coll., 100/2010 Coll., 356/2011 Coll., 232/2012 Coll., 161/2014 Coll.,

the Slovak constitution. The identity of the Slovak Constitution may be different from the identity of Slovak people as there are some categories of national or political communities that have their collective identity, but this is not reflected in the Constitution.

We have already mentioned that not all provisions of the Slovak Constitution form its material core, i.e. some provisions, principles are more important than others. This also applies to the changes of the constitution. The Slovak Constitution was adopted in 1992 and was amended 25 times since then and not all the amendments were so significant that they would bring substantial changes. To ensure that the constitution is not amended easily, a constitutional majority must be achieved, i.e. the consent of at least a three-fifths majority of all Members of the Parliament is required.[16] However, the Constitution does not only consist of the constitutional text itself. Very important is the jurisprudence, the interpretation of the words and norms used in the text of the Constitution. The Constitutional Court of the Slovak Republic has the competence to review the compliance of acts or other legal norms with the Constitution. The Constitutional Court of the Slovak Republic is an independent judicial body for the protection of constitutionality.[17] It is the role and competence of the Constitutional Court to give an interpretation of the Constitution or constitutional law if the matter is disputable. The interpretation is generally binding from the date of its promulgation.[18]

Constitutional identity is created not just from the text, but includes the Constitution itself, its interpretation by the jurisprudence which reflects the complexity of core values, applicable rules and legal principles. To define the core values is a very difficult task, as they are often formed in political discussions and arguments of public morality and

306/2014 Coll., 427/2015 Coll., 44/2017 Coll., 71/2017 Coll., 137/2017 Coll., 40/2019 Coll., 40/2019 Coll., 99/2019 Coll., 422/2020 Coll.

[16] Article 84(4) of the Slovak Constitution.

[17] Article 125 of the Slovak Constitution defines the competence of the Constitutional Court of the Slovak Republic to review the norms of lower legal force with the Constitution.

[18] Article 125 of the Constitution of the Slovak Republic.

the values of society are used very often. However, the core values are not defined only by the majority of the population, but these also include the democratic principles as core values. The values and constitutional norms may sometimes be in contradiction, or at least their interpretations are diverse. It is, therefore, the Constitutional Court who, by interpreting the text of the Constitution and by using the constitutional praxis and methods of interpretation, is competent to provide the authoritative interpretation of the text of the Constitution and to draw the demarcation line between the values enshrined in the Constitution. The role of the Constitutional Court is to make the assessment of the values, to "weigh" their essentiality if they tend to be in conflict or if they enable different interpretation. From the praxis of constitutional courts the core values are the values of human rights or the values that characterize democracy (again, we may discuss what democracy is, changing the structure of the court system or changing the current political system, electoral process, limitation of the freedom of speech to protect some categories of people, etc.). The Slovak Constitution does not contain any clause that would stipulate the eternal principles, i.e. principles that are so fundamental that they should be specially preserved and protected from change. From the settled case law of the Constitutional Court of the Slovak Republic it becomes clear that the democratic principles and the rule of law principles are values that enjoy constitutional protection. These values cannot be changed as these are considered as inviolable.[19]

Identity of the Slovak people

The Constitution is addressed to the people who live in a specific territory, since these people constitute a state, create their institutions, political system, taxes, civic rights, etc. The question arises what is the identity of those people? The Slovak Constitution begins the preamble

[19] See the following chapter relating the material scope of the Constitution.

with the words "We, the Slovak nation".[20] It is clear, that the authors of the Slovak Constitution reflected the historical efforts of the Slovak nation to establish their own state. However, the definition of the "Slovak nation" cannot be found in the Constitution or in other legal acts. Constitutionalists discuss a lot about the concept of nation and what the characteristics of the concept of nation are. This concept shall include the ethnicity of the people living in a specific territory or the language that is common to the people, common history or culture. From the characteristics of the identity of the people we can see a big difference between the identity of the constitution and identity of the people.[21]

Material Core of the Slovak Constitution

Unlike many other constitutions in Europe and around the world, the Constitution of the Slovak Republic does not contain an explicit eternity clause or a provision mentioning its material core. However, the Constitutional Court of the Slovak Republic has progressively developed the doctrine of the implicit material core of the constitution.

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[20] "We, the Slovak nation,

Bearing in mind the political and cultural heritage of our predecessors and the experience gained through centuries of struggle for our national existence and statehood,

Mindful of the spiritual bequest of Cyril and Methodius and the historical legacy of Great Moravia, Recognizing the natural right of nations to self-determination,

Together with members of national minorities and ethnic groups living on the territory of the Slovak Republic, In the interest of continuous peaceful cooperation with other democratic countries, endeavouring to implement a democratic form of government, to guarantee a life of freedom, and to promote spiritual culture and economic prosperity,

Thus we, the citizens of the Slovak Republic, have, herewith and through our representatives, adopted this Constitution."

[21] For further discussions relating the difference between two concepts: (1) the constitutional identity of the people with another concept, and (2) the identity of the constitutional authority, see J.L. Martí, "Two Different ideas."

It started as early as 1995 (the court was established in 1993), when it held that the Slovak Constitution is a value-oriented constitution and that "the legislative body is without any doubts bound by the Constitution and its principles, the amendment of which the Constitution does not allow, because they are of constitutive significance for the democratic nature of the Slovak Republic, as declared in Article1 of the Constitution."[22] The Constitutional Court reconfirmed this position in 2001 in PL ÚS 12/01: "No modern constitution, with the Constitution of the Slovak Republic being no exception, is value-neutral; on the contrary, it is based on a relatively comprehensive system of values that the state appreciates, respects and protects through public authorities. These values are objective in nature and are an expression of the socially recognized general 'good' and generally have a non-material nature."

Later, the court proceeded to clarify the contents of the value system of the Constitution by putting it into context primarily with Article 1(1) of the Constitution, according to which: "The Slovak Republic is a sovereign, democratic state governed by the rule of law." Thus, the fundamental values of the Slovak Constitution are national sovereignty, democracy and the rule of law. Eventually, the court translated previous hints into a blunt statement by declaring that the principles of democracy and rule of law "form the material core of the Constitution of the Slovak Republic and as key (constitutional) fundamental values are inviolable (m.m. PL. ÚS 16/95) and form the basic criterion of constitutional review of any decision of a public authority."[23]

Content of the implicit material core of the Slovak Constitution

Alongside the recognition of the implicit material core of the Slovak constitution, the Constitutional Court gradually uncovered some fragments of the backbone of this material core. As the court recently put it,

[22] PL. ÚS 16/95.
[23] PL. ÚS 7/2017.

> [t]he concept of the implicit material core of the constitution leads to the search for building blocks through an ad hoc procedure for determining the constitutional norms that together form the material core. The purpose of the protection afforded to the Constitution through its implicit material core is to protect the fundamental principles on which a modern European state stands and exists. In the opinion of the Constitutional Court, the foundation of the implicit core of the Constitution is the principle of a democracy and the rule of law (Article 1(1) of the Constitution).[24]

Subsequent case law of the Constitutional Court shed some light on the principles of democracy and the rule of law as a critical component of the material core of the constitution. According to the Court,

> [t]hese principles undoubtedly include the principle of separation of powers and the related independence of the judiciary or the principle of legal certainty. Any other building blocks of the implicit material core of the constitution are awaiting discovery in specific disputes over the constitutionality of constitutional acts, if such disputes arise.[25]

Furthermore, the Court slowly extended the material core of the constitution beyond the principles of democracy and the rule of law, which are protected by Article 1(1) of the Constitution.

> In the conditions of the Slovak Republic, the immutability of constitutional articles guaranteeing fundamental rights and freedoms is protected, in particular by Article 12(1) second sentence of the Constitution, however, the provisions with the above purpose undoubtedly include Article 93(3) of the Constitution (PL. ÚS 24/2014, para. 37).

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[24] PL. ÚS 21/2014, para. 69.
[25] PL. ÚS 21/2014, para. 95.

Principles of democracy and the rule of law as a cornerstone of the material core

The Court repeatedly reiterated that the principles of democracy and the rule of law are at the heart of the implicit material core of the Slovak Constitution. It is, therefore, of crucial importance to break down this concept. In its recent judgment,[26] the Court itself provided a summary of its previous case law, listing constitutional principles falling under the umbrella of *principles of democracy and the rule of law*:

- principle of freedom (II. ÚS 94/95, PL. ÚS 12/01, PL. ÚS 10/2013),
- principle of equality (PL. ÚS 4/97, PL. ÚS 12/01, PL. ÚS 10/02, II. ÚS 5/03, II. ÚS 249/04, PL. ÚS 8/04, PL. ÚS 16/08, PL. ÚS 12/2014, I. ÚS 404/2016),
- principle of human dignity (PL. ÚS 12/01, PL. ÚS 10/06, PL. ÚS 16/09),
- principle of sovereignty of the people (PL ÚS 42/95, I. ÚS 76/97, PL ÚS 19/98, I. ÚS 238/04, PL ÚS 6/08, PL ÚS 105/2011), resp. principle of democracy (I. ÚS 76/97, I. ÚS 60/97),
- principle of legality (PL. ÚS 6/01, PL. ÚS 6/04, PL. ÚS 17/2014, PL. ÚS 30/2015),
- principle of sovereignty of the constitution and laws (III. ÚS 2/00, III. ÚS 100/02, PL. ÚS 49/03, PL. ÚS 6/04, PL. ÚS 9/04, IV. ÚS 154/05, PL. ÚS 12/05, PL. ÚS 19/05, PL. ÚS 10/2014),
- principle of (democratic) legitimacy (I. ÚS 238/04, PL. ÚS 14/06, PL. ÚS 105/2011, PL. ÚS 4/2012, PL. ÚS 24/2014),
- principle of protection of human rights and fundamental freedoms (PL. ÚS 49/03, PL. ÚS 1/04, PL. ÚS 12/01, PL. ÚS 24/2014),
- principle of legal certainty (II. ÚS 48/97, PL. ÚS 37/99, PL. ÚS 49/03, PL. ÚS 25/00, PL. ÚS 1/04, PL. ÚS 6/04, PL. ÚS 17/2014) including the protection of legally-acquired rights and legitimate expectations (I. ÚS 30/99, PL. ÚS 10/04, PL. ÚS 12/05, PL. ÚS 10/06, PL. ÚS 53/2015) and prohibition of retroactivity (PL. ÚS 37/99, PL. ÚS 28/00, PL. ÚS 49/03, I. ÚS 238/04, PL. ÚS 9/2013),

[26] PL. ÚS 21/2014.

- principle of protection of citizens' trust in the legal order (II. ÚS 48/97, PL. ÚS 37/99, PL. ÚS 49/03, PL. ÚS 25/00, PL. ÚS 1/04, PL. ÚS 6/04, PL. ÚS 17/2014),
- principle of justice [also referred to as the principle of the material rule of law (I. ÚS 10/98, I. ÚS 54/02, I. ÚS 24/03, I. ÚS 10/00, I. ÚS 84/02, I. ÚS 84/02, PL. ÚS 49/03, IV ÚS 47/03, III ÚS 142/03, I. ÚS 73/03, PL ÚS 6/04, PL ÚS 42/2015)],
- principle of prohibition of arbitrariness (prohibition of abuse of power) (PL. ÚS 52/99, PL. ÚS 49/03, PL. ÚS 1/04, PL. ÚS 12/05, PL. ÚS 102/2011, PL. ÚS 4/2012, II. ÚS 298/2015, PL. ÚS 27/2015),
- principle of proportionality (PL. ÚS 52/99, PL. ÚS 3/00, I. ÚS 4/02, I. ÚS 193/03, PL. ÚS 3/04, PL. ÚS 29/05, PL. ÚS 67/07, PL ÚS 106/2011),
- principle of division of power, including the system of checks and balances (PL. ÚS 16/95, PL. ÚS 29/95, PL. ÚS 38/95, PL. ÚS 25/00, PL. ÚS 105/2011, PL. ÚS 24/2014),
- principle of transparency (public controllability) of the exercise of public authority (PL. ÚS 4/2012, II. ÚS 29/2011, II. ÚS 298/2015, I. ÚS 298/2015).

Nonetheless, the Constitutional Court reiterated that the list is not exhaustive and that additional principles are waiting to be discovered.

Independence of the judiciary as a component of the implicit material core of the Constitution

Recently, the Constitutional Court extended the content of the material core of the Constitution to also include the constitutional protection of the independence of the judiciary and the independence of judges.[27] The Constitutional Court was confronted with a question of compliance with the constitution of a constitutional amendment, which introduced mandatory background checks (security clearances)

[27] PL. ÚS 21/2014, para. 141, 142, 153.

of judges (and candidate judges) based on information provided by the National Security Authority. In its judgment, the Constitutional Court held that these security clearances were in breach of the principle of judicial independence which, according to the ruling, forms part of the implicit material core of the Constitution.

However, the court stipulated that the independence of the judiciary and the independence of judges is ensured by several guarantees, which are either constitutional or legal in nature[28] and not every one of these guarantees in itself necessarily belongs to the material core of the Constitution, otherwise the core would lose its exceptional character.[29] Consequently, only provisions of Article141(1)[30] and Article144(1)[31] of the Constitution were found to belong to the material core of the Constitution in this regard, since the Court considered it sufficient for the independence of the judiciary and the independence of judges to be assessed within the scope of these two provisions. Inclusion of Article145(1)[32] of the Constitution (to the extent guaranteeing the appointment of judges without a time limit) to the material core of the Constitution was not found to be necessary.[33]

Quite controversially, the Constitutional Court concluded in this judgment, that it has the authority to examine a possible conflict between the provisions of a constitutional act and the implicit material core of the Constitution, and if it finds a conflict, it is entitled to declare the inconsistency of the norms of the constitutional act with the implicit material core of the Constitution.[34]

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[28] The Court made a specific reference as an example to the legal regulation of remuneration of judges.

[29] PL. ÚS 21/2014, para. 153.

[30] Article 141(1) of the Slovak Constitution: "In the Slovak Republic, the judiciary is administered by independent and impartial courts."

[31] Article 144(1) of the Slovak Constitution: "Judges are independent in the performance of their duties and are bound by the constitution, constitutional act, international treaty pursuant to Article 7 par. 2 and 5 and by law."

[32] Article 145(1) of the Slovak Constitution: "The President of the Slovak Republic shall appoint and recall judges on the basis of a proposal of the Judiciary Council of the Slovak Republic; they are appointed without time restrictions."

[33] PL. ÚS 21/2014, para. 153.

[34] PL. ÚS 21/2014, para. 169 (iii).

Criticism of the judgment of the Constitutional Court

According to some authors,[35] the key question is the orientation of the Constitution: is it value-oriented or is it neutral? What should prevail? Natural law or positive law, justice or order? Marek Káčer states that the Slovak Constitution is value-oriented and argues by the judgment of the Constitutional Court. In his view, constitutional values have an objective character and are an expression of the socially-recognized common good. The implicit core of the Constitution can be compared to the eternity clause, while its immutability is expressed in Article 12(1)[36] and Article 93(3)[37] of the Constitution. The criticism of the material core of the Constitution is the result of a radical inclination to legal positivism, which results in the thesis that the sovereignty of the people cannot be legally limited. The argument for this view is supported by the fact that there is a difference between the power that is establishing and the established power, and the Parliament must be seen as the established institution that must respect the constitutional limits. Since the Slovak Constitution is value-oriented, the Constitutional Court must distinguish between nuclear norms and other constitutional norms, the former having a higher legal force.[38] Káčer analyzes why the judgment of the Constitutional Court suffers from serious deficiencies. Among the more serious ones belong the arbitrary choice of sources, which is illustrated by a comparative analysis of constitutions and case law of constitutional courts (the Constitutional Court did not use specific criteria for comparison), the absence of proper argumentation (the Constitutional Court used the notion of the clause of eternity, material core, constitutional values, constitutional

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[35] See M. Káčer, J. Neumann, *Materiálne jadro v slovenskom ústavnom práve. Doktrinálny disent proti zrušeniu sudcovských previerok*, Praha 2019, p. 77.

[36] Article 12(1) of the Constitution of the Slovak Republic: "All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are sanctioned, inalienable, imprescriptible and irreversible."

[37] Article 93(3) of the Constitution of the Slovak Republic: "No issues of fundamental rights, freedoms, taxes, duties or state budget may be decided by a referendum."

[38] See Káčer, Neumann, *Materiálne jadro*, p. 78.

identity and constitutional continuity almost as synonyms) or trying to address the complicated issue of the constitutional sovereignty without sufficient support in the text of the Constitution and without sufficient social credit.

Material core and eternal clauses in European integration

It is not possible to consider the terms "eternity clause" and "material core" as synonyms. On the one hand, the eternity clause includes the rules that are identified by the Constitution as unchangeable, and on the other hand, the material core rather refers to those norms that determine the very foundations of the constitutional order and they, therefore, define the given constitution in the sense that if something changed on them, it would be a completely different constitution, it would be a matter of destruction or removal of the existing constitution.

The material core forms the load-bearing walls of the constitution, the normative basis without which the constitution will collapse and not stick together. It is not formed by the parliament, but arises from the basic social consensus of the people as a legislator. On the other hand, the eternal provisions are rather protected parts of the constitution, which may deserve such protection either because they are also load-bearing walls (this is an ideal situation where the material focus overlaps with immutable provisions), or perhaps only because they are particularly endangered and, therefore, need to be protected, or, finally, because they are a nice and historically valuable "ornament", as is the case with Turkey's national symbols protected by the eternity clauses.[39]

[39] P. Molek, *Materiální ohnisko ústavy: věčný limit evropské integrace?* Brno 2014. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia, sv. č. 488, p. 140.

From the EU Member States it is expected to adopt constitutions that would be compatible with the European constitutional culture.[40] The question arises what should be the content of the material core of the constitutions that enable the European integration or, in other words, what provisions would be problematic in European integration? In this respect, the values of the European Union are the values that are respected and protected by all EU Member States.[41] The values of the European Union characterize the liberal democracies, i.e. a state that respects the human dignity of all individuals, rule of law, including the political pluralism that includes respect to all members of the society, including minorities, justice, solidarity, equality and non-discrimination.

The Court of Justice of the EU confirmed that the respect to human dignity forms one of the characteristics of the EU. This was confirmed in the *Omega* case.[42] Omega had been operating an installation known as a "laserdrome", normally used for the practice of "laser sport". The authorities issued an order forbidding Omega the kinds of games with the object of firing on human targets using a laser beam or other technical devices (such as infrared, for example), with shots hitting their targets recorded – in other words, "playing at killing people". According to the prohibition order, the games constituted a danger to public order, since the acts of simulated homicide and the trivialization of violence thereby engendered were contrary to fundamental values prevailing in public opinion. According to the Federal Administrative

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[40] The term "European constitutional culture" is used by the Austrian legal scientist, Peter Pernthaler. See *Der Verfassungskern: Gesamtänderung und Durchbrechung der Verfassung im Lichte der Theorie, Rechtsprechung und europäischen Verfassungskultur*, Wien 1998, p. 2.

[41] Treaty on European Union, Article 2 (see the consolidated version: OJ C 202 7.6.2016): "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[42] Judgment of the Court (First Chamber) of 14 October 2004, Case C-36/02, *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (ECLI:EU:C:2004:614).

Court (*Bundesverwaltungsgericht*), the commercial exploitation of a "killing game" constituted an affront to human dignity, a concept established in the German Basic (Constitutional) Law. It was, however, uncertain whether that result is compatible with EU law, particularly with the rules on the freedom to provide services and the free movement of goods. The Court of Justice confirmed that according to settled case-law, fundamental rights form an integral part of the general principles of EU law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect. The Court of Justice was of the opinion that since both the EU and the EU Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services.[43] However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only insofar as those objectives cannot be attained by less restrictive measures.[44]

We may see a kind of similarity between constitutions of the EU Member States. These concern the division of competences, rule of law or the values of liberal democracies. The Member States of the European Union have also decided to accept the values of the European Union as referred in Article2 TEU and these values also became part of their national identity, i.e. the EU Member States have accepted these values as part of their identity. The European Union and its Member States have adopted the provision that is applied if the values of the European Union

[43] Ibid., point 35.
[44] Ibid., point 37.

are threatened. Article 7 TEU establishes a mechanism for enforcement of these values if they are breached by Member States.

Respect for national identities from the EU

Membership in the European Union is very specific as the EU is not an ordinary international organization established by an agreement which merely creates mutual obligations between the contracting states. This was confirmed by the Court of Justice that set the demarcation between European law, national law and international law: the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals.[45] This judgment was adopted before the constitutions of the EU Member States considered the membership in the EU as a part of the material core of their constitutions. The respect for the constitutions of the Member States was significant, particularly in the area of human rights, especially before the Charter of the Fundamental Rights of the European Union has been adopted. The missing limits in the area of human rights had been replaced by the constitutional limits of the Member States' constitutions: "The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."[46] Currently, the Treaty on European Union explicitly refers to the standard of human rights

[45] See Judgment of the Court of 5 February 1963, Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (ECLI:EU:C:1963:1).

[46] Judgment of the Court of 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECLI:EU:C:1970:114).

protection as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.[47]

The concept of national identity has been protected as from the beginning of the integration process by the EU institutions. This concept was legally enacted in the Maastricht Treaty for the first time.[48] The idea was to reflect the identity of the Member States and express their sovereignty as the Union's Member States as an opposite to the efforts for the federalization of the European Union. The national identity is understood as identity of the constitution created from the eternity clauses and material core (these may in some cases overlap), i.e. not the provisions that are specific for the constitution, but the provisions that are considered as essential. Despite the discussions about the content of the term "national identity", we lean towards the opinion that this term does not include cultural identity. This opinion may be supported by Article3(3) TEU that separately regulates the respect of the EU to cultural and linguistic diversity of the Member States. This respect to diversity of the Member States may also be interpreted as a tool, how the EU shall perform its activities, regardless the competence that is actually used. The respect to cultural identity may be used as a general concept for application of the principle of proportionality. On the other hand, it is not implausible that national constitutional courts may unilaterally apply this clause as an *ultima ratio* tool to declare some specific provisions of EU law as not applicable.

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[47] Article 6(3) TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and, as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[48] This concept is enacted in Article 4(2) TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including 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."

Concluding remarks

The paper deals with the concept of national identity of EU Member States and reflection of the obligation of the European Union to respect the national identity when it uses its competences. The concept of respecting the national identity of EU Member States is not often discussed by EU lawyers and is not even mentioned in any judgment of the Slovak Constitutional Court. There is even not an adequate amount of jurisprudence at the EU level to formulated a proper interpretation of this concept. The concept of national identity is connected with the constitutional identity of the Member State, which is also analysed in the text, together with the material core of the constitution or eternity clauses that form the constitutional identity. Incorporation of Article 4(2) TEU results in the EU's obligation to accept the legitimacy of the Member States as independent units protected against the demands of growing European integration.

Goran Ilik

The Janus Face of the EU: European Integration and the Constitutional Identity of North Macedonia

Introduction

This is a work of combined research based on the content analysis method, comparative analysis, and the online survey method, aimed at investigating the changes of the constitutional identity of the Republic of North Macedonia during its integration path, filled with many obstacles, challenges, and constraints. Moreover, this paper aims to reveal the EU's hypocritical attitude towards the integration process of North Macedonia concerning the "sacrifices" that North Macedonia made regarding its major constitutional changes with the Ohrid Framework Agreement and the change of its national name with the Prespa Agreement. Moreover, the EU's hypocrisy and incapability is more obvious with the Bulgarian blockade for opening negotiation talks with North Macedonia, which came as a "cold shower" for the allies and proponents of Macedonian full integration with the EU structures. Therefore, in what follows I shall present the main and major changes of the Constitution of the Republic of North Macedonia since its independence – 30 years ago – until today, to describe the "sacrifices" that North Macedonia has made towards joining the EU.

The European Union values

Considering the EU values, I will investigate the EU constitutive treaties, to extract and reveal its axiological provisions. Therefore, the Lisbon Treaty in Article 1a stipulates that:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.[1]

This Treaty prescribed the systematized *axiological (value) framework* that requires the EU and its Member States to affirm and respect its values. In turn, as it is stated in Article 4 of the treaty on European Union (TEU),

> [the Union] shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.… Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.[2]

It should be borne in mind that the EU values are not always named as "values" but sometimes referred to by terms such as "objectives", "tasks", "principles", "duties" and so on, which have an indisputable

[1] Treaty of Lisbon, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT.

[2] Treaty on European Union, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M%2FTXT&qid=1646082186899.

axiological essence. Moreover, it is important to stress that values are normally standards beyond the law. The Treaty on European Union specified the EU values in Article B, stating that the EU shall

> promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal borders, through the strengthening of economic and social cohesion and the establishment of economic and monetary union, ultimately including a single currency following the provisions of this Treaty. (TEU)

Likewise, the Treaty Establishing a Constitution for Europe (TECE) in Article I-2 listed the following values: respect for human dignity, liberty, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities.[3] This Treaty also confirmed the values of the previous Treaty establishing the European Community:

> promotion of scientific and technological development, opposition to social exclusion, the promotion of social justice and social protection, equality between men and women, solidarity, the promotion of economic, social and territorial cohesion, and respect for cultural and linguistic differences. (TECE)

Moreover, Article 21 of the Lisbon Treaty (LT) noted that the EU's actions on the international scene shall be guided by the principles which have inspired

> its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights

[3] Treaty establishing a Constitution for Europe, available at http://europa.eu/scadplus/constitution/objectives_en.htm#VALUES.

> and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the UN Charter and international law. (LT)

This article also confirms that the EU shall define and pursue its common policies and actions and shall work for a high degree of cooperation in all fields of international relations, to achieve the following objectives:

> Safeguard its values, fundamental interests, security, independence and integrity; consolidate and support democracy, the rule of law, human rights and the principles of international law; preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the UN Charter. (LT)

In the meantime, the Preamble of the Charter for Fundamental Rights of the EU additionally determines the Member States and the EU:

> to strengthen the protection of fundamental rights.… Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality, and solidarity; it is based on the principles of democracy and the rule of law.[4]

Consequently, Professor Ian Manners, the "father" of the concept of "normative power Europe", stated that "the EU represents neither a civilian power of an intergovernmental nature utilizing economic tools, nor a military power of a supranational nature using armed force, but a normative power of an ideational nature characterized by

[4] Charter of Fundamental Rights of the European Union, p. 8; available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN.

common principles."[5] This kind of power has its basis, directly derived from the EU value system "developed over the past fifty years through a series of declarations, treaties, policies, criteria and conditions" (p. 33), which comprises the EU *acquis communautaire* and the *acquis politique*. Therefore, it is crucial to emphasize that the most powerful tool for imposing the EU's normative power is the membership itself. The EU norms and values "are not simply declaratory aims of a system of governance (…) but represent crucial constitutive features of a polity which creates its identity as being more than a state" (p. 33). On this basis, the procedural diffusion of the EU's normative power appears as an extraordinary channel for the diffusion of EU values and norms to other actors (states and international organizations). This channel of norms and diffusion of values concerns the "institutionalization of relationship" (p. 33) between the EU and other actors, in this case, the Republic of North Macedonia. Or, as Manners emphasized, procedural diffusion "involving symbolic and substantial normative power involves the institutionalization of a relationship between the EU and a third party, such as an interregional cooperation agreement, membership of an international organization or enlargement of the EU itself" (p. 35).

The acceptance of the Copenhagen criteria in the process of accession of new member states to the EU is stated as the most powerful instrument for the direct establishment of the EU value system, and, thus, a typical manifestation of the procedural diffusion of European normative power. The Copenhagen criteria stipulate that:

> Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership

[5] I. Manners, "Normative Power Europe: A Contradiction in Terms?" *Journal of Common Market Studies*, 2002, vol. 40(2), p. 29.

> presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic, and monetary union.[6]

The integration processes, and consequently the accession of the Republic of North Macedonia to the EU, involve a series of accepted and implemented declarations, policies, criteria, and conditions, aimed at achieving the full consistency of the Macedonian normative and value system with that of the EU. The Republic of North Macedonia has been participating in the Stabilisation and Association process since 1999. The Stabilisation and Association Agreement (SAA) with the EU, signed in 2001, sets the framework for relations with the EU, including political, economic, and technical dialogue. The procedural diffusion of normative power means the capacity of the EU to impose its norms and values through procedural or institutional means.

In the case of the Republic of North Macedonia, one can detect "double-standards" in the overall accession process, as well as the use of more political than legal "force" in revising, reforming, or changing the Macedonian constitutional identity, as evidenced by most (serious) revisions of the Macedonian Constitution in the last 30 years. Such interventions provoked serious distortions and transformations in the overall Macedonian political system (especially with the Ohrid Framework Agreement establishment), accompanied by serious revisions of the Macedonian constitutional identity.

In the text below, I will present the changes of the Constitution of the Republic of North Macedonia with special emphasis on the two major revisions, i.e. the constitutional revision derived from the Ohrid Framework Agreement (2001) – as a revision which was triggered by internal (inter-ethnic) factors, and the revision made due to the name change – as a revision triggered by the external factor (resolving the "name dispute" with Greece). Also, I will try to introduce the preliminary impulses of the Bulgarian-triggered "clash" over the Macedonian

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[6] Copenhagen European Council, *Presidency Conclusions*, 1993, available at http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf.

national and ethnic identity, which possibly can lead to another change of the Macedonian constitutional identity in the future.

All of these constitutional revisions and interventions seriously changed the constitutional identity of the Republic of North Macedonia, which is reflected in the change of the Macedonian political system and the name of the country.

Taking into account the fact that "constitutional identity" is a flexible term for which there is no concrete and comprehensive definition, the notion of constitutional identity in this paper will be treated as a normative concept "primarily understood as the identity of the constitution itself"[7] with decisive consequences to the political system. For Jürgen Habermas, the concept of constitutional identity "is not an independent theoretical concept in itself, but a corollary to the idea of a *Verfassungspatriotismus* (constitutional patriotism)" (p. 1600), namely that the identity of a nation of citizens is only related to "the essential constitutional principles, such as human rights, democracy and the rule of law" (ibid.). This approach focuses, on the relationship between values, constitution, and a political system of a particular state – in this case, the Republic of North Macedonia and its constitutional (systemic) accommodation with the EU values as a candidate-state. For Gary Jeffrey Jacobsohn, the concept of constitutional identity is "primarily a tool for analyzing and describing constitutional development and change; constitutional law is always about interpretation" (p. 1601). Or as he pointed out: "identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as a determination of those within the society who seek in some ways to transcend this past" (p. 1602). Thus, it is very important to underline that "constitutional identity is not only shaped by the judiciary, but also by the political process itself. The process of shaping a constitutional identity is driven by disharmony, either in the text of the constitution or in the society itself – in particular, historical

[7] M. Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, p. 1597; available at https://www.cambridge.org/core/journals/german-law-journal/article/constitutional-identity-as-a-constructed-reality-and-a-restless-soul/664451F50BA00AF676350CBECB677323 (accessed 15 Jan. 2021).

changes or political contestations" (ibid.). This formulation is the initial inspiration for this paper, especially since the changes (amendments) to the Constitution of the Republic of (North) Macedonia were predominantly politically induced rather than legal. My understanding of constitutional identity implies the formal (constructed) aspects of the constitutional evolution, starting from the premise that "constitutional identity is a special, constructed identity related to the constitution itself, so this identity can only be expressed and found in the process of making, applying and interpreting the constitution itself – this is the main difference between a constitutional identity and a national identity" (p. 1604). Hence, in the light of this paper, I can conclude that the constitutional identity is the identity of the political system.

Changing the constitutional identity of the Republic of (North) Macedonia

I can immediately say that it is about locating and presenting the key changes, constraints, and challenges faced by the Republic of North Macedonia, starting from 1991 and the adoption of the first constitution as an independent, sovereign, and democratic state, until today, in a completely changed political environment facing the challenges that are coming. The new Macedonian Constitution practically brought about a radical systemic change as a result of the changing international and domestic societal and political environment. The list of priorities that were included in the new Macedonian Constitution is the following: incorporation of the scope and type of individual rights, defining the concept of citizenship (regulating the relation of ethnicity versus citizenship), giving an explicit emphasis on democracy and the resulting institutional structure, defining the role of the Constitutional Court (as a neutral arbitrator and guarantor of the constitutional order) regulating the procedure for constitutional changes.

Given the possibility of amending the Macedonian Constitution, it belongs to the group of "soft" constitutions, although the amendment requires a two-thirds majority of the total number of MPs, or for certain issues such as local self-government, decision-making on accession to an amendment to the Constitution, or to provisions relating to the rights of communities, the Ombudsman, the Security Council, the Judicial Council, the Constitutional Court, the Committee on Inter-Community Relations, provides for the use of a double majority. The double majority voting, popularly known as the "Badinter majority" (named after the "father" of this tool, the French lawyer Robert Badinter), is a complex type of qualified majority. The decision making about laws that directly impact "the culture, language use, education, personal documentation, and use of symbols requires the majority votes from the attending MPs that belong to the non-majority communities"[8] in the Republic of (North) Macedonia.

With the Constitution of 1991, the Republic of (North) Macedonia is constituted as an independent and sovereign, democratic and social state that aims to establish and respect the rule of law, guarantees human, political, economic, social, and cultural rights, provides peace and coexistence, social justice and economic well-being and prosperity. Or as it is stated in Article 8 of the Constitution, the fundamental values of the constitutional order of the Republic of North Macedonia (2019) are:

- the basic freedoms and rights of the individual and citizen, recognized in international law and set down in the Constitution,
- the free expression of national identity,
- equitable representation of persons belonging to all communities in public bodies at all levels and in other areas of public life,
- the rule of law,
- the division of state powers into legislative, executive, and judicial,
- political pluralism and free, direct, and democratic elections,

[8] Leaflet available on the website of the Assembly of the Republic of Macedonia (link "Procedure for adopting laws at the Assembly of the Republic of Macedonia/textual description"), available at https://www.sobranie.mk/activities-of-parliamentary-institute.nspx (accessed 15 Jan. 2021).

- the legal protection of property,
- the freedom of the market and entrepreneurship,
- humanism, social justice, and solidarity,
- local self-government,
- proper urban and rural planning to promote a congenial human environment, as well as ecological protection and development,
- respect for the generally accepted norms of international law.[9]

Considering the abovementioned, it is very important to emphasize that all listed fundamental values of the constitutional order of the Republic of (North)Macedonia are aligned with the value system of the EU, and harmonious with the previously mentioned "normative power Europe" concept, according to Prof. Ian Manners (Table 1).

[9] Constitution of the Republic of Macedonia, available at https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspx.

Table 1. Normative power Europe and fundamental values of North Macedonia (Author's depiction, based on the Normative Power Europe concept)

Founding principles	Tasks and objectives	Stable institutions	Fundamental rights	Fundamental values of North Macedonia
• Liberty • Democracy • Respect for human rights & fundamental freedoms • Rule of law	• Social progress • Non-discrimination • Sustainable development	• Guarantee of democracy • Rule of law • Human rights and fundamental freedoms • Protection of minorities	• Dignity • Freedoms • Equality • Solidarity • Citizenship • Justice	• Basic freedoms and rights • Free expression of national identity • Equitable representation of persons belonging to all communities in public bodies at all levels and in other areas of public life • Rule of law • Division of state powers into legislative, executive, and judicial • Political pluralism and free, direct, and democratic elections • Legal protection of property • Freedom of the market and entrepreneurship • Humanism, social justice, and solidarity • Local self-government • Proper urban and rural planning to promote a congenial human environment, as well as ecological protection and development& • Respect for the generally accepted norms of international law
Treaty base set out in Art. 6 TEU	Treaty Base set out in Art. 2 TEC and TEU, and Art. 6 and 13 TEC	Copenhagen Criteria, set out in the conclusions of the June 1993 European Council	Charter of the Fundamental Rights of the European Union	Constitution of the Republic of North Macedonia

Source: I. Manners, "Normative Power Europe: A Contradiction in Terms?" *Journal of Common Market Studies*, 2002, vol. 40(2), p. 33

Source: Constitution of the Republic of North Macedonia

The first amendments to the 1991 Constitution were adopted as a result of the diplomatic pressure by the Republic of Greece over the Republic of (North) Macedonia. The Assembly of the Republic of (North) Macedonia on January 6, 1992, adopted Amendment I to Article 49 with the following wording: "In the exercise of this concern the Republic will not interfere in the sovereign rights of other states or their internal affairs," indicating that: "The Republic of Macedonia has no territorial pretensions towards any neighboring state.… The borders of the Republic of Macedonia can only be changed in accordance with the Constitution and on the principle of free will, as well as in accordance with generally accepted international norms."[10]

The next amendment to the Constitution was aimed more at advancing the rights of persons in detention, and by extensively determining the length of detention until the moment of indictment (from the previously provided 90 to 180 days). Thus, Amendment III replaced the previous para. 5 of Article 12 and provided that: "Detention until the indictment may last, by a court decision, for a maximum period of 180 days from the day of detention." While, after the indictment, "detention may be prolonged or determined by a competent court in the case and the procedure prescribed by law." The adoption of this amendment possesses legal content, resulting from the commitments of the Republic of (North) Macedonia to promote the rule of law, human rights, and freedoms following the general principles of law, such as security and protection of the evidence, security of the detainee, continuity of the procedure, legal certainty, witnesses protection, etc.

The major revision of the Constitution so far has been made since the end of the 2001 military conflict, and the end of (peace) negotiations between representatives of the then two largest political parties of the Macedonian bloc (SDSM and VMRO-DPMNE) and two of the Albanian ethnic bloc (DPAand PDP), under the supervision of the appointed representatives of the EU and the USA, with a promise for

[10] The Constitution of the Republic of Macedonia, ILO; available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/36714/70972/F511737559/MKD36714%20Eng.pdf (accessed 15 Jan. 2021).

quick accession of the Republic of (North) Macedonia to the EU and NATO. The result of these negotiations was embodied in the (Ohrid) Framework Agreement. With this Agreement, not only was the 1991 Constitution amended and modified, but the foundations were laid for the future redefinition of the Macedonian political system – from a liberal-democratic political system with a parliamentary democracy to a moderate-consociational political system, where the segments (ethnic communities) are (latent) bearers of power, and, thus, have the primacy in decision-making. These changes of the Constitution of the Republic of (North) Macedonia with the Ohrid Framework Agreement largely implied the use of languages and scripts, nurturing ethnic identity, the use of symbols, mechanisms of political decision-making in the election of important state officials and bodies, the formation of special parliamentary bodies and the like. They covered all those issues that could in some way be in the interest of the members of the ethnic communities who lived in the Republic of (North) Macedonia. With the adoption of Amendment IV, the original text of the (part of the) Preamble was changed. The original text is the one that follows:

> Taking as the points of departure the historical, cultural, spiritual, and statehood heritage of the Macedonian people and their struggle over centuries for national and social freedom as well as for the creation of their state … Macedonia is established as a national state of the Macedonian people, in which full equality as citizens and permanent co-existence with the Macedonian people is provided for Albanians, Turks, Vlachs, Romanies and other nationalities living in the Republic of Macedonia.

The changed the text of the (part of the) Preamble was formulated in the following manner:

> The citizens of the Republic of Macedonia, the Macedonian people, as well as citizens living within its borders who are part of the Albanian people, the Turkish people, the Vlach

> people, the Serbian people, the Roma people, the Bosniak people, and others taking responsibility for the present and future of their fatherland….

With the adoption of Amendment V, it was once again confirmed that on the entire territory of the Republic of (North) Macedonia and in its international relations, the Macedonian language and its Cyrillic alphabet are obligatorily used as an official language, but also any other language spoken by at least 20% of the population (meaning ethnic communities), acquires the status of an official language including its alphabet. For the citizens who speak an official language other than the Macedonian language, they can request that their documents be issued except in Macedonian language and its alphabet, and in that language and its alphabet under the law. The same principle is applied at the level of local self-government, and for the use of languages and scripts spoken by less than 20% of the citizens, which is decided by the bodies of the local self-government units.

Amendment VIII stipulated that they have a right freely to express, foster, and develop their identity and community attributes, and to use their community symbols(as a right that is more precisely regulated by the Law on the use of community symbols). Also, the Republic guarantees the protection of the ethnic, cultural, linguistic, and religious identity of all communities. The members of the communities have the right to learn their language in primary and secondary education in a manner determined by law. In the schools where the education takes place in another language, the Macedonian language, and its Cyrillic alphabet are also studied. For laws directly related to culture, the use of languages, education, personal documents, and the use of symbols, the Assembly decides by a majority vote of the MPs attending, within which there must be a majority of the votes of the MPs attending who belong to communities not in the majority in the population of Macedonia (popularly known as "Badinter majority").

Also, in the event of a dispute within the Assembly regarding the application of this provision, the Committee on Inter-Community Relations shall resolve the dispute (the Committee). The Committee

is constituted as a parliamentary body which through its work (in which the MPs of all ethnic communities in the Republic of (North) Macedonia participate), has the task to harmonize the (possibly) conflicting positions between the ethnic communities, to resolve the issues of their interest, and in direction of achieving interethnic harmony, political stability and the unique functioning of the political system of the Republic of (North) Macedonia as a whole. This Committee is composed of 19 members, of which seven members are from the ranks of Macedonian and Albanian MPs and one member each from the MPs of Turks, Vlachs, Roma, Serbs, and Bosniaks. The real problem that arises from the content of this body is precisely its binational potential which unjustly enables majoritarianism by the seven Macedonians and Albanians over the other ethnic communities in decision-making, which is in principle contrary to the fundamental liberal-democratic principles. However, in the last instance, the Assembly is obliged to take into consideration the appraisals and proposals of the Committee and to make the final decision regarding them.

Based on that, I think that this body, despite its positive and affirmative dimension in terms of promoting interethnic relations, still needs to be redefined in terms of composition, i.e. to install the principle of parity in terms of the number of MPs of ethnic communities, and, thus, to disable the "systemic" possibility of majorization (by the Macedonian and Albanian members in relations to the others in the Committee).

The principle of double majority, regarding the rights of members of ethnic communities in the Republic of (North) Macedonia, is also applied in the part of local self-government in the decision-making process by the Councils of the local self-government, for the election of the Ombudsman (Amendment XI), for the election of three members of the Judicial Council out of 15 members (Amendment XIV) and for three of the nine judges of the Constitutional Court of the Republic of (North) Macedonia (Amendment XV).

Amendment VI regulates the adequate and equitable representation of all ethnic communities in state bodies and other public institutions

at all levels, including the Security Council of the President of the Republic (for three members), and the election of Public prosecutors.

Amendment VII regulates the status of religious communities, emphasizing their separation from the state (the principle of secularism) and their equality before the law. Also, religious communities and religious groups are free to establish religious schools and social and charitable institutions in a procedure provided by law.

Undoubtedly, the constitutional amendments resulting from the OhridFramework Agreement have made a serious modification and redefining of the then Macedonian political system, installing elements of consociational democracy, which significantly implies a binational arrangement of relations within the political system, and thus, giving primacy to the two largest ethnic communities – the Macedonian and Albanian community.

Therefore, the consociality elements have fundamentally transformed the nature of the political system of the Republic of (North) Macedonia, gradually imposing through constitutional changes a long-term impact on creating a different political culture, which tends to reach a common consensus on decisions made and their implementation, as well as sharing opinions on the main problems of society and how to address them.

Another change in the Constitution is made with Amendment XIX which guarantees the freedom and inviolability of correspondence and other forms of communication. To more firmly protect the privacy of citizens in all forms of communication, the Constitution stipulates that: "Only a court decision may, under conditions and in the procedure prescribed by law, authorize non-application of the principle of inviolability of correspondence and other forms of communication, in cases where it is indispensable to preventing or revealing criminal acts, to a criminal investigation or where required in the interests of security and defense of the Republic."

Furthermore, with the reforms that the Republic of (North) Macedonia has made in 2005, several amendments have been adopted (XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, and XXX) which refer to the judiciary, courts and their competencies,

election, dismissal and the responsibility of the judges, the composition of the Judicial Council, its status, competencies and mandate, misdemeanors, which bodies can impose a sanction, guaranteeing the right to appeal (and two levels in a court proceeding), the Public Prosecutor's Office, the application of the rule of equitable representation in these bodies, etc. As for Amendment XXXI, it can be said that it was adopted just before the 2009 presidential election, and it provided that: "A candidate is elected President if he/she wins a majority of the votes of those who voted, provided more than 40% of the registered voters voted." This constitutional intervention was confirmed as adequate, because in the presidential elections that followed, the President was elected in the second round, narrowly exceeding the 40% threshold.

The last to be adopted is Amendment XXXII, adopted on April 12, 2011, which refers to the fact that: "A citizen of the Republic of Macedonia can not be deprived of citizenship, nor can he/she be expelled from the Republic of Macedonia. A citizen of the Republic of Macedonia can not be extradited to another country, except based on a ratified international agreement upon a decision of the Court." The adoption of this amendment is explained by the efforts and tendencies for dealing with organized crime and corruption, as well as by the processes for harmonization of the Macedonian judiciary and legislation with international agreements and European Union legislation in this area. It can be concluded that the changes of the constitutional identity of the Republic of (North) Macedonia since independence was a complex process to establish, build and adapt its constitution to the circumstances that occurred in a certain time bearing in mind the realization of the most important national strategic goal – full integration of the Republic of (North) Macedonia in the EU and NATO.

The changes continue: The agreement between (North)Macedonia and Greece

The Agreement concluded on June 12, 2018, between the Republic of (North) Macedonia and the Republic of Greece, under the auspices of the United Nations, also known as "the Prespa Agreement," resulted in Amendments XXXIII, XXXIV, XXXV, and XXXVI of the Constitution of the Republic of Macedonia, adopted by the Assembly at the session held on January 11, 2019.

Amendments XXXIII, XXXIV, XXXV, and XXXVI of the Constitution of the Republic of Macedonia are an integral part of the Constitution of the Republic of (North) Macedonia and entered into force upon the entry into force of the Final Agreement on Resolving the Differences Described in Resolutions 817 (1993) and 845 (1993) of the United Nations Security Council to end the validity of the 1995 Interim Accord and to establish a strategic partnership between the Parties and the ratification of the NATO Accession Protocol by Greece to the Final Agreement.

The purpose of these amendments to the Constitution is the implementation of the Final Agreement with Greece, which should enable the accession of the Republic of North Macedonia to the European Union and NATO. Following the Final Agreement with the Republic of Greece, the amendments are to enter into force on the day of the ratification of the Agreement and the Protocol on NATO Accession by the Parliament of the Republic of Greece.

FollowingAmendment XXXIII to the Constitution, the words "The Republic of Macedonia" are replaced with the words "The Republic of North Macedonia", and the word "Macedonia" is replaced with "North Macedonia", except in Article 36 of the Constitution of the Republic of North Macedonia, which refers to the particular social security rights to veterans of the Anti-Fascist War and all Macedonian national liberation wars, to war invalids, to those expelled and imprisoned for the ideas of the separate identity of the Macedonian people and Macedonian statehood, as well as to members of their families.

Due to the harmonization with the Prespa Agreement, concrete changes are made in the Preamble as well. In listing the state and legal traditions are appointed legal decisions of ASNOM, which are listed in the Proclamation from the First Session of ASNOM to the Macedonian people. The Preamble also mentions the Ohrid Framework Agreement, which has already been incorporated with the 2001 constitutional amendments.

With Amendment XXXIV in the Preamble of the Constitution of the Republic of Macedonia, the words "citizens living within its borders who are" shall be deleted, the words "the decisions of the ASNOM" shall be replaced with the words "the legal decisions cited in the Proclamation of the First Session of the ASNOM to the Macedonian people about the said session of the ASNOM," the words "which expressed the will to create an independent sovereign state and the Ohrid Framework Agreement" shall be added after the word "year", and the words "have decided to" shall be deleted.[11]

The Final Agreement confirms the existing border between the Republic of (North) Macedonia and Greece as a permanent and inviolable international border, whereby neither of the two countries undertakes to have, nor to support any claims to any part of the territory of the other country, nor claims to change their mutually existing boundary. In addition, the Republic of (North)Macedonia and Greece has undertaken not to support any claims made by third parties. They committed themselves to respect the sovereignty, territorial integrity, and political independence of another state and do not support any actions of third parties directed against the sovereignty, territorial integrity, or political independence of another state. The two states have also undertaken, by the purposes and principles of the Charter of the United Nations, to refrain from threats or use of force, including threats or use of force with the intent to violate their existing boundaries.

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[11] Constitution of the Republic of North Macedonia, available at https://vlada.mk/sites/default/files/dokumenti/zakoni/the_constitution_of_the_republic_of_north_macedonia_containing_the_valid_constitutional_provisions_in_force_as_amended_by_constitutional_amendments_i-xxxvi.pdf (accessed 15 Jan. 2021).

Article 3 of the Constitution regulates that the territory of the Republic of (North)Macedonia is indivisible and inalienable. The current border of the Republic of (North)Macedonia is inviolable. The Republic of North Macedonia has no territorial claims to the neighboring countries. The border of the Republic of North Macedonia can be changed only per the Constitution, and on the principle of voluntariness and in accordance with the generally accepted international norms. This article was already amended in 1992 by Amendment I when the principle of voluntary border change and compliance with generally accepted international norms was added. Also with this amendment, it was declared that the Republic of North Macedonia has no territorial claims to the neighboring countries. Hence, Amendment XXXV declares respect for the sovereignty, territorial integrity, and political independence of the neighboring states.

Furthermore, the Republic of (North) Macedonia and Greece undertake that no provision of the Constitution can or should not be interpreted in a way that constitutes or will at any time constitute grounds for interference in the internal affairs of the other State, in any form or for any reason, including the protection of the status and rights of any persons who are not its citizens.

Namely, Article 49 of the Constitution stipulates that the Republic cares for the status and rights of those persons belonging to the Macedonian people in neighboring countries, as well as Macedonian expatriates, assists their cultural development, and promotes links with them. The Republic cares for the cultural, economic, and social rights of the citizens of the Republic abroad. In doing so, the Republic shall not interfere with the sovereign rights of other states and with their internal affairs. This article was also amended by Amendment II in 1992 which provided that the Republic would not interfere in the sovereign rights of other states and their internal affairs. Otherwise, the constitutional Amendment XXXVI emphasized the obligation of the Republic of (North) Macedonia to protect, guarantee and foster the characteristics and the historical and cultural heritage of the Macedonian people, and thus, the Republic "shall protect the rights and interests of its nationals living or staying abroad." This amendment also guarantees protection

of the rights and interests for the diaspora of the Macedonian people and part of the Albanian people, Turkish people, Vlach people, Serbian people, Roma people, Bosniak people, and others. This Amendment XXXVI replaced Article 49 and Amendment II to the Constitution of the Republic of Macedonia. But obviously, this is not the end. Many other challenges face the Republic of North Macedonia today.

The Bulgarian surprise and the integration path of North Macedonia

The present (incoherent) attitude of the EU (and its Member States) towards the Republic of North Macedonia accession process causes the emergence of Eurodefeatism in the Macedonian society and a feeling of distrust towards the EU due to the constitutional and political concessions made so far by the Republic of North Macedonia, as previously described. Despite the evident obstacles and constraints, the last European Commission Report (SWD (2020) 351 final) for the Republic of North Macedonia manifests a predominantly positive attitude for the advancement of the integration process, taking into account the political (Copenhagen) criteria, claiming that:

> North Macedonia continued to implement EU-related reforms throughout the reporting period. Efforts continued to strengthen democracy and the rule of law, including by activating existing checks and balances and through discussions and debates in key policy and legislative issues. Opposition parties remained engaged in the Parliament and supported key issues of common national interest, such as EU-related reforms and the NATO integration process, which North Macedonia joined in March 2020.… The inter-ethnic situation remained calm overall. Efforts were made to strengthen inter-ethnic relations and to implement the Ohrid Framework Agreement, which ended the 2001 conflict

> and provides the framework for preserving the multi-ethnic character of the society.[12]

Considering the economic (Copenhagen) criteria, the Republic of North Macedonia "is at a good level of preparation in developing a functioning market economy but made limited progress during the reporting period. Economic growth accelerated in 2019 as investment picked up, but, since April 2020, the COVID-19 crisis has left its mark on the economy and public finances.… Integration with the EU in trade and investment deepened further" (p. 7). As far as the ability to take on the obligations of membership, as a legislative alignment:

> [North Macedonia] continues to be moderately prepared in most areas, including in the areas of competition, public procurement, statistics, financial control, transport, energy. The country shows a good level of preparation in areas such as company law, customs union, trans-European networks, and science and research. The country is at an early stage of preparation in areas such as free movement of workers as well as financial and budgetary provisions. Over the coming period, more focus is also needed on administrative capacity and effective implementation. The country has continued to improve its alignment with the EU common foreign and security policy.… North Macedonia is moderately prepared to implement the EU *acquis*. (pp. 7–36)

Besides the provisions in the Report, the lack of consensus in the European Council has again blocked the accession process of the Republic of North Macedonia. This is because to join the EU, the applicant country needs to gain a unanimous vote in the Council, or as Article 49 (Title VI) of the Lisbon Treaty stipulates:

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[12] Commission Staff Working Document, *North Macedonia 2020 Report*, SWD (2020) 351 final, available at https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/north_macedonia_report_2020.pdf (15 Jan. 2021), p. 4.

> Any European State, which respects the *values* [of the EU] and is committed to promoting them, may apply to become a member of the Union.… The Applicant State shall address its application to the Council, *which shall act unanimously* after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members.

In respect of such decision-making by the Council, Eurofederalist thinker Leo Klinkers stated that making decisions based on the principle of unanimity, and, therefore, with the right of veto, is "a tool for EU-politicians who do not feel like guardians of European interests. Adherence to that principle is one of the signs that the European Union is acting solely based on national interests. Not from an internalized awareness of European interests."[13]

Considering the fulfillment of the political, economic, and legal criteria (Table 2) and other institutional instruments according to the Report, the Republic of North Macedonia has already reached the level for starting accession negotiations with the EU. Regarding the regional cooperation, the Republic of North Macedonia "maintained its good relations with other enlargement countries and participated actively in regional initiatives,"[14] and also, the Report stated that: "It is important to continue implementing bilateral agreements, including the Prespa Agreement and the Treaty on Good Neighbourly Relations with Bulgaria."[15]

The optimistic approach of the European Commission for the relations between North Macedonia and Bulgaria, was on an upward trend, especially since "Bulgaria and North Macedonia [co-chaired] the Berlin Process in 2020, aimed at stepping up regional cooperation

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[13] L. Klinkers, "The Right of Veto as a Hand Grenade in the European Council," *Europe Today Magazine*, 30 March 2021; available at https://www.europe-today.eu/2021/03/30/the-right-of-veto-as-a-hand-grenade-in-the-european-council.

[14] SWD (2020) 351 final, p. 6.

[15] Ibid.

in the Western Balkans.… [Also] Bulgaria provided support to the country in the context of the COVID-19 crisis, including by providing medical equipment and supporting the repatriation of stranded citizens."[16] Immediately after that, the Bulgarian government (outside the provisions of the Treaty on Good Neighbourly Relations) launched a long and stiff set of conditions for the progress of North Macedonia towards EU membership talks.

The Bulgarian government's "Framework Position" listed more than 20 demands (with an excessive nationalistic and discriminatory sound) – and a timetable for North Macedonia to fulfill them – during the accession talks. Generally speaking, the content of this "Framework Position" which is totally outside of the Treaty on Good Neighbourly Relations, directed nebulous and discriminatory demands to the Republic of North Macedonia, for example:

> Bulgaria insists on the fundamentally Bulgarian character of the [historical] VMRO movement.… A bitter dispute continues also over whether leading figures in the rising, including [Goce] Delchev, are to be considered Macedonian or Bulgarian.… The Macedonian language is another point of dispute. Alongside its long-standing claim that Macedonians are Bulgarian, Bulgaria also sees the Macedonian language as a dialect of Bulgarian, insisting its differences are the result of deliberately anti-Bulgarian policies pursued by the former Yugoslav state.[17]

This Bulgarian attitude was met with sharp reactions from the public in North Macedonia, which further heated the overall atmosphere. In the meantime, Sofia accused "Skopje of hate speech, freezing infrastructure projects and not implementing a bilateral Treaty on good

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[16] Ibid., pp. 57–59.

[17] S.J. Marusic, "Bulgaria Sets Tough Terms for North Macedonia's EU Progress," *BalkanInsight*, 10 Oct. 2019; available at https://balkaninsight.com/2019/10/10/bulgaria-sets-tough-terms-for-north-macedonias-eu-progress (accessed 15 Jan. 2021).

neighborly relations signed in 2017."[18] Contrary to that, Zoran Zaev, the President of the Government of the Republic of North Macedonia, to calm the situation, stated:

> We will continue the fight against hate speech. Provocations are not in anyone's interest and we must maintain a civilized and European-like dialogue on all levels. Let us not enter a circle of insults, accusations, and hate speech, which will not bring anything good to anyone, least to the Macedonian and Bulgarian peoples.… At home, we will not allow the overwhelming disappointment with the EU by not approving of the negotiating framework to cause a stalemate in internal reforms.[19]

Consequently, Bulgaria vetoed in November the opening of accession negotiations with North Macedonia, "warning that it would not tolerate the distortion of historical events, documents, and artifacts as well as the role and views of personalities from Bulgarian history."[20] And with that came a complete scandalous surprise for North Macedonia and its allies (especially the USA), because Bulgaria previously supported the accession of North Macedonia to NATO, without intending to block the EU accession process afterward. This new situation was evaluated by the Croatian President Zoran Milanovic as "entering an intimate space.… And I will openly oppose that, of course within the scope and reach of my word … Macedonia was forced to change

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[18] G. Gotev, "MEPs pressure Bulgaria to lift North Macedonia accession veto," *EURACTIV*, 29 March 2021, https://www.euractiv.com/section/enlargement/news/meps-pressure-bulgaria-to-lift-north-macedonia-accession-veto.

[19] Government of the Republic of North Macedonia, "Bulgaria Confirms Its Veto – European Values and Expectations of Our Citizens Have Been Betrayed – North Macedonia Will Continue to Build Good Neighborly Relations and Implement European Standards," *vlada.mk*, 16 Dec. 2020; available at https://vlada.mk/node/23577?ln=en-gb (accessed 15 April 2021).

[20] Gotev, "MEPS pressure Bulgaria."

its name, and now it is in an impossible situation."[21] In the meantime, the German Ambassador to Skopje Anke Holstein said that: "a country holding hostage 26 countries and harms the entire European Union when it comes to the enlargement."[22]

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The descriptive method of this paper aims to describe that North Macedonia since the beginning of its integration process in 1999, made serious constitutional and political concessions and compromises to fully integrate into the EU. Also, North Macedonia continues to follow the EU values and norms and to reform its national system in line with the EU *acquis* (Table 2).

Table 2. Compliance with the Copenhagen Criteria by North Macedonia

Copenhagen criteria	Fulfillment
Political criteria	North Macedonia continued to implement EU-related reforms throughout the reporting period
Economic criteria	North Macedonia is moderately prepared for the free movement of goods
Legislative alignment	North Macedonia is moderately prepared to implement the EU *acquis*

Source: Author's depiction, based on North Macedonia 2020 Report, SWD(2020) 351 final.

[21] "Bugarija saka da ja uništi Makedonija samozatoašto e poslaba, velihrvatskiotpretsedatel Milanovic," *SDK*, 17 May 2021; available at https://sdk.mk/index.php/makedonija/bugarija-saka-da-ja-unishti-makedonija-samozatoa-shto-e-poslaba-veli-hrvatskiot-pretsedatel-milanovik/?fbclid=IwAR2RylCRkp7uMa-3_aVMGE6G10TeT6NTXQTRK9A8kUKaiESX9SL-k4KAqA#.YKVmQFdzSnw.facebook (accessed 18 May 2021).

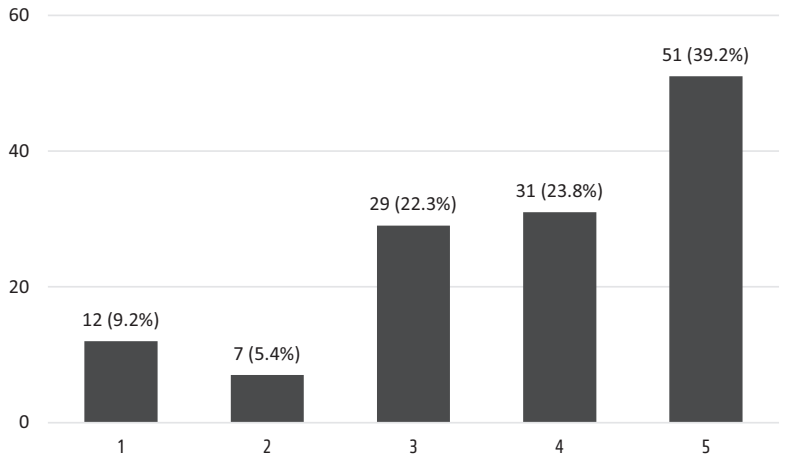
[22] "Edna zemjadržikakozaložnici 26 zemjičlenkiipravištetanacelata EU, kažagermanskataambasadorkaHolštajn za proširuvanjeto," *SDK*, 19 May 2021; available at https://sdk.mk/index.php/makedonija/edna-zemja-drzhi-kako-zalozhnitsi-26-zemji-chlenki-i-pravi-shteta-na-tselata-evropska-unija-kazha-germanskata-ambasadorka-holshtajn-za-proshiruvaneto/?fbclid=IwAR3njye7zpVEHVBWG4P-hGPdfz8064gxn-bFW-Cp84vkJlf8uWyQ3Xa5m6k (15 Jan. 2021).

The problem with Bulgaria came as a surprise, destroying the momentum for North Macedonia to start with EU accession talks, shortly after the painful compromise with Greece on the "name dispute". NATO rewarded that with granting full membership for North Macedonia, but the EU failed, seriously deviated from its promises, declarations, and efforts to open the European future for the Macedonian citizens, and thus, to stabilize the region. The EU has once again proved to be hostage to the national interests of its Member States, and, therefore, incapable of pursuing its own postnational, EU interests and objectives (as Leo Klinkers previously emphasized). The blockade of Bulgaria is not only a blockade of the EU accession process of North Macedonia but also a blockade of the EU enlargement policy, as the most powerful instrument for diffusion of its axiological influence in the region, leaving the region at the mercy of new emerging powers, such as Russia and China.

The surveying method was applied in this research, and the technique that was used is the online survey examination. An online questionnaire was created through Google Forms and it was transmitted to the respondents via e-mail and social networks. The questionnaire was answered by 130 respondents. The results obtained from this research are indicative and can be used to implement more complex and more comprehensive research in the future.

As regards the question: "How important do you think is the integration of the Republic of North Macedonia in the European Union?" 39.2% answered very positively, grading the integration of North Macedonia to the EU as the most important national objective, as opposed to 9.2% percent of those who believe that the EU has no significance for North Macedonia (Figure 1). Hence, the importance of the EU for the future of North Macedonia is once again confirmed as the most important national objective which, despite everything else, still attracts public support.

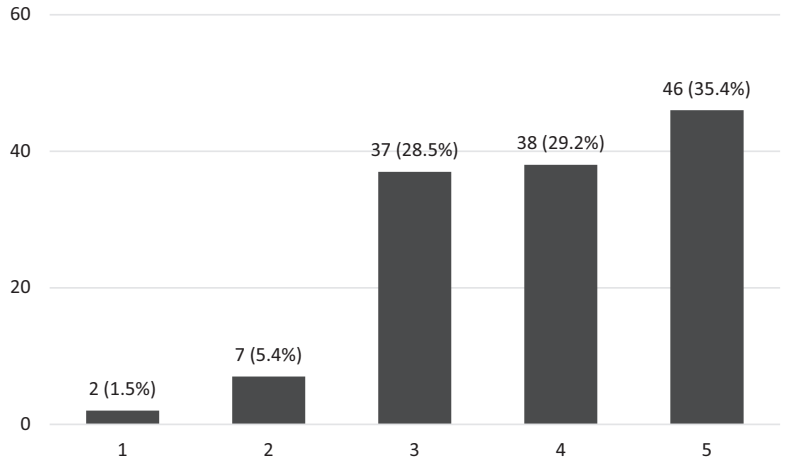
Figure 1. How important do you think is the integration of the Republic of North Macedonia in the European Union?



Source: Author's depiction based on the data obtained from the online survey.

In parallel, the online survey requested a response about the knowledge of the EU values, which is very important to emphasize. 35.4% responded that they are familiar with the EU values. This may be a small percentage of what is required, but it is still good that it dominates over the other answers (Figure 2). This trend shows that, on the one hand, the EU is not present enough on the ground – in North Macedonia – and does not pay enough attention to maintaining the Euro-optimistic mood among Macedonian citizens. On the other hand, this shows that the Macedonian political elites are not sufficiently engaged in finding ways to acquaint Macedonian citizens with the EU values. The absence of promotion of EU values from both the EU and North Macedonia undoubtedly contributes to the low level of knowledge of this most important component of the EU. Lack of knowledge and ignorance of the EU value system, trivializes and relativizes the overall essence of the European integration and makes it sterile and unattractive.

Figure 2. How much do you know about the EU values?



Source: Author's depiction based on the data obtained from the online survey.

Subsequently, the online survey requested a response about the EU double standards concerning the Republic of North Macedonia, because the Macedonian citizens predominantly feel manipulated by the EU. The EU always demands something new from North Macedonia but never delivers. 71.5% agreed that the EU has double standards when it comes to the EU membership of North Macedonia. Only a few (21.5%) responded that such a situation is not true (Table 3).

Table 3. Has the EU manifested double standards in relation to the Republic of North Macedonia?

Has the EU manifested double standards concerning the Republic of North Macedonia?		
	Response percent	Response count
True	71.5	93
False	21.5	29
I do not know	1.5	2
		Answered: 124 Skipped: 6
Total:	100%	130

Source: Author's depiction based on the data obtained from the online survey.

This kind of incoherent attitude of the EU towards North Macedonia also causes a feeling of betrayal of the European values and expectations of the Macedonian citizens. 82.3% of the respondents answered that this is a betrayal of the EU values because it comes right after the most painful compromise that Macedonia has made for EU integration – the change of its national name, and, thus, its constitutional identity after almost 30 years of arduous negotiation with Greece on the "name issue".

The surprise staged by Bulgaria only intensified fatigue of the Macedonian citizens for EU accession, or as 61.5% of the respondents think that this situation only contributes to the creation of a (soft) Eurosceptic mood in the Republic of North Macedonia, 32.3% think that this situation maybe will contribute to such a mood, and only 5.4% respondents deny that. Soft Euroscepticism is where "there is not a principled objection to European integration or EU membership but where concerns on one (or a number) of policy areas [the enlargement policy in this case] lead to the expression of qualified opposition to the EU."[23] This mood is mostly driven by the reaction of Macedonian public opinion to the Bulgarian provocations and the feeling of being discriminated against by the EU. This could be better qualified as Euro-defeatism, describing the stagnant and uncertain condition of the Republic of North Macedonia concerning the EU accession process previously blocked by Greece and today by Bulgaria. In that context, Zoran Zaev, the President of the Government of the Republic of North Macedonia, resolutely stated:

> The Prespa Agreement, reached by Greece and North Macedonia in 2018 to resolve the name dispute and facilitate EU accession talks, is an example of the country's readiness to engage in diplomacy.… We expect the EU, all 27 member states, the European Commission, to be in line with what it has promised us. That was it: you deliver, we deliver. We

[23] P. Taggart, A. Szczerbiak, *The Party Politics of Euroscepticism in EU Member and Candidate States*, SEI Working Paper No. 51/Opposing Europe Research Network Working Paper, 2002, p. 8.

> delivered more than that. And we expect the European Union to deliver now.[24]

Obviously, "times have changed since the EU was established, and the EU should change, too. Without that the enlargement process threatens to be deadlocked, the stability of Western Balkans will be jeopardized, and the EU values will be betrayed."[25] The time has come for the EU to take off the Janus mask. The EU must no longer play hypocritically concerning North Macedonia and must do everything to unblock the integration process, and, at the same time, to cancel the irrational and scandalous conflict with Bulgaria, because such a dispute does not fit into the 21st century. The dispute over the ethnic and national identity of a certain people is completely against the EU values and as such must not be allowed in contemporary Europe.

Conclusion

The Bulgarian opposition in the European Council blocks the EU accession process of the Republic of North Macedonia and, thus, interrupts the (procedural) diffusion of EU normative power. This situation provoked negative reactions amongst the Macedonian (and wider) public, engendering a defeatist mood concerning the EU.

As indicated in the research results, the feeling of discrimination and subordination due to the Bulgarian (and previously Greek) blockages in the European Council provoked a "Eurodefeatist" mood

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[24] "Zaevza Euronjuz: Ne e možno razdvojuvanje na Severna Makedonija i Albanija," *MKD*, 10 May 2021; available at https://www.mkd.mk/makedonija/politika/zaev-za-euronjuz-ne-e-mozhno-razdvojuvanje-na-severna-makedonija-i-albanija (25 May 2021).

[25] B. Jovanovic, "The EU should act resolutely after the Bulgarian veto," *wiiw*, 15 Dec. 2020; available at https://wiiw.ac.at/the-eu-should-act-resolutely-after-the-bulgarian-veto-n-476.html (15 Jan. 2021).

amongst the Macedonian public. This Eurodefeatist mood describes the stagnant condition of the Republic of North Macedonia concerning the EU accession processes, caused by the interruption to the EU's normative power by Bulgarian (and previously by Greek) opposition in the European Council.

Consequently, this problem can easily be overcome solely by unblocking the EU accession negotiations. This should not be discouraging for the EU-integration processes of the Republic of North Macedonia but should serve as an incentive to undertake additional activities in the integration processes and deepening of the partnership with the EU as a whole, as well as the individual Member States, moreover that the Republic of North Macedonia has made serious constitutional changes to align and to harmonize its constitutional identity towards the EU values and norms since its independence until today.

The time has come for the EU to take the Janus mask off its face and replace its hypocritical behavior with a constructive one, because as MEP Tanja Fajon acknowledged:

> The credibility of the EU is at stake. The crisis caused by the Bulgarian veto is only going to threaten the enlargement process for other countries.[26]

[26] Gotev, "MEPS pressure Bulgaria."

Carmen Moldovan

The European Union's Core Value of the Rule of Law: Constants and New Developing Standards

1. Introduction

The rule of law is a common ideal within the European continent not only at the European Union level. States are sharing this value that influences the process of shaping the European legal order in all its dimensions, demonstrating convergence in establishing standards to be implemented by its Member States.

The concept of the rule of law, meaning the pre-eminence of law as such and the institutions of the legal system in a system of governance, is not novel. It presents a multitude of connotations imposed by the political, social, economic, cultural relations and realities and traditions of different countries.[1] It is an ideal of the political morality with roots in the works of Plato and Aristotle in the form of limiting the power by law. The law is a central element of Plato's philosophy[2] and one the most representative embodiments of the rule of law concept's importance is the following statement from the *Laws*:[3] "When the laws are subject to other authorities and have no authority of their own, the collapse of the state is near, and when the law is the master

[1] M. Balan, "Considerații privind evoluția teoriei statului de drept," *ASUAIC*, 2007, vol. 53, pp. 27–46; C. Gilia, *Teoria statului de drept*, București 2007, p. 165.

[2] J. Hall, "Plato's Legal Philosophy," *Indiana Law Journal*, 1956, vol. 31(2), Article 1, pp. 171–206, https://www.repository.law.indiana.edu/ilj/vol31/iss2/1 (accessed 5 May 2021).

[3] Plato, *Laws*, transl. B. Jowett, https://www.gutenberg.org/files/1750/1750-h/1750-h.htm (accessed 5 May 2021).

and the government a slave, all men will enjoy the blessings of the gods of the state."

The primary sense of the principle consists in acting in conformity with the law and it concerns all branches of government with a special focus on the judiciary as it has the competence of interpreting and effectively applying the law.[4] At the same time, the rule of law does not concern only the government but the individuals as well, who must comply with legal norms even if they disagree with their content.

As a central element of the European legal order,[5] the acts adopted within the Council of Europe expressly provide this principle showing its importance and special formal status. The preamble to the Statute of the Council of Europe[6] expressly yields the rule of law as a principle of democracy[7] and it also represents a condition for acceding the Council, as stated in Article 3.[8] Consequently, the rule of law is a *sine qua non* value for joining the Council of Europe, as well as an element of the common spiritual heritage of the Member States and one of the foundations of any democratic society.[9] It is also mentioned in the

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[4] G. Nolte (ed.), *European and US Constitutionalism*, Cambridge 2005, p. 211.

[5] L. Pech, *Rule of law as a guiding principle of the European Union's external action*, Centre for the Law of EU external relation, CLEER Working Papers 2012/2013, p. 9; L. Pech, J. Grogan, P. Bárd, *Meaning and Scope of the EU Rule of Law*, Work Package 7 – Deliverable 2, RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law, 2020; E. Mak, S. Taekema, "The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application," *Hague Journal on the Rule of Law*, 2016, vol. 8, pp. 25–50.

[6] Statute of the Council of Europe, London, 5 May 1949, European Treaty Series – No. 1.

[7] Recital 2 of the preamble reads as follows: "Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy."

[8] Article 3 reads as follows: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."

[9] J.F. Renucci, *Droit européen des droits de l`homme. Droits et libertés fondamentaux garantis par la CEDH*, Paris 2015, p. 27.

preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms[10] as part of the common heritage of States.[11]

The Venice Commission[12] drafted a *Rule of Law Checklist*[13] mentioning as safeguards legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination, access to justice with a special attention to corruption and conflict of interest. Despite their *soft law* nature, the role of the opinions is to give important and useful information that judicial bodies use in their analysis.

2. The rule of law: a symbiotic and convergent European Union concept

The rule of law is one of the essential values of the European Union[14] enshrined in Article 2 of the Treaty on European Union[15] (TEU) which reads as follows:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and

[10] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov. 1950, ETS 5.

[11] Recital 5 of the preamble reads as follows: "Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."

[12] European Commission for Democracy through Law is the Council of Europe's advisory body on constitutional matters established on 18 May 1990.

[13] Rule of Law Checklist, CDL-AD(2016)007-e, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e (accessed 16 May 2021).

[14] K. Niklewicz, "Safeguarding the rule of law within the EU: lessons from the Polish Experience," *European View*, 2017, vol. 16, p. 287, https://link.springer.com/article/10.1007/s12290-017-0452-8 (accessed 16 May 2021).

[15] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, pp. 13–390.

> respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 2 is a token of the underlying fundamentals of the liberal democracy of the European States despite the differences between its members regarding national identities, legal systems and traditions and the margin of discretion in establishing the domestic norms of the judiciary procedures. They must not be seen as rhetorical values or just general aspirational goals[16] but as effective aims for the European institutions and for the Member States concerning the relationship between individuals and State as well as those between Member States and the Union itself. The values and principles enshrined in Article 2 are features of an ideal European society based on pluralism, tolerance, justice, solidarity and equality all of which the Union aims to create.[17] This ideal has been shaken in recent years by actions of States that undermine the effective respect of the rule of law.

The fact that the rule of law is not enshrined in the Treaty on the Functioning of the EU (TFEU) is following the logic that the Treaty on European Union sets the basic constitutional principles of the EU, while the TFUE establishes more substantive policies.[18] At the same time, the expressed wording of essential values in Article 2 TEU has the significance of moving the Union's orientation from the economic to the general area.[19]

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[16] D. Chalmers, G. Davies, G. Monti, *European Union Law*, Cambridge 2010, pp. 40 and 43.

[17] European Parliament, *The triangular relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism*, 2013, https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf (accessed 17 May 2021).

[18] K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford 2014, p. 2.

[19] L.-C. Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică*, București 2016, p. 101.

Even before the express provision in the Treaty of the European Union, the idea of rule of law was already and continuously present in its legal order and that of the European Economic Community. Hitherto the European Court of Justice had recognized the relevance of the rule of law before the express wording as it stated in its ruling in the *Les Verts* case that the European Economic Community is

> based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.[20]

Previously, in the landmark *Van Gend and Loos* award, the European Court of Justice stated that

> [T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[21]

The European Union has a very important task in this regard: it must lead by its own example and the task to ensure the respect for the rule of law seems to be a never-ending story.[22]

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[20] ECJ, Case 294/83 *Les Verts v European Parliament* (1986) E.C.R. 1339, para. 23, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61983CJ0294&from=EN#CO (accessed 17 May 2021).

[21] Judgment of the Court of 5 Feb. 1963. *NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. Reference for a preliminary ruling: Tariefcommissie – Netherlands, Case 26-62. English special edition 1963 00001, ECLI:EU:C:1963:1.

[22] T. von Danwitz, "The Rule of Law in the Recent Jurisprudence of the ECJ," *Fordham International Law Journal*, 2014, vol. 37(5), p. 1345.

Undoubtedly, the rule of law is a fundamental value upon which the Union is built,[23] which correlates with other values and principles expressly enshrined and for which all Member States share the same attachment, in theory at least, and is a part of their constitutional heritage. However, it does not present a comprehensive definition[24] yet one may argue that there is a tacit agreement on the meaning and the content of this value within the institutions of the European Union[25] and Member States' internal legal order. In short, its meaning is that all members of a society are equally subject to the law and under the control of impartial and independent courts;[26] it encompasses judicial capacity and judicial impartiality at the same time.[27] It is at the heart of the system of judicial protection in the European Union and its Member States.[28] Therefore, it should not be regarded as an abstract concept, but one of the fundamental values common to Member States[29] and the compliance with Article 2 is one of the European Union membership's requirements.[30] As established by the Treaty of Amsterdam,

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[23] R. Metais, Ch. Thépaut, S. Keukeleire (eds.), *The European Union's Rule of Law Promotion in its Neighbourhood: A Structural Foreign Policy Analysis*, College of Europe, Department of EU International relations and diplomacy studies, 2013, EU Diplomacy Papers 4/2013.

[24] K. Nicolaidis, R. Kleinfeld, *Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma*, SIGMA Paper No. 49, OECD 2012, p. 8.

[25] R. Carp, "The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism," *Utrecht Law Review*, 2020, vol. 10(1), p. 3.

[26] European Commission, *The Rule of Law Report 2020* (factsheet), Sept. 2020, https://ec.europa.eu/info/sites/info/files/rule_of_law_mechanism_factsheet_en.pdf (accessed 18 May 2021).

[27] M. Mendelski, "Romanian Rule of Law Reform: A Two-Dimensional Approach," 2011, https://rm.coe.int/romanian-rule-of-law-reform-a-twodimensional-approach-martin-mendelski/168078fa0a (accessed 18 May 2021).

[28] Lenaerts, Maselis, Gutman, *EU Procedural Law.*

[29] J.P. Jacqué, *Droit institutionnel de l`Union européenne*, Paris 2015, p. 135.

[30] G. De Baere, "European Integration and the Rule of Law in Foreign Policy," in J. Dickson, P. Eleftheriades (eds.), *Philosophical Foundations of European Union Law*, Oxford 2012, pp. 354–383.

before receiving the candidature of a State, the Council verifies if it meets these conditions.[31]

The rule of law requirement was first enunciated by the Maastricht Treaty and not by the original treaties and it initially concerned external relations – it was provided by Article J.1 (2) EU on the CFSP and in Article 130u(2) EC on development cooperation.[32] The rule of law is now mentioned in the second[33] and fourth[34] recitals in the preamble to the EU Treaty and also in Article 21(2) of the Treaty on European Union which lists the objectives for the pursuit of which the European Union is to define and pursue common policies and actions.[35]

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[31] Jacqué, *Droit institutionnel*.

[32] Lenaerts, Maselis, Gutman, *EU Procedural Law*.

[33] "Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."

[34] "Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law."

[35] Article 21 (2) reads as follows:

"The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;
(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
(g) assist populations, countries and regions confronting natural or man-made disasters; and
(h) promote an international system based on stronger multilateral cooperation and good global governance."

Also, the Charter of Fundamental Rights of the European Union[36] states in its preamble that the Union is based in particular on the principle of the rule of law and according to Article 47 of the Charter which reads as follows:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.

Article 2 is closely related to Article 6 of the Treaty which represents the central element of the European Union framework on human rights,[37] as it refers to the safeguards of the Charter of fundamental rights and of the European Convention on Human Rights.[38] This demonstrates the close relationship with other principles and values of the European Union order such as human dignity, freedom, democracy,

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[36] The Charter was proclaimed in Nice on 7 December 2000 by the European Parliament, the Council and the Commission and adopted in Strasbourg on 12 December 2007 (OJ C303/1). According to Article 6(1) para. 1 TEU, the Charter enjoys the same legal value as the Treaties of the European Union.

[37] P. Craig, G. de Búrca, *EU Law: Text, Cases, and Materials*, Oxford 2011, p. 363.

[38] Article 6 TEU reads as follows:

"1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

equality, respect for human rights, including the rights of persons belonging to minorities, expressly mentioned by Article 2.[39]

3. Romanian constitutional framework on the rule of law and the constitutional identity

The rule of law concept has been disseminated to Central and Eastern Europe both as a structural principle of the State and a legal order which materializes fundamental values of the Constitution, the society and the State itself.[40] This is also the case of the Romanian legal and judiciary systems which are based on the principle of legality and priority of law at all levels of judicial activity.

The analysis of the respect of the rule of law and independence of the judiciary in Romania must be made in the European context characterized by serious threats to these values and the potential creation of a "dark territory"[41] in the absence of coherent measures to be enforced at the level of all Member States. Formal recognition of this value is at odds with the *de facto* European Union situation, which is facing a real crisis[42] as regards enhancement of the rule of law within Member States.

The rule of law is one of the fundamental principles of the State, enshrined in Article 1 of the Constitution of Romania[43] which reads as follows:

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[39] I. Gâlea, *Tratatele Uniunii Europene. Comentarii și explicații*, București 2012, pp. 9–29.

[40] Gilia, *Teoria statului*, p. 21.

[41] D. Sarmiento, "Europe's Judiciary at the Crossroads," *Maastricht Journal of European and Comparative Law*, 2021, vol. 28(1), pp. 3–6.

[42] D. Kochenov, "On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed," *Polish Yearbook of International Law*, 2013, vol. 33, pp. 145–170.

[43] The Constitution of Romania, in its initial form, was adopted in the sitting of the Constituent Assembly of 21 November 1991, published in the Official Gazette [Monitorul Oficial; henceforth referred to as MO] of Romania, Part I, No. 233 of 21 Nov. 1991, and came into force after its approval by the

(1) Romania is a sovereign, independent, unitary and indivisible National State.
(2) The form of government of the Romanian State is a Republic.
(3) Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.
(4) The State shall be organized based on the principle of the separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy.
(5) In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory.

The Basic Law expressly provides the safeguards for the respect of the rule of law such as the separation of powers in the state, the application of the principle of legality in all aspects of judicial activity, respect and guarantee of fundamental rights,[44] as stated in Article 1 para. 3.

national referendum of 8 Dec. 1991. The Constitution of Romania of 1991 was amended and completed by the Law No. 429/2003 on the revision of the Constitution of Romania, MO Part I, No. 758 of 29 Oct. 2003, republished by the Legislative Council on the grounds of Article 152 of the Constitution, with the updated denominations and the renumbered texts (Article 152 was republished as Article 156). Law No. 429/2003 on the revision of the Constitution of Romania was approved by the national referendum of 18–19 Oct. 2003, and came into force on 29 Oct. 2003, MO Part I, No. 758 of 29 Oct. 2003 of the Decision of the Constitutional Court No. 3 of 22 Oct. 2003 for the confirmation of the result of the national referendum of 18–19 Oct. 2003 concerning the Law on the revision of the Constitution of Romania.

[44] M. Andreescu, C. Andreescu, *Statul de drept. Semnificații constituționale și jurisprudențiale contemporane*, https://www.universuljuridic.ro/statul-de-drept-semnificatii-constitutionale-si-jurisprudentiale-contemporane (accessed 16 May 2021).

This statement is correlated with the provisions of Article 16(2) which mentions that "No one is above the law" and those of Article 15(2) which proclaim the principle of non-retroactivity of the law, essential principles for the entire construction of the rule of law. Moreover, the content of the rule of law is expressed in particular in the constitutional provisions on the separation and balance of powers within the State, as well as those concerning the organization, functioning and attributions of State institutions. The principle of proportionality can also be considered a condition of the rule of law.[45]

The Romanian constitutional approach and the interpretation of the Court on the rule of law is theoretically consistent with the European vision and the evolution of the concept, as it expressly requires observing several principles such as, but not limited to, taking into consideration the elements mentioned above, organizing the national authorities according to the separation of powers taking into consideration especially the requirements of independence of the judiciary, providing safeguards for fundamental rights and freedoms, ensuring the supremacy of the Constitution and the rule of law within the domestic legal order.[46]

The jurisprudence of the Romanian Constitutional Court expresses the main requirements of the rule of law in relation to the purposes of State activity and identifies the fundamental feature of the rule of law, namely the supremacy of the Constitution and the obligation to comply with the law[47] which ensures "the correlation of all laws and

[45] M. Andreescu, A. Puran, *Drept constituțional. Teoria generală a statului*, București 2018, pp. 65–75.

[46] D.C. Dănișor, "Statul – metaforă și realitate juridică," *Revista de Drept public*, 2018, no. 2, pp. 57–65; idem, *Drept constituțional și instituții politice*, București 1997, p. 2; M. Balan, *Drept constituțional și instituții politice*, vol. 1: *Teoria generală a statului și a constituției. Constituția română în context european*, București 2015, pp. 102–111.

[47] Constitutional Court of Romania, Decision No. 232/5 July 2001, MO No. 727 of 15 Nov. 2001; Constitutional Court of Romania, Decision No. 53/25 January 2011, No. 90 of 3 Feb. 2011.

all normative acts with it."[48] It also enshrines a "series of guarantees, including jurisdictional ones, which ensure the observance of citizens' rights and freedoms through self-limitation of the State and the application of the coordinates of law to public authorities respectively."[49]

The qualities of clarity and predictability that the law must present are considered also by the Constitutional Court as requirements of the rule of law.[50]

The principle of stability and legal certainty is not expressly enshrined in the Romanian Constitution, but the Constitutional Court stated that it is implied by the provisions of Article 1 para. 3 as well as from the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in its jurisprudence.[51] The stability of civil legal relationships is considered to be an essential dimension of the rule of law.[52]

It should also be stressed that the very observance of the decisions of the Constitutional Court is a requirement and a safeguard of the rule of law[53] even if they are criticized by the society or considered unpopular.[54]

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[48] Constitutional Court of Romania, Decision No. 22/27 January 2004, MO No. 233 of 17 March 2004; Constitutional Court of Romania, Decision No. 17/21 January 2015, MO No. 79 of 30 Jan. 2015.

[49] Constitutional Court of Romania, Decision No. 17/21 January 2015, MO No. 79 of 30 Jan. 2015.

[50] Constitutional Court of Romania, Decision No. 26/18 January 2012, MO No. 116 of 15 Feb. 2012.

[51] Constitutional Court of Romania, Decision no. 685/25 November 2014, MO No. 68 of 27 Jan. 2015.

[52] Constitutional Court of Romania, Decision no. 570/29 May 2012, MO No. 404 of 18 June 2012; Constitutional Court of Romania, Decision no. 615/12 June 2012, MO No. 454 of 6 July 2012.

[53] Constitutional Court of Romania, Decision No. 1093/5 December 2012, MO No. 61 of 29 Jan. 2013; F. Mitrofan, "Jurisprudența constituțională – factor de stabilitate și securitate juridică," volume of the scientific session "Rolul jurisprudenței în dezvoltarea noului drept roman," organized by de Institutul de Cercetări Juridice "Acad. Andrei Rădulescu" of the Romanian Academy, 10 May 2019, București 2019, pp. 215–219.

[54] M. Balan, "Unele aspecte metodologice ale practicii recente a Curții Constituționale a României," volume of the scientific session "Rolul jurisprudenței în dezvoltarea noului drept roman," organized by de Institutul de Cercetări

The Constitutional Court refers to the concept of constitutional identity in its recent judgment delivered on 8 June 2021[55] in which it noted that the rules of the European Union may not be considered as denying the constitutional identity of Romania enshrined in Article 11(3) together with Article 152 and which should not be relativized in the process of the European integration. By virtue of the concept of constitutional identity, it is the opinion of the Constitutional Court that it is empowered to ensure the supremacy of the Basic Law on the Romanian territory[56] despite the ruling of the Court of Justice of the European Union on the issue of creation of a special prosecutorial section for criminal offenses within the judiciary.

As regards the meaning and scope of the national constitutional identity invoked, the Constitutional Court provides no criteria or objective elements, it only refers to the provisions of Article 1 para. 3 of the Constitution read together with Article 152. It is unclear how the ruling of the European Court affects the core values of the Romanian state embraced in the post-communist era. From this perspective, the concept of national constitutional identity may be considered just a pretext used in order to justify the existence of the special prosecutorial section.

The concept of constitutional identity is considered a meta-legal concept, subjective and vague, complex and difficult to identify strictly.[57] Instead, the notion of identity of the Constitution may be easier to identify as it comprises the elements of Title I of the Basic Law and especially those of Article 1 para. 3 which includes "the democratic traditions of the Romanian people," as well as "the spirit of the 1989 Revolution."[58] Elements such as social diversity, pluralism of opinions, including politics and attitudes are the essential for the constitutional

Juridice "Acad. Andrei Rădulescu" of the Roman Academy, 10 May 2019, București 2019, pp. 179–184.

[55] Constitutional Court of Romania, Decision No. 1093/8 June 2021, MO No. 612 of 22 June 2021.

[56] Ibid., para. 81.

[57] E.S. Tănăsescu, "Despre identitatea constituțională și rolul integrator al Constituției," *Curierul Judiciar*, 2017, no. 243, pp. 243–247.

[58] Ibid.; Dănișor, *Statul*, pp. 57–65.

identity. The idea of pluralism represents a feature of the Romanian Constitution and of the Romanian society which shapes the identity of the Constitution, a concept that needs to be clarified by common efforts of the national constitutional tribunal and of the European Court of Justice.[59]

4. The cooperation and verification mechanism decision regarding Romania as an expression of the rule of law

As part of the Romanian accession to the European Union in 2007, the Cooperation and Verification Mechanism (hereinafter referred to as "CVM") was established as a condition of the accession by Commission Decision of 13 December 2006[60] as it was considered that further work was needed in key areas to address shortcomings in judicial reform and the fight against corruption, the most sensitive topics for the accession. Since its set up, the CVM reports have examined the progress made by Romania in these areas and at the same time they aimed to focus the efforts of the Romanian authorities through specific recommendations. From the lenses of the European institutions, the CVM reports played an important role in consolidating the rule of law in Romania throughout monitoring and cooperating with the Romanian authorities in order to promote reform in the specified fields. The first point of the CVM Decision refers to the rule of law as a common value of the Union. The Annex to Article 1 of the CVM Decision provides the benchmarks to be addressed by Romania, in a very wide wording and scope.[61]

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[59] S.-M. Teodoroiu, M. Safta, M. Enache, "Identitate constituțională națională și dialog judiciar," *Studii și Cercetări Juridice*, 2019, vol. 64(2), pp. 203–216.

[60] Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, 13 Dec. 2006, C (2006) 6569 final.

[61] The most relevant benchmarks are: (1) to "ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of

The results of the CVM reports concerning the progress made by Romania in achieving the objectives established by this mechanism is quite important given the consequences applicable in case of failure from the Romanian authorities. In this regard point 7 of the CVM Decision states that

> If Romania should fail to address the benchmarks adequately, the Commission may apply safeguard measures based on Articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute, under the conditions laid down in Community law, Romanian judgments and judicial decisions, such as European arrest warrants.

The outcome of a contrary conduct from Romania would mean a loss of credibility and lack of legal effects of its domestic judicial decisions in relations with the other Member States, according to Article 37 and 38 of the Act of Accession[62] if the failure is causing a serious breach of the functioning of the internal market.

Neither the relationship between Romania and the European institutions during the consultations within the reporting mechanism, nor the progress made were always linear. At some point, especially during the consultations for the 2019 CVM Report, the actions of the European institutions were considered by political factors as an interference with the constitutional and national legal system. Even if the members of the Constitutional Court did not directly use these terms,

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the Superior Council of Magistracy.…"; (3) "building on progress already made, [to] continue to conduct professional, non-partisan investigations into allegations of high-level corruption" and (4) to "take further measures to prevent and fight against corruption, in particular within the local government."

[62] Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded, AA2005/ACT/en 1, OJ L 157, 21.6.2005, pp. 203–375.

their refusal to further participate in the consultations process[63] can be interpreted in this way.

Over time, the findings and recommendations contained in the CVM reports have been criticized or even had their legal force challenged as the critics argued that the reports contained recommendations lacking binding legal force.[64]

However, it did not come to ascertain the *ultra vires* character of acts of the European Union, as the German Constitutional Court found in May 2020, for the very first time in the history of the European Union, making it inapplicable in Germany.[65]

5. Romanian Constitutional framework on the judiciary

The Fundamental Law of Romania contains a specific chapter devoted to the regulation of the "Judicial Authority" (Chapter VI, under Title III) which comprises three sections: Section I on "Courts of Law", Section II on "The Public Ministry" and Section III on "The Superior Council of Magistracy". According to the constitutional provisions, prosecutors are thus, in the Romanian system, part of the judicial authority.

Similar to the general requirements, Article 124(3) guarantees that "judges shall be independent and subject only to the law," while Article 125(1) adds that the judges, appointed by the President of Romania, "shall be irremovable, according to the law." Paragraph 2 of the same provision states: "The appointment proposals, as well as the promotion, transfer of, and sanctions against judges shall only be within the competence of the Superior Council of Magistracy, under the provisions of its organic law." Article 126(1) establishes that "[j]ustice shall

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[63] Constitutional Court of Romania, press release of 15 March 2018, https://www.ccr.ro/15-martie-2018 (accessed 19 May 2021).

[64] Constitutional Court of Romania, Decision No. 137/13 March 2019, MO no. 295 of 17 April 2019.

[65] Sarmiento, "Europe's Judiciary," p. 4.

be administered by the High Court of Cassation and Justice, and the other courts of law set up by the law."

Regarding the statute of public prosecutors, Article 132 provides in its para. 1: "[p]ublic prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice."

According to Article 133(1) the Superior Council of Magistracy (SCM) "shall guarantee the independence of justice, and Article 134 establishes, as main SCM powers, that SCM "shall propose to the President of Romania the appointment of judges and public prosecutors, except for the trainees, according to the law" (para. 1); and "shall perform the role of a court of law, by means of its sections, as regards the disciplinary liability of judges and public prosecutors, based on the procedures set up by its organic law" (para. 2).

Legality is one of the fundamental principles of the Romanian judicial system, stated by the Basic Law, codes of procedure, special laws governing the functioning of the judicial system.

Member States enjoy a high degree of discretion in establishing the domestic judicial system as they deem it to be adequate, including the activities and competences of the prosecutors. In this regard, the Venice Commission noted in its Rule of Law Checklist that

> [t]here is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence.[66]

Accordingly, there is not a *prima facie* case of incompatibility between the domestic provisions and the safeguards of the European law in this regard and Romania enjoys a certain margin of discretion in regulating its judicial systems as it sees fit.

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[66] Venice Commission CDL-AD(2016)007, Rule of Law Checklist, para. 91.

6. Recent amendments to the Romanian justice laws and possible impact on the rule of law

6.1. The establishment of the section for the investigation of criminal offenses within the judiciary

In 2017–2018, the laws generic called "justice laws" in Romania – Law No. 303/2004 on the status of judges and prosecutors, Law No. 304/2004 on judicial organization, and Law No. 317/2004 on the Superior Council of Magistracy – were the object of several amendments made by laws.[67] A further Emergency Ordinance adopted by the Government in October 2018 established the framework for the operation of the Section for the Investigation of Criminal Offenses within the Judiciary (SIOJ), a special body within the Prosecutor's Office attached to the High Court of Cassation and Justice set up by an amendment to the law on judicial organization.[68]

This was and continues to be one of the most sensitive issues on the independence of the judiciary in regard to the independence of prosecutors. The establishment of the new special investigation section was made by Articles 88^1 to 88^9 which were inserted after Article 88 of Law no. 304/2004.[69] The normative activity in this field in Romania is not

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[67] Law No. 207 of 20 July 2018 amending and completing Law No. 304/2004 on judicial organization (MO, 20 July 2018); Law No. 234 of 4 October 2018 amending and completing Law No. 317/2004 on the Superior Council of Magistracy (MO, 8 Oct. 2018); Law No. 242 of 12 October 2018 amending and completing Law No. 303/2004 on the status of judges and prosecutors (MO, 15 Oct. 2018).

[68] Emergency Ordinance No. 90 of 10 October 2018 on some measures for the operationalization of the Section for the Investigation of Criminal Offences within the judiciary, MO No. 862 of 10 Oct. 2018.

[69] According to Article 88^1 of Law No. 304/2004, as amended:

"1. The [SIOJ] shall be established within the Parchetul de pe lângă Înalta Curte de Casație și Justiție [Prosecutor's Office attached to the High Court of Cassation and Justice]. That section shall have exclusive jurisdiction in relation to criminal proceedings in respect of offences committed by judges and prosecutors, including military judges and prosecutors and those who are members of the [SCM].

2. The [SIOJ] shall retain jurisdiction in relation to criminal proceedings where other persons are prosecuted in addition to those referred to in paragraph 1.…

singular within the European Union, as other States enacted reforms on the rules of the status of judges, prosecutors and legal professionals.[70]

The amendments were intensely discussed and strongly criticized both internally by civil society, who organized massive protests,[71] academia and by members of the judiciary, for distancing Romania from the requirements of the rule of law value of the European Union, taking into consideration the other relevant factors such as the incapacity of the Superior Council of the Magistracy to effectively provide safeguards for the independence of the judiciary, the rulings of the Constitutional Court and the refusal to give effect to the opinions of the Venice Commission or to observe the rulings of the Court of Justice of the European Union.[72] At the European level, they were analyzed by several bodies such as GRECO[73] and the Venice Commission,[74] while

4. The [SIOJ] shall be headed by a chief prosecutor of the section, assisted by a deputy chief prosecutor, appointed to those roles by the general assembly of the [SCM], subject to the conditions laid down in this Law.

5. The Prosecutor General of the Parchetul de pe lângă Înalta Curte de Casație și Justiție [Prosecutor's Office attached to the High Court of Cassation and Justice] shall settle conflicts of jurisdiction between the [SIOJ] and the other structures or units of the Public Prosecutor's Office."

[70] European Commission, *The 2020 EU Justice Scoreboard*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM (2020) 306, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf (accessed 20 May 2021), p. 5.

[71] L. Bojin, A. Mercescu, "Protests in Romania: Civil Society, Populism and Civic Constitutionalism," in A. Mercescu (ed.), *Constitutional Identities in Central and Eastern Europe*, New York 2020, p. 212.

[72] D. Călin, "Zece cereri de decizie preliminară formulate de instanțele judecătorești din România în vederea menținerii statului de drept, valoare comună a tuturor statelor membre ale Uniunii Europene," *Revista Română de Drept European*, 2019, no. 4, pp. 98–99.

[73] Group of States against Corruption (GRECO) is a monitoring body for anti-corruption standards of the Council of Europe established in 1999, https://www.coe.int/en/web/greco (accessed 20 May 2021).

[74] CDL-AD(2018)017-e Romania – Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, adopted by the Commission at its 116th Plenary Session (Venice, 19–20 October 2018), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)017-e (accessed 20 May 2021).

the CVM reports[75] of the European Commission highlighted the negative outcome on the functioning of the concerned institutions. In 2018, the Venice Commission delivered on opinion on the amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors[76] after the President of Romania requested its opinion on the laws amending the "justice laws". Generally, the Commission has been highly critical of situations in which acts of Parliament regulating important aspects of the legal or political order were being adopted in an accelerated procedure, frequently prompted by a motion put forward by an individual member of the Parliament (so as to avoid required procedures for the assessment of government drafts). In the Commission's opinion, such an approach to the legislative process cannot provide conditions for proper consultations with the opposition or the civil society.[77]

The European Commission in the 2018 CVM Report[78] noted the negative impact of the amendments on judicial independence.[79] The amendments also determined more than ten referral requests from several Romanian courts to the European Court of Justice, asking for guidance on different issues related to the amendments, their effects and their compatibility with the European Union law in the light of Articles 2, 6, 19 TEU or Article 47 of the Charter of Fundamental Rights of the European Union.[80]

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[75] European Commission, *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and verification Mechanism*, COM(2019) 499 final, 22.10.2019.

[76] CDL-AD(2018)017-e Romania – Opinion…

[77] https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)017-e (accessed 20 May 2021).

[78] European Commission, *Report of the Commission to the European Parliament and the Council on Progress* in Romania under the Cooperation and Verification Mechanism, 13.11.2018, COM(2018) 851 final, https://ec.europa.eu/info/sites/info/files/progress-report-romania-2018-com-2018-com-2018-851_en.pdf (accessed 20 May 2021).

[79] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2020 Rule of Law Report – The rule of law situation in the European Union*, 30.09.2020.

[80] CJEU Joined Cases C-83/19, C-127/19 and C-195/19, C 291/19, C-355/19, ECLI:EU:C:2021:393, not yet published.

Taking into consideration previous rulings of the Court concerning similar issues implying other Member States,[81] the findings of the Court were at least partially predictable.

On 3 April 2019, the speech of Vice-President Frans Timmermans on the need to strengthen the rule of law noted that the reform process in Romania needs to be put back on track.[82] Subsequently, a letter from 10 May 2019 following the European Council in Sibiu added the requirement of loyal cooperation to the rule of law.[83]

6.2. The procedure for appointing top prosecutors in Romania

A very sensitive and criticized topic related to the amendments to the justice laws in Romania, is represented by the procedures for appointing top prosecutors – the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, their First Deputy and Deputy, the Chief Prosecutor of the National Anti-corruption Directorate, their deputies, the Chief Prosecutor of the Directorate for the Investigation of Organized Crime and Terrorism Offenses (DIICOT), their deputies, and the prosecutors heads of divisions of these prosecutor's offices. According to Article 54(1) and (2) of Law No. 303/2004 regarding the status of judges and prosecutors, they are

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[81] Case C-64/16, Associação Sindical dos Juízes Portugueses, EU:C:2018:117, Minister for Justice and Equality – deficiențe ale sistemului judiciar, C-216/18 PPU, EU:C:2018:586.

[82] "Remarks by First Vice-President Frans Timmermans on further strengthening of the rule of law in the EU," 3 April 2019, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_1972 (access 22 of May 2021).

[83] Available at https://cdn.g4media.ro/wp-content/uploads/2019/05/Scrisoare-Timmermans-Rule-of-law-Framework.pdf (accessed 22 May 2021); L. Pech, V. Perju, S. Platon, "How to Address Rule of Law Backsliding in Romania: The Case for an Infringement Action Based on Article 325 TFEU," 29 May 2019, https://verfassungsblog.de/how-to-adress-rule-of-law-backsliding-in-romania (accessed 22 May 2022); B. Grabowska-Moroz, "Rule of Law Framework – Is It Time for Romania?" 5 June 2019, https://reconnect-europe.eu/blog/grabowska-moroz-rule-of-law-romania-timmermans (accessed 23 May 2021).

to be appointed by the President of Romania, at the proposal of the Minister of Justice, with the approval of the Section for Prosecutors of the SCM.

Recommendation no. 1 of the European Commission CVM Report of 15 November 2017,[84] reiterated the recommendation addressed by the European Commission in previous CVM reports to Romania to

> [p]ut in place a robust and independent system of appointing top prosecutors, based on clear and transparent criteria, drawing on the support of the Venice Commission. In the view of the European Commission, the fulfilment of this recommendation will also need to ensure appropriate safeguards in terms of transparency, independence and checks and balances, even if the final decision were to remain with the political level.

The law provides special access conditions for prosecutors: they shall possess at least 15 years of experience as judge or prosecutor and will be appointed for a period of 3 years, with the possibility of re-appointment only once.[85] The selection process is organized by the Minister of Justice and it is based on an interview, during which the candidates present a project regarding the exercise of the specific duties of the management position for which they have applied. In order to ensure transparency, the interview of the candidates is broadcasted live, audio and video, on the website of the Ministry of Justice, is recorded and published on the website of the Ministry.[86] The President of Romania may refuse an appointment only once, providing reasons

[84] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM (2017) 751 final, Brussels, 15.11.2017.

[85] According to Article 54(1) of the Law No. 303/2004 on the statute of judges and prosecutors.

[86] According to Article 54(1^1) of the Law No. 303/2004 on the statute of judges and prosecutors.

for such a refusal.[87] When the Minister of Justice proposes a second candidate, the President is bound to appoint this person, even in the case of a negative opinion of the SCM.

The premature termination of the mandate of the chief prosecutor of the National Anti-corruption Directorate (*Direcția Națională Anticorupție*) as a result of the justice law reforms in 2019 became subject of the analysis of the European Court of Human Rights which delivered a judgment completely unfavorable towards Romania, in the *Kovesi* Case.[88] In its judgment, the Court found the violation of several fundamental rights enshrined in the European Convention on Human Rights:[89] Article 6 – the right to have access to a court, inability to effectively challenge premature termination of mandate (because such a procedure was not provided by the domestic law) and Article 10 – premature termination of the mandate following public criticism of legislative reform, lack of a legitimate aim from the impugned measure, criticism expressed in the context of debate of public interest.

As the Court noted, the mandate as chief prosecutor of the National Anti-corruption Directorate was terminated following a report of the Ministry of Justice on the managerial aspects of her activity.[90] Initially, the President of Romania refused to revoke the chief prosecutor, but eventually had to comply with the Decision of the Constitutional Court on the request for settling the legal conflict of a constitutional nature between the Minister of Justice, on the one hand, and the President of Romania, on the other,[91] delivered by a majority vote.

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[87] According to Article 54(3) of the Law No. 303/2004 on the statute of judges and prosecutors.

[88] ECHR, *Kövesi v Romania*, 3594/19, ECLI:CE:ECHR:2020:0505 JUD000359419.

[89] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 Nov. 1950, ETS 5.

[90] ECHR, *Kövesi v Romania*, 3594/19, para. 18, 19.

[91] Decision No. 358/2018, MO No. 473 of 7 June 2018.

7. Constitutional framework on the European Union law priority over domestic law

From the Romanian constitutional law perspective, the European Union mandatory regulations prevail over national regulations,[92] as stated in Article 148(2) which reads as follows:

> As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

Moreover, Article 148(4) establishes an obligation for the national authorities to comply with the European acts:

> The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.

From the perspective of international law, the wording of this text unquestionably refers to an obligation of result[93] for Romania, not one of due diligence in giving effect to the obligations undertaken.

From the perspective of the Constitutional Court of Romania,[94] the sole authority of constitutional jurisdiction, there is an evolution

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[92] B.M.C. Predescu, *Drept instituțional comunitar. Drept instituțional al Uniunii Europene*, București 2013, pp. 200–201; M.A. Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, București 2012, p. 199; C. Moldovan, *Drept internațional public*, București, 2019, pp. 59–61.

[93] Moldovan, *Dreptul Uniunii Europene*, p. 43.

[94] The functioning of the Constitutional Court of Romania is based on the Constitution and Law no. 47/1992 on the Organisation and Operation of the Constitutional Court republished pursuant to the provisions of Article V of Law no. 177/2010 for the amendment and completion of Law no. 47/1992 on

in applying Article 148 of the Constitution, having as a result a series of general conclusions that can be drawn from its jurisprudence: the Romanian constitutional norm is the only direct reference rule in the process of the constitutional review and a rule of European Union law can be used in this process as a rule interposed to the direct reference (which can only be the Constitution), subject to a series of objective conditions (such as those concerning the requirement of clarity of the norm) and others of a subjective nature (such as those relating to the margin of appreciation of the constitutional relevance of the rule of European Union law).[95]

Regarding the Charter of Fundamental Rights of the European Union, the Romanian Constitutional Court stated that it is in principle applicable in the constitutional review process "insofar as it ensures, guarantees and develops the constitutional provisions on fundamental rights, in other words, insofar as their level of protection is at least at the level of constitutional norms in the field of human rights."[96] In its view, the legal basis of invoking the Charter is Article 148 and not Article 20 of the Constitution[97] which sets the relationship between international law and domestic law regarding human rights.[98]

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the organization and functioning of the Constitutional Court, the Code of Civil Procedure and the Code of Criminal Procedure of Romania (MO Part I, no. 672 of 4 Oct. 2010), giving the texts a new numbering. For a critical perspective, S. Tănăsescu, "Constitutional Review or Judicial Activism?" *Law Review*, 2013, vol. 3(2), pp. 19–36.

[95] T. Toader, M. Safta, *Contencios constituțional*, București 2020, pp. 438–440; idem, *Dialogul judecătorilor constituționali*, București 2015, p. 65.

[96] Constitutional Court of Romania, Decision No. 871 of 25 June 2010, MO No. 433 of 28 June 2010.

[97] Constitutional Court of Romania, Decision No. 12 of 22 January 2013, MO No. 114 of 28 Feb. 2013; Constitutional Court of Romania, Decision No. 967 of 20 November 2012, MO No. 853 of 18 Dec. 2012.

[98] Article 20 – International treaties on human rights – reads as follows:

"(1) Constitutional provisions concerning treaties on the citizens' rights and liberties shall be human rights interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party.

(2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights to which Romania is a party, and the domestic laws,

Therein, the Constitutional Court of Romania noted that

> the use of a norm of European law in the constitutionality control as a norm interposed to the reference one implies, under Article 148(2) and (4) of the Romanian Constitution, cumulative conditions: on the one hand, this norm should be sufficiently clear, precise and unequivocal in itself or its meaning should have been established clearly, precisely and unequivocally by the Court of Justice of the European Union; on the other hand, the rule must be limited to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution – the only direct reference rule in the constitutional review.

In such a case, the approach of the Constitutional Court is different from the simple application and interpretation of the law, a competence that belongs to the courts and administrative authorities, or of the possible issues related to the legislative policy promoted by the Parliament or the Government, as the case may be.[99]

Recently, by a decision delivered on 8 June 2021, following the decision of the Court of Justice of the European Union from 18 May 2021,[100] the Romanian Court refused to change its previous interpretation of Article 148 of the Basic Law on its legal consequences over the constitutional framework on the basis of the national constitutional identity in the following terms:

> this priority of application must not be perceived in the sense of removing or disregarding the national constitutional identity, enshrined in Article 1 paragraph (3) in conjunction

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the international regulations shall prevail, unless the Constitution or domestic laws comprise more favourable provisions."

[99] Toader, Safta, *Dialogul*.

[100] CJEU (Grand Chamber) Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 Judgment 18 May 2021 ECLI:EU:C:2021:393.

> with Article 152 of the Basic Law, as a guarantee of a fundamental identity relativized in the process of European integration.[101]

It may be argued that it is not a methodological or rigorous argument, as it is a tautological expression of the concept. Criticism of the decision may be justified because, from a practical point of view and of the future application of European Union law, it can be seen as being contrary to the constitutional provisions themselves and to the value of the rule of law in the constitutional architecture and jurisprudence.

On the other hand, unconditional respect for the decisions of the Constitutional Court is the focal point of the legal effects of the rule of law. This assessment is in contradiction with the findings of the Luxembourg Court in its recent judgment of 18 May 2021, para. 7 of the operative part[102] which states that the principle of the primacy of European Union law means that the domestic courts are permitted to disapply of its own motion a national provision falling within the scope of the Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU.

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[101] Constitutional Court of Romania, Decision No. 390 of 8 June 2021, MO No. 612 of 22 June 2021, para. 81.

[102] CJEU (Grand Chamber) Judgment 18 May 2021 ECLI:EU:C:2021:393– "The principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU."

8. The impact of the CVM reports

Throughout the provisions of Article 148(2) of the Romanian Constitution, in 2019, the Constitutional Court had to decide on the effect of the CVM reports and their legal force and ruled that they are not legally binding on Romania.[103] The Court argued that even if the Decision establishing the CVM is binding for the State to which it is addressed, it cannot have constitutional relevance since "neither it develops a constitutional norm, being circumscribed to the existing ones, nor does it fill a gap in the national Fundamental Law."[104]

The Court stated that the CVM reports suggest directions of action and they do not present constitutional relevance, therefore, they are not mandatory given the lack of constitutional relevance of Decision 2006/928/EC establishing the CVM, which is a European act binding on Romania. The Court also showed that although there are acts adopted on the basis of a decision, these reports of the European Commission include provisions having a legal force of recommendation as it uses the terms: "To remedy the situation, the following measures are recommended…."

These considerations were used by the Constitutional Court of Romania in 2019 when it decided by a majority vote that the Emergency Ordinance No. 92/15.10.2018 for amending and completing some normative acts in the field of justice,[105] on the operationalization of the Special Investigation Section does not violate the Fundamental Law. This Decision of the Constitutional Court and its reasoning marked a paradigm shift in this matter.

Previously, in 2012, the Court stated that the CVM reports are legally binding taking into consideration the following arguments:

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[103] Constitutional Court of Romania, Decision No. 137 of 13 March 2019, MO No. 295 of 17 April 2019.

[104] Ibid.

[105] Emergency Ordinance No. 92/15.10.2018 for amending and completing some normative acts in the field of justice, MO No. 874 of 16 Oct. 2018.

> The quality of members of the European Union imposes on the Romanian state the obligation to apply this mechanism and to follow the recommendations established in this framework, in accordance with the provisions of Article 148 (4) of the Constitution.[106]

The change of paradigm concerning the legal effects of the CVM reports by the Constitutional Court is intriguing as it considers them irrelevant from the constitutional perspective although the provisions of Article 148 of the Romanian Constitution seem sufficiently clear on the relationship between domestic law and European law and the supremacy of the latter.

At the moment, in Romania, steps are being taken to cancel the Section for the Investigation of Offenses committed within the Judiciary.[107] On 11 February 2021, the Superior Council of Magistracy gave a negative opinion on this Draft Law,[108] mainly focusing on the aim of safeguarding the independence of the judiciary in the sense of excluding the influence of other authorities and referring to a question addressed in the 2018 opinion of the Venice Commission if specialized prosecutors on anti-corruption and granting procedural safeguards for those investigated, without setting up a special structure in this regard, may be considered better suited for investigating judges and prosecutors. At the same time, by an official letter, the Minister of Justice of Romania requested on 29 March 2021 an opinion of the

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[106] The Constitutional Court of Romania, Decision No. 2 of 11 January 2012 on the objection of unconstitutionality of the provisions of the Law for amending and supplementing Law No. 303/2004 on the status of judges and prosecutors and Law No. 317/2004 regarding the Superior Council of Magistracy, point IV of the operative part of the decision, MO No. 131 of Feb. 23, 2012.

[107] The First Chamber of the Parliament adopted on 24 March 2021 the Draft Law for the dismantling of the Section for the Investigation of Offenses committed within the Judiciary and amending normative acts on justice (*Lege privind desființarea Secției pentru investigarea infracțiunilor din justiție, precum* și *pentru modificarea* și *completarea unor acte normative* în *domeniul justiției*), http://www.cdep.ro/pls/proiecte/docs/2021/cd108_21.pdf (accessed 15 May 2021).

[108] CSM, Decision No. 23 of 11 February 2021, http://old.csm1909.ro/csm/linkuri/11_02_2021__101170_ro.pdf (accessed 5 May 2021).

Venice Commission on the Draft Law for dismantling this section.[109] The Venice Commission delivered its opinion on 5 July 2021[110] providing recommendations concerning the amendments made by the Chamber of Deputies;[111] it also noted that dismantling the special prosecutorial section is only the first step in the reform process.[112]

Despite the normative safeguards provided by domestic, European and International Law for the independence of judiciary and respect for the rule of law, these principles seem to have become technicalities for the process of justice in Romania and the European context. Concerning the perceived judicial independence in Romania among the general public, the 2020 EU Justice Scoreboard shows that a very small percentage (under 10%) considers it "very good", placing Romania in the last third of the ranking of European Union States.[113]

9. The view of the Court of Justice of the European Union

Also, as regards the legal effects of the CVM reports,[114] we should note that the Opinion of Advocate General Bobeck delivered in 2020 does not qualify the effects against the Romanian authorities as legally

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[109] https://www.venice.coe.int/webforms/events/?id=3123 (accessed 5 May 2021).

[110] CDL-AD(2021)019-e Romania – Opinion on the draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary, adopted by the Venice Commission at its 127th Plenary Session (Venice and online, 2–3 July 2021), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)019-e (accessed 10 July 2021).

[111] Ibid., para. 70.

[112] Ibid., para. 72.

[113] European Commission, *The 2020 EU Justice Scoreboard*, p. 41, fig. 44.

[114] C. Moldovan, "Implicații ale dreptului Uniunii Europene asupra reformelor sistemului judiciar." Succint comentariu al Opiniei Avocatului General din 23 septembrie 2020 în cauzele reunite C-83/19, C127/19, C-195/19, C-291/19, C-355/19, C-397/19," *Analele Științifice ale Universității "Alexandru Ioan Cuza" din Iași, Științe Juridice*, 2020, vol. 66, no. 2, pp. 227–239.

binding[115] nor enforceable before the national courts or the European jurisdiction, but persuasive (as opposed to binding authority).[116]

During the proceedings before the Court of Justice of the European Union, the position of the Romanian Government was inconsistent. In the written observations it claimed that the CVM reports were of a recommendatory nature and that the only obligation of Romania is to periodically report to the Commission, while at the hearing it claimed the opposite, submitting that the benchmarks of the CVM Decision are connected to the conditions of the Treaty of Accession, in accordance with the values and principles of Article 2 and Article 19 TEU.[117]

Article 1 of the CVM Decision provides for Romania an obligation to report to the Commission on the progress made in addressing each of the benchmarks provided in the Annex and this means, in the Opinion of the Advocate General, not only giving formal reports but taking them into account in the light of Article 4(3) TEU which establishes the obligation of sincere cooperation.[118]

An Opinion of Advocate General Bobeck delivered on 4 March 2021 in Case C-379/19 *DNA – Serviciul Teritorial Oradea v KI, LJ, IG, JH*[119] is relevant as it addresses, *inter alia*, issues on the rule of law value and the effects of the CVM reports in criminal proceedings for corruption offenses and the implications of the prosecutor with the Romanian Intelligence Services (*Serviciul Român de Informații*, SRI) during the criminal investigation stage on the basis of protocols concluded by the Prosecutor's Office attached to the High Court of Cassation and Justice (*Parchetul de pe lângă Înalta Curte de Casație și Justiție*).[120] Several decisions of the Constitutional Court from 2017 and 2019[121] declared

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[115] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 Opinion of the Advocate General Bobeck, ECLI:EU:C:2020:746, para. 164.

[116] Opinion of the Advocate General, para. 167.

[117] Ibid., para. 144.

[118] Ibid., para. 162.

[119] C-379/19, DNA – *Serviciul Teritorial Oradea*, Opinion of the Advocate General Bobeck, ECLI:EU:C:2021:174.

[120] Opinion of the Advocate General, 4 March 2021 para. 17.

[121] Decision No. 302/2017, MO No. 566 of 17 July 2017, Decision No. 26 of 16 Jan. 2019, MO No. 193 of 12 March 2019; E.-S. Tănăsescu, "Romania – Another

the absolute nullity in respect of the measures used in executing the surveillance warrants and requested that all reports of recordings deriving from those surveillance measures be excluded from the evidence, respectively that it is vital to ensure that the entire criminal proceedings are not vitiated by evidence which may have been obtained unlawfully.

Regarding the legal nature of the CVM reports, the Opinion of the Advocate General is similar to the previous one already analyzed, except that in this case it adds in a very synthetic manner that the reports are to be duly taken into consideration by the Member State in its efforts to fulfil the obligations to attain the benchmarks set out in the Annex to the MCV Decision. Furthermore, the obligations on Romania to attain these objectives do not preclude decisions of the national constitutional court declaring as unconstitutional the procedure carried out by technical surveillance measures by domestic intelligence services.[122]

As anticipated, the ruling of the Court of Justice of the European Union delivered on 18 May 2021 confirmed the legal effects of the Decision and the reports in the sense that:

> That decision is binding in its entirety on Romania, as long as it has not been repealed. The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in the sense that Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.[123]

Brick in the Wall Fencing the Fight against Corruption," *VerfBlog*, 19 March 2019, https://verfassungsblog.de/romania-another-brick-in-the-wall-fencing-the-fight-against-corruption (accessed 29 May 2021).

122 Opinion of the Advocate General, 4 March 2021, para. 78.

123 Para. 2 of the operative Article.

As regards the special prosecutorial section, the answer given by the Court of Justice is that

> Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 must be interpreted as precluding national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors, where the creation of such a section
> – is not justified by objective and verifiable requirements relating to the sound administration of justice, and
> – is not accompanied by specific guarantees such as, first, to prevent any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and, secondly, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.[124]

From the perspective of the Constitutional Court, the crux on this matter seems to be Article 148 of the Basic Law and its effects on the constitutional analysis and Court remains faithful to its previous approach. It places the problem of establishing and operationalizing the special section in the scope of the national legislator`s competences in adopting laws to give content to the Basic Law.[125] Despite the conclusions of the European Court, the national constitutional tribunal considers that the criteria aimed at the proper administration of justice are met.[126]

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[124] Operative para. 5.
[125] Constitutional Court of Romania, Decision 390/2021, para. 56.
[126] Ibid., para. 57.

A dissenting opinion notes that the norms on the establishment and operationalizing the special section should be considered unconstitutional formally and procedurally mainly because the CVM Decision is binding in its entirety, including the objectives set for the Romanian state, which does not allow the adoption or maintenance of measures to compromise the results they provide.[127] Moreover, the dissenting opinion stressed that given the fact that Romanian Constitutional Court based its analysis and interpretation on the national law (the Romanian Constitution), it acted *ultra vires* when making assessments on the supranational jurisdiction.[128] In order to support the idea of the systemic priority application of European Union law, the separate opinion emphasizes that the legal force of Article 148 of the Constitution concerns all public authorities for fulfilling the obligations resulting from the accession act.[129]

The arguments on the dissenting opinion are the ones that comply with the logic and spirit of European Union values and of Romanian Basic Law.

Conclusions

The concept of the rule of law has developed in relation to the internal legal order of States as a fundamental constitutional principle and over time has become one of the values of the European Union. This process reveals the importance of a national law concept and the actual influence of internal constitutional principles in creating common European values. On the one hand, we may argue that in reality this concept already existed at the domestic level of the Member States and the Romanian legal order makes no exception, theoretically speaking,

[127] Constitutional Court of Romania, Decision 390/2021, Dissenting opinions of Judges Stanciu and Tănăsescu, paras. 4.2.2 and 4.2.3.

[128] Ibid., para. 4.4.

[129] Ibid., paras. 7, 8, 9.

since the adoption of its first democratic Constitution in the post-communist era. On the other hand, effective respect of the rule of law in the sense of establishing the pre-eminence of the law, may be achieved by the use of a supranational mechanism aiming at enforcing the values agreed on at the European level.

From this perspective, within the European Union, its Member States enjoy a limited margin of discretion in establishing the standards of the rule of law they must comply with the common understanding and requirements set by the European Institutions. Therefore, we may argue that the process of applying the rule of law and its safeguards changed in the sense that there is a vertical transmission which radiates from the European Union to its Member States. The relationship between Romania and the European Union may seem complicated in regard of respect of principle of the rule of law and its safeguards, especially those related to the judicial independence. However, one should note that efforts have been made over the years with the assistance of the Union, even if there were imperfect law amendments and possible slippery situations that constituted a possible threat for the rule of law. These negative consequences were limited due to the control exercised by the domestic courts, first of all, as an expression of this core European value.

Until now, Romania has not entirely been a success story in its quest on finding a balance suitable for an effective rule of law due to the influence of its politics, yet important steps have been made under high scrutiny. The process of improving judicial capacity results in setting at least higher standards for the process of strengthening the rule of law was very complex and the assistance of the institutions of the European Union contributed greatly to its understanding.

However, in this difficult context, we must note that the identity of the Romanian Constitution is a rational and European one as it includes a democratic state organization, based on the rule of law and sets pluralism, justice, free development of the human personality, civil rights and freedoms as fundamental values which Romania is attached to. The synthesis of the Constitutional Court regarding the scope of the rule of law is generally eloquent and consistent, yet, it seems to establish

a double standard regarding the priority application of the norms of the European Union and considers the interpretation as a problem of domestic law. Moreover, the constitutional identity and the identity of Romanian Basic law may not be perceived and established outside the framework of the European Union that Romania assumed.

Mladen Karadjoski

The Constitutional Legacy of the Ex-Yugoslav Countries and Their Potential Implications Towards Common EU Values, Constitutional Features and the Rule of Law

Introduction

The constitutional legacy of the countries that are the successors of former Yugoslavia is a very important aspect in terms of the values that they will possess and attribute to the European Union when they become part of it. The constitutional matrix and the values matrix of the countries of the European continent vary depending on the geographical location, historical development of each country, political circumstances, socio-economic form, and the like.

However, even if the countries that founded the European Coal and Steel Community in 1951 had almost identical democratic origins, as the community grew and expanded through new European countries from all parts of the continent, they also developed democratic, economic and constitutional and legal divergences between them. This made the European Union in many ways a very heterogeneous formation – also from a constitutional and legal point of view.

Most of these countries share similar values, in addition to having very similar constitutional systems as a result of a common state and a common constitutional and legal system in the recent past. The key issue, however, is what the constitutional legacy of Albania, Bosnia and Herzegovina, Kosovo, Montenegro, Northern Macedonia, and Serbia will bring to the European Union upon their accession.

An additional dilemma arises as to whether the values specific to the Balkan countries are compatible with the values inherent in the EU Member States, such as the rule of law, democracy, individual human rights and freedoms, minority rights among others.

Hence, all the countries of the former Yugoslavia will be analyzed in terms of their constitutional systems, value systems and the characteristics they possess and which could potentially affect established European values.

The three main theses of the article are as follows:

1. the constitutional legacy of the Western Balkan countries has a certain, but still limited, impact on common EU values;
2. the process of Europeanization initiated by the European Union has a very subtle, sophisticated, but highly beneficial influence on the democratization processes in the Western Balkan countries with a communist past;
3. the concept of the rule of law is understood and applied differently in different countries, depending on democratic traditions, institutional capacity and political will.

1. Constitutional and Legal Systems in the Socialist Federal Republic of Yugoslavia and Representation of the Constitutional Systems of its Successor Countries

Although the constitutional norms in the SFRY were largely considered standard and common for a socialist state, there is still a certain deficit of democracy if compared to countries with market economies and democratic systems of government. For example, the egalitarian approach characteristic of these constitutions is not in line with individual human rights and freedoms in the European Union (formerly the European Economic Community).

For example, Article 153 of the 1974 Constitution of the SFRY reads as follows:

> The freedom and rights of man and the citizen, spelled out by the present Constitution shall be realized through solidarity among people and through the fulfilment of duties and responsibilities of everyone towards everyone. The freedoms of man and the citizen shall only be restricted by the equal freedoms, rights of others and by the constitutionally-specified interests of the socialist community, as defined in the Constitution.[1]

Article 155 of the Constitution states:

> Working people and citizens shall have the inalienable right to self-management which enables each individual to decide on his personal and common interests in an organisation of associated labour, local community, self-managing community of interest or other self-managing organisation or community and socio-political community, and in all other forms of their self-management integration and mutual linkage.[2]

These two articles are quite sufficient indicators of the difference in the understanding of human rights and freedoms in socialist countries compared to capitalist ones. Namely, one of the aspects is the complete subordination of individual freedoms and human rights to the state in socialist systems such as the SFRY. Consequently, it is explicitly stated that a person's rights are limited to the interests of the "socialist community", which is unusual for democratic systems. Naturally, restrictions exist in all countries, even in the most democratic ones,

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[1] Official Gazette of the SFRY No. 9, XXX, Belgrade, February 1974, Article 153.

[2] Ibid., Article 155.

but are only applicable in crisis situations such as war, epidemics, natural disasters and the like. This means that the conditions generating restrictions on an individual's rights and freedoms are specified in detail. On the other hand, in the case of the SFRY, as in other socialist countries, there is an incomplete definition of situations and categories, such as "interests of the socialist community". Such a definition can lead to extensive interpretations of the application of human rights and freedoms in practice, usually always in favor of state and public interests to the detriment of individual human rights and freedoms.

This concise historical analysis is important in terms of the consequences left by the SFRY constitutional system as a "constitutional legacy" for successor countries, namely North Macedonia, Serbia, Montenegro, Bosnia and Herzegovina, and Kosovo (excluding the analysis of Slovenia and Croatia, which have been members of the European Union since 2004 and 2013, respectively).

Of course, the constitutions of these countries in force today cannot be considered a complete anachronism, but we must also note the striking changes brought about by the wave of democratization in the 1990s, which meant a significant reorientation of their constitutional, as well as political and economic systems, from authoritarian to democratic, from planned to market economies.

2. Reforms of the Constitutional Systems of the Western Balkan Countries

The influence of the socialist "constitutional legacy" on the new constitutions of the Western Balkan countries adopted in the 1990s was not large enough to have a significant impact and challenge the democratic concept and paradigm. If we analyze certain parts of the constitutions of these countries that address human rights and freedoms, we can draw the general conclusion that they have evolved in the real sense of the word.

Article 8 of the Macedonian Constitution makes a clear distinction and departure from the previous socialist regime:

> The fundamental values of the constitutional order of the Republic of Macedonia are: basic freedoms and rights of the individual and citizen, recognized in international law and set down in the Constitution; free expression of national identity; rule of law; division of state powers into legislative, executive and judicial; political pluralism and free, direct and democratic elections; legal protection of property; freedom of the market and entrepreneurship; humanism, social justice and solidarity; local self-government; proper urban and rural planning to promote a congenial human environment, as well as ecological protection and development and respect for the generally-accepted norms of international law. Anything that is not prohibited by the Constitution and by law is permitted in the Republic of Macedonia.[3]

The differentiation is mentioned not only with regard to fundamental human rights and freedoms, but also with regard to the separation of powers, introduction of political pluralism, method of electing the government, market orientation of the economy, adoption of modern values such as the rule of law, but also under many other parameters that confirm the significant constitutional evolution achieved in the Republic of Macedonia compared to the Socialist Republic of Macedonia (as a constituent member of the former SFRY). Of course, this is also one of the main reasons why the Arbitration Committee, headed by the President of the Constitutional Council of France, Robert Badinter, assessed Macedonia as having the right (along with Slovenia) to gain independence and begin the process of accession to the European Union (then the European Economic Community).

Of course, constitutional reorientation and democratization also took place in other Balkan countries. For example, Article15 of the

[3] Constitution of the Republic of Macedonia, 1991, Article 8.

Constitution of Albania reads: "The fundamental human rights and freedoms are indivisible, inalienable, and inviolable and stand at the basis of the entire juridical order. The bodies of public power, in fulfilment of their duties, shall respect the fundamental rights and freedoms, as well as contribute to their realisation."[4]

Noting that fundamental human rights and freedoms lie at the core of the entire legal system, their paramount importance is clearly emphasized, without attaching their applicability to any community (socialist, capitalist or any other), i.e. these human rights and freedoms are placed on a kind of "constitutional pedestal".

Article 17, on the other hand, states:

> The limitation of the rights and freedoms provided for in this Constitution may be established only by law for a public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.[5]

Although there are situations where a certain limit to the basic protection of human rights and fundamental freedoms is foreseen, these must be justified and, on the other hand, should not be more stringent than the measures and limitations provided for in the European Convention on Human Rights. This means that these measures and limitations are as specific as possible, listed and, to some extent, predictable.

For example, if we consider the Constitution of Kosovo (which is relatively "young" but analyzed in this context as a former entity of the SFRY) with respect to the protection of human rights and freedoms and the values it promotes, it can be observed that Article 22 of the document lists international declarations and conventions that have

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[4] Constitution of the Republic of Albania, 1988, Article 15.

[5] Ibid., Article 17.

a direct impact on the territory of Kosovo, and even have priority in implementation in terms of laws and regulations developed by state and public institutions in Kosovo. Thereby, the above article lists the following documents: Universal Declaration of Human Rights; European Convention for the Protection of Human Rights and Fundamental Freedom and its protocols; International Covenant on Civil and Political Rights and its protocols; Council of Europe Framework Convention for the Protection of National Minorities; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child; "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[6]

All these international human rights acts are included in the constitutions of all Balkan countries, but nowhere are they mentioned directly, such as in Kosovo. The reason is the complexity of the situation in Kosovo, not only from a historical perspective of security, but also from a constitutional-legal aspect – in the case of Kosovo, the international community plays a strong paternalistic role in every sense of the word, which is reflected in the Constitution.

Kosovo is also free from the "constitutional burden" of the SFRY, as it had the status of a province, not a republic, within the Federation. Thus, free from the historical baggage of the SFRY, Kosovo relatively easily and quickly adopted in the Constitution the democratic values and principles characteristic of all democracies, certainly incorporating its specific features resulting from the overall ethnic, religious, political, economic and social background.

The Constitution of Bosnia and Herzegovina is also a very specific and complex "piece of legislation" that stemmed from the bloody conflict in the 1990s. Unlike other parts, where the content of the constitution differs from canton to canton, however, the section on fundamental human rights has uniform provisions for the whole federation. And so, the appendix to the Constitution, in the section on tools for the protection of human rights that have constitutional and

[6] Constitution of the Republic of Kosovo, 2008, Article 22.

legal force, names all international acts, from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide to the 1994 Framework Convention for the Protection of National Minorities. It lists a total of twenty-two international documents, including those mentioned above.[7]

It is clear that the position of the international community in Bosnia and Herzegovina shares the same protectionist premises as in the case of Kosovo. The political history itself has strongly influenced the constitutional and legal system of Bosnia and Herzegovina. At the same time, it is noticeable that there is a cautious approach to the proclamation of fundamental European values, first focusing on reconciliation and peace, and then moving on to Europeanization.

The Serbian Constitution is relatively thorough when it comes to the protection of fundamental human rights and freedoms. Two articles are of particular interest for this analysis – one of them is Article 18:

> Human and minority rights guaranteed by the Constitution shall be implemented directly. The Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally-accepted rules of international law, ratified international treaties and laws.
>
> The law may prescribe manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right. Provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well

[7] For more information, see the Constitution of the Federation of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 1/1994 with all amendments.

> as the practice of international institutions which supervise their implementation.[8]

Thus, the arbitrariness of the states – meaning the government – is almost completely excluded when it comes to fundamental human rights and freedoms. The direct application and affirmation of these rights by international documents is another guarantee that Serbia has at least nominally, legally-accepted modern European values regarding fundamental rights and freedoms.

Article 20, however, reads:

> Human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right.
>
> Attained level of human and minority rights may not be lowered. When restricting human and minority rights, all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, nature and extent of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means.[9]

Restrictions on fundamental human and minority rights and freedoms under the Constitution of Serbia are minimal and limited, but they must also be proportionate to the purposes for which they were established. Thus, once the stated constitutional objective has been achieved, restrictions are completely lifted.

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[8] Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006, Article 18.

[9] Ibid., Article 20.

The Constitution of Montenegro, adopted in 2007 and amended in 2013, is also modelled on the ex-Yugoslav republics. It does, however, have certain distinctive features, such as the emphasis put on gender equality in a separate article, namely in Article18: "The state shall guarantee the equality of women and men and shall develop the policy of equal opportunities."[10]

Article 24 is quite similar to Article 20 of the Constitution of Serbia, reading: "Guaranteed human rights and freedoms may be limited only by the law, within the scope permitted by the Constitution and to such an extent which is necessary to meet the purpose for which the limitation is allowed, in an open and democratic society. Limitations shall not be introduced for other purposes except for those for which they have been provided for."[11]

Naturally, this strong resemblance comes from the decade-long shared government-legal system of Serbia and Montenegro (and previously within the SFRY).

In general, the constitutions of the countries of the former Yugoslavia encompass most of the modern European values typical of the Member States of the European Union, as well as of the European Union, as a type of constitutional-legal formation. The difference lies in the ways in which they are implemented, in which there are large discrepancies in relation to European countries, as well as in their understanding, which in the Balkan countries is often broad and inaccurate and interpreted in day-to-day political terms. However, in order to finalize the transition of the constitutions of the Balkan states from totalitarian to democratic, the formulation of European values, as well as their implementation on the ground and their operation in practice, must also be respected.

[10] Constitution of Montenegro, Official Gazette of Montenegro No. 1/2007 and 38/2013, amendments I–XVI.

[11] Ibid., Article 24.

3. The Values of the Balkan Countries as Compared to European Values

Prior to the analysis of the values of the ex-Yugoslav countries that are characteristic of their constitutional-political systems and then comparing them with the values typical of the EU Member States, it is necessary to have a brief overview of the process known as Europeanization, i.e. the determination of the level of acceptance of the normative and transformative powers of the European Union, i.e. the so-called soft power on the part of the Western Balkan countries, but also in general terms for all countries applying for EU membership.

Broadly speaking, the concept of Europeanization refers to a set of processes in which the EU's political, social and economic values become part of the logic of internal discourse, identity, political structures and public policy.[12]

The meaning of the term "Europeanization" is surrounded by considerable conceptual contradictions. In most definitions, it is seen as a process that stimulates change in political structures. One of the first definitions was proposed by Robert Ladrech, who describes Europeanization as "an incremental process of re-orienting the direction and shape of politics to the extent that EC political and economic dynamics become part of the organisational logic of national politics and policy making."[13]

Similarly, Robert Harmsen and Thomas Wilson define Europeanization as "the emergence and development at the European level of distinct structures of governance, that is, of political, legal and social institutions that specialise in the creation of authoritative European rules".[14] Maarten Wink and Paolo Graziano included integration within the EU in the very definition of "Europeanization", calling

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[12] C. Radaelli, "Wither Europeanisation? Concept Stretching and Substantive Change," *Political Studies Association Annual conference*, London 2000.

[13] R. Ladrech, "Europeanization of Domestic Politics and Institutions: the Case of France", *Journal of Common Market Studies*, 1994, no. 32.

[14] R. Harmsen, M.T. Wilson, "Introduction: Approaches to Europeanization," *Yearbook of European studies*, 2000, vol. 14.

it a process of internal adaptation to European regional integration. A fuller definition of "Europeanization", encompassing processes, structures and actors, is proposed by Frank Schimmfenning and Ulrich Sedelmeirer, according to whom Europeanization is "a process in which states adopt EU rules that cover a broad range of formal and informal issues and structures. This means the transposition of the EU law into domestic law, the restructuring of domestic institutions according to the EU rules; or the change of domestic political practices according to the EU standards."[15] On the other hand, Johan Olsen refers to the "face of Europeanization" and describes it through five changes: the first change concerns the expansion of territorial boundaries, making Europe a single political space; the second one defines the development of governance institutions at the European level; the third shows the EU penetration into national and subnational systems of governance, including the distribution of responsibilities and powers between different levels of governance; the fourth describes the forms of exporting the concept of European political organization and its implementation throughout the European territory; and the fifth is the political project aimed at building a unified and politically stronger Europe.[16]

All these definitions and concepts justify the influence that the European Union as a single entity has on the accession candidate countries, as well as on other European countries, as manifested in its values, ideals, goals and objectives. In other words, Europeanization is a very subtle and sophisticated way of injecting the "European mentality" into all European countries, regardless of their status in relation to the European Union.

However, the impact of the EU on countries with varying political, economic and social systems, especially post-communist European countries in the period of transition, remains a poorly explored "field". Once the Eastern Bloc disintegrated, significant differences emerged

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[15] F. Schimmfelfenning, U. Sedelmeier, "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe," *Journal of European Public Policy*, 2004, vol. 11, no. 4.

[16] J.P. Olsen, "The many faces of Europeanization," *Journal of Common Market Studies*, 2002, vol. 40, no. 5.

between these countries. Yet a vast majority of them shared a common aspiration for EU membership, as they saw this as a *sine qua non* condition for democratic development, economic progress and cultural achievements.

The European Union is a paradigm for the modernization of the political, economic and social systems of candidate and potential candidate countries, as well as for the process of Europeanization, which is essentially a set of steps leading to alignment of systems through processes of democratization, advertising, stabilization and institutional integration.[17]

The agenda of Europeanization defines the role of specific cases and contains forms of short-term, medium-term and long-term planning on political, social, economic, security and technical issues. In southeastern Europe, the EU agenda covers matters of security and peacebuilding, border issues, reconstruction and development, as well as the post-communist transition and the EU accession agenda. Never before has the EU been involved in such a wide range of issues when dealing with candidate or potential candidate countries. The fact that the Balkan countries are entering the process with much weaker potential than previous candidate countries has made the management of the EU agenda that much more important. The EU, for its part, should adhere to the agreed agenda; it should abide by the same rules and standards for all states with a view to safeguarding its own achievements in terms of economic and political integration.[18]

The rational choice approach has led to progressive studies of Europeanization, as it explains the impact of EU membership on newly acceding States. Tanja Börzel and Thomas Risse note that Europeanization is theorized in categories of two different mechanisms: rational choice emphasizing a logic of consequences and sociological

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[17] A. Agh, *The Politics of Central Europe*, London–Thousand Oaks 1998.

[18] M. Karadjoski, G. Ilik, "Will the European Union Europeanise the Balkans to Avoid the Balkanisation of Europe," *Studies in European Affairs (Studia Europejskie)*, 2019, no. 4, pp. 41–72.

institutionalism emphasizing a logic of appropriateness.[19] Schimmfenning and Sedelmeirer test rationalist institutionalism with regard to the impact of EU membership on the new Central and Eastern European member states. It was earlier discovered by them that, according to the rationalist view, international organizations are instrumental associations intended to aid the countries in the effective defense of their interests. Rationalist theories view international organizations as voluntary groups that will not be joined by members unless the result of membership itself is a net gain. Following this logic, expected individual costs and benefits determine the preferences of candidates and member states in expansion. A potential country will seek to join the EU if there is a gain from the membership.

Of course, all Balkan countries aspire to membership of the European Union because of the benefits and privileges offered by accession itself. Namely, if they were members of the European Union, all Balkan countries would be pure beneficiaries of the membership, meaning that much more would be received than invested, unlike, for example, Germany, which is the largest net investor, i.e. it invests in the European Union much more compared to what it receives.

There is no precise definition of the term "rule of law", which means that its meaning can vary from country to country and from one legal tradition to another. In general, the rule of law can be understood as a political and legal mode whereby the law constrains the state and its powers (legislative, executive and judicial), promoting certain freedoms and establishing order and predictability in the functioning of the state. In the most general sense, the rule of law is a system intended to protect the rights of citizens against arbitrary abuses of state power. Under this understanding, the "rule of law" is considered a fundamental prerequisite and necessary element of any democratic system.[20]

It is a broad concept that is defined either in terms of the values it is supposed to serve, the principles it is supposed to protect, the

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[19] T. Börzel, T. Risse, "When Europe Hits Home: Europeanization and Domestic Change," *European Integration Online Papers (EIOP)*, 2000, vol. 4, no. 15.

[20] S.R. Roos, *The "Rule of Law" as a Requirement for Accession to the European Union*, Bonn–Berlin 2008, p. 2.

institutions that are obliged to protect it, or the procedures these institutions employ to do so. This multidimensional analysis reflects the volume of definitions and interpretations of this very important term, which is impossible to be defined in a precise and universally-applicable way.

For a state to be classified as a "state under the rule of law" (*Rechtsstaat*), certain basic elements and institutions must be established, such as: the separation of powers; the legitimacy of the administration – in particular, the principle of legal certainty and unity, which in particular includes the principle of reliability, the principle of the prohibition of retroactive acts and the principle of proportionality; the guarantee of fundamental rights and freedoms and equality before the law.

At the level of the European Union, the concept of the rule of law has a constitutional meaning encompassing two aspects: internal and external. The internal aspect refers to the existence of this principle in the treaties (which have constitutional force and significance) under which the European Union has been created and developed over decades, while the external one gives the rule of law the importance of a guiding principle as well as a norm (reference).

Within the constitutional framework of the EU, the rule of law is not only mentioned as a general core value, but is also used as a reference point to assess the efforts of accession candidates and as an objective of foreign policy. Viewed through the prism of national constitutional traditions, these features appear too authentic and original.[21]

There is a profound commitment to strengthening the rule of law declared by the countries that are candidates for accession to the European Union. Effective application of the law is essential for the system to function effectively, to improve security for citizens and the protection of human rights, and to successfully implement the reforms needed to prepare their economy for integration into the Union's internal market, in accordance with the economic criteria for membership of the European Union. The practice of the "rule of law" requires precise

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[21] L. Pech, *Rule of Law as a Guiding Principle of the European Union's External Action*, Hague 2013.

and applied measures against organized crime, fraud, corruption, arms trafficking, drugs and human trafficking. What is a "mote in the eye" for the European Union when assessing the application of this principle in accession candidate countries, however, constitutes a large discrepancy between the "European rules" adopted by the countries and their "Balkan application" in practice.

The European Union's external human rights policy is progressively focusing on strengthening third country actors (including accession candidates), specialized regional bodies and agencies, enhancing their independence and sustainability, and creating a model that encourages people to understand and assert their rights. The EU also plays an important role in funding national human rights institutions.[22]

The human rights situation in the European Union candidate countries over the past decade has been assessed as relatively good in terms of a number of international factors. Each of these countries has signed a number of international human rights protection documents, including the European Convention on Human Rights. Human rights and freedoms are largely guaranteed by Constitutions, which also provides for the direct application and acceptance of ratified human rights treaties in domestic law. In addition to the general commitment to strengthening the rule of law, there are other areas in the field of human rights where intensive work needs to be done, particularly those relating to freedom of expression and the status of the media.

The highest legal acts of the countries that are candidates for adoption of the EU Constitution are a direct guarantee and direct protection of human rights and freedoms. Indeed, the constitutions of all these countries clearly affirm their democratic nature in terms of protecting and promoting human rights. By outlawing inhuman and degrading treatment of people as defined in these acts, they prohibit discrimination on the grounds of religion, race, gender, ethnic origin, social status, age, as well as capital punishment, forced labour, etc., therefore, confirming their compliance with European standards, as well as their

[22] EU Foreign Affairs Council, *Council Conclusions on the Mid-term Review of the Action Plan on Human Rights and Democracy*, 2017, DGC 2B.

commitment to developing, complying with and even updating these standards and laws.[23]

The human rights-based approach is a key methodology for ensuring respect for and promotion of the international human rights system through development and cooperation. The European Union's practices are well coordinated and harmonized, particularly with regard to guidelines, recommendations, proposals and opinions on respect for human rights and democracy. These methods also complement the work of other global and regional organizations working on this issue.

It is essential that candidate countries develop appropriate strategies and institutional tools to put into practice the concept of protecting and guaranteeing human rights, without contradicting the aforementioned principles and methodology of the European Union. The conditions for practical implementation will be dependent on the individual capacities of each country, that is, on their systemic approach and institutional coherence.

The European Union is one of the main advocates and defenders of the universality and indivisibility of all human rights. Non-discrimination, human dignity, gender equality, strengthening women's rights, as well as children's rights. It also places greater emphasis on efforts to promote economic, social and cultural rights. At the same time, the protection of vulnerable groups is expanding, combating all forms of discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion, national minority, property, birth, disability, age or sexual orientation.[24]

In line with this philosophy, the EU has been a catalyst for massive legal reform across Eastern Europe; it is encouraged primarily in annual progress reports, as well as in policy criteria and parts of legislation. Some of these new regulations are essential to the functioning of modern states. However, regulations can always be improved and new ones can always be added, but the difficulty in distinguishing the difference between serious legal reform and "cosmetic legislative

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[23] Karadjoski, Ilik, "Will the European Union Europeanise the Balkans."
[24] EU Foreign Affairs Council, 2017.

intervention" remains. Indeed, new laws are also often amended if defects are found in the original version.

The Balkan countries may have some of the most up-to-date and complete legal codes in Europe, but face significant challenges due to their application and the legal uncertainty that affects business, society and citizens.

Although constitutional amendments occur much less frequently compared to changes in laws, great care must still be taken in such "constitutional and legal efforts", mainly to maintain legal certainty and reliability, which is quite problematic in Yugoslavia's successor states. As mentioned earlier, the biggest problem in these countries is not their constitutional/legal physiognomy, but the practical embodiment of constitutional and legal norms, as well as their interpretation.[25]

The possible accession of these countries to the European Union will further complicate their constitutional framework, as in certain areas they will have to give up their national sovereignty and transfer it to the supranational level in the EU. Such a complex constitutional and legal restructuring would require a very careful and thorough approach on the part of the states in order to effectively adapt to the constitutional legal system of the European Union.

According to Giorgio Repetto, in the last 15 years, the debate on the constitutionality of European law has gained great importance and broadened its scope. After the failure of the Treaty establishing a Constitution for Europe, this Constitution of the European Union in the years 2003–2005, there was a widespread scholarly discussion on the new constitutional paradigm with which they were forced to come to terms with their own ambitions. As the dream of a uniform, increasingly inclusive constitutional structure for Europe under the auspices of a political contribution from the EU faded, claims for a broader and more complex model of constitutional legitimacy came to fruition. No one denied that the EU was a leading player in this process, but the considerably weak constitutional legitimacy revealed the need for

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[25] K. Nicolaidis, R. Kleinfeld, *Rethinking Europe's Rule of Law and Enlargement Agenda: The Fundamental Dilemma*, SIGMA Papers 2012, no. 49, OECD.

a broader framework in which EU legislation and policy itself ceased to exist, embracing a broader package of policies into a European setting and sources of legitimacy. Not surprisingly, therefore, the Council of Europe, and, in particular, its "jewel" – the European Convention on Human Rights (ECHR), together with the European Court of Human Rights (ECtHR) – have been able to play a major role in the process of reassessment on this constitutional basis.[26]

Constitutional restructuring is a complex and time-consuming process for all countries that become part of the European Union, whether relatively homogeneous or heterogeneous (in terms of ethnic and religious structure). Following the breakup of Yugoslavia, the European Union faced a variety of challenges in each of the SFRY's successor countries. Given that all these countries declared membership of the European Union as one of their strategic objectives, they felt the need and the obligation to contribute to the creation of modern and democratic constitutions that embrace fundamental European values such as the rule of law, democracy, protection of human rights, protection of minority rights, etc. This task was particularly difficult in countries such as Bosnia and Herzegovina, Macedonia and Kosovo.

Constitution-building in Bosnia, Macedonia and Kosovo is a unique example of the continued intervention of a regional organization or formation in state-building and as a result of the internal conflicts that have engulfed the three countries. All three countries share similar historical legacies of the Ottoman Empire and Yugoslavia and the conflicts that emerged in each of them after the breakup of Yugoslavia, when the young developing countries were not ready to deal with the new challenges ahead. In all three cases, international actors played an important role in the unfolding of events. Heterogeneous ethnic composition, weak states and powerful diasporas played key roles in the conflicts, and peace in all three cases was achieved through foreign diplomatic and military intervention. In the three cases, a generally

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[26] G. Repetto (ed)., *The Constitutional Relevance of the ECHR in Domestic and European Law – an Italian Perspective*, Intersentia, Cambridge–Antwerp–Portland 2013.

similar consociational approach to the constitution was adopted, with each of them differing to some extent from the ideal model of a consociational constitutional arrangement.[27]

Bosnia has features of all the consociational principles implemented through the institutional mechanisms recommended by consociational theory. Kosovo and Macedonia have adopted all the consociational principles, but deviate somewhat from the theory, as they practice two of the four consociational principles. First, the principle of segmental autonomy was implemented in Kosovo and Macedonia not through a formal federal territorial structure, but through extensive decentralization with a formally unitary state structure. Secondly, the principle of mutual veto between Kosovo and Macedonia was limited to certain territories and implemented through several indirect mechanisms.[28]

The constitution-making process in the post-conflict zone of the former Yugoslavia with the assistance of the European Union was an instructive case of the involvement of a regional organization in developing a constitution in a post-conflict society. These processes differ in modality and degree of participation, as well as in the specific provisions of the constitutional system.[29]

Undoubtedly, such involvement of the EU should not be interpreted as interference in the constitutional and legal affairs of independent states, but as assistance and support with good intentions for the entity which the small Balkan states have the desire and determination to join. This "Constitutional paternalism" would be repugnant if it were a powerful, large and well-organized state, but for smaller countries it means "good constitutional mentoring" and professional, financial, material and technical assistance.

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[27] R. Belloni, "Peacebuilding and Consociational Electoral Engineering in Bosnia and Herzegovina," *International Peacekeeping*, 2004, vol. 11, no. 2, pp. 334–353.

[28] F. Bieber, *Institutionalizing Ethnicity in the Western Balkans Managing Change in Deeply Divided Societies*, Working Paper 19, Flensburg: European Centre for Minority Issues 2004.

[29] A. Galyan, *Learn as We Go: The European Union's Involvement in Constitution Building in the Post-Conflict Western Balkans*, International Institute for Democracy and Electoral Assistance, Stockholm 2014.

Reforming the concept of the rule of law requires a broader approach to social transformation and observance of norms of democratic and proper governance. Therefore, the governments of the successor states of the former Yugoslavia must: invest in education (research on justice and the rule of law), in order to provide sufficient knowledge so that the population can influence the improvement of the rule of law and be able to apply these principles on a daily basis. This approach requires cooperation with educational institutions and changes to curricula in primary and secondary schools and in higher education.[30]

Such a systematic and consistent approach to education would certainly increase the possibility of meaningful rather than formal and palliative efforts when it comes to the rule of law. Because planting the "seeds of the rule of law" in educational institutions at all levels would undoubtedly result in the growth of healthy and functional "institutional seedlings" that would apply the concept of the rule of law in line with its original idea.

The rule of law reform is a long and potentially multi-generational process in which the social and cultural succession of transmitted norms is ultimately achieved by making sure that every accountable member of society has the skills and habits necessary to comply with them. Therefore, in order to accomplish the mission of introducing accepted norms into everyday life and the process of transforming the legal state, it is necessary to involve the broadest layers of society.[31]

This means maximum involvement of all "stakeholders" at vertical and horizontal levels, i.e. all state and public institutions at central, regional and local levels, political parties and interest groups, the non-profit sector, business organizations, etc., i.e. of all organized individuals who are directly or indirectly involved in putting the concept of the

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[30] D. Jano, J. Marovic, *How to Foster The Rule of Law in The Western Balkans: 10 Notes to Decision-Makers*, Institute for Democracy "Societas Civilis", Skopje 2019.

[31] J. Marovic, T. Prelic, M. Kmezic, *Strengthening the Rule of Law in The Western Balkans: Call for a Revolution Against Particularism*, Balkans in Europe Policy Advisory Group, Policy Study, January 2019.

rule of law into practice, so that it is fully integrated into the "social structure" of all Balkan countries.

Of course, the rule of law as a concept is applied differently in the Balkan countries compared to countries that are members of the European Union, but also to the Union as a single entity. The main difference is that in the Balkan countries most attention is paid to the formal application of the rules, that is, only to the apparent normative satisfaction from the regulations, but not to the material changes that should arise from their enforcement. The main problem is, therefore, the effect of the application of the provisions. Such an attitude can only be changed under strong influence and pressure from the European Union.

Summary

The constitutional features of the EU Member States may vary from country to country, but, nevertheless, when it comes to the enforcement of the "public domain" arising from the founding treaties, there needs to be some uniformity and consistency in its application.

However, this division is distinguishable from the point of view of the rule of law in the application of European law, namely whether national constitutions are hierarchically superior to EU law or whether they are subject to rules of constitutional authority of the "public domain". Advocates of intergovernmental cooperation, i.e. those who favor the supremacy of national constitutions over general laws of the European Union, take one position, believing that when there is a conflict between national constitutions and international law, preference should be given to national acts because of the sovereignty that is inherent in the genesis of individual countries, while the fact of the European Union not being a state puts us in a certain subordinate "position". Another view, directly opposite to the first, is promoted by supporters of integration, federalists and other structures that always

prioritize the "public domain" over national legal norms and even national constitutions.

On the other hand, a group of small countries on the Balkan Peninsula, most of which are from the former Yugoslavia, define membership of the European Union as a strategic commitment. This means that in addition to gaining the ambition, energy and constructiveness of the Union when they become members, they will also give up their constitutional principles, habits and institutional efforts that could hinder the already existing ones in the EU.

These countries are expected to have an easier time adopting integrationist, or federalist, views on the rule of European law over national constitutions, with several reasons for this. The first is political instability, which they will want to neutralize through a centralized approach from the EU as a whole, the second is economic inferiority, which they will want to compensate for with common EU (structural and cohesion) funds, and the third is the size of the countries, which means that these countries will not dare to enter into conflict with Brussels, unlike, for example, Berlin or Paris.

Atanas Semov

Raison d'Être and Application of the Principle of Respect for National Constitutional Identity in the EU

Introduction

National constitutional identity (NCI) in the EU has become a highly topical issue. This is understandable, given that EU membership and the Union law deeply affect the sovereignty of Member States (MSs) but also guarantee their sovereignty, above all, precisely through the principle of respect for NCI in the EU.

In order to understand, rationalize and implement the principle of respect for NCI in the EU, 11 theses should be assumed:

1. Respect for NCI is a principle of the EU.
2. Enshrined in Article 4(2) TEU, this principle should be viewed as a counterweight to the principles of integration and of sincere cooperation.
3. EU MSs need protection of their NCI because of the peculiarities of the EU and its legal order.
4. Understanding the status of the integrated State is key to understanding and applying the principle of respect for NCI. It incorporates **protection of NCI** – as **a right to incidental deviation from the obligation of sincere cooperation and from the principle of primacy**.
5. There is a distinct boundary to the limitation of sovereignty and the primacy of EU law: they do not affect the essential elements of NCI. But then, there is also a boundary to MSs' right to protect their NCI: it may not affect the essence, the raison d'être and the core principles of the Union legal order.

6. The concept of NCI is an autonomous Union concept, a comprehensive concept, and a concept reflecting only specific material peculiarities of a particular MS. Identity manifests itself in a formal aspect and in a value aspect.
7. The protection of NCI is moreover a subjective right of an MS and, accordingly, of every natural or legal person under its jurisdiction.
8. This protection can be implemented in practice only with confirmation (recognition) by the CJEU. The Court may not monitor *proprio motu*. Hence, the CJEU must be seized, and this can be done by following only the procedures laid down in Article 258, 259, 263 and 267 TFEU.
9. A ruling given by the national constitutional jurisdiction is necessary but not mandatory.
10. If the CJEU confirms (recognizes) an element of NCI of an MS, the consequences consist in the right of that MS (and of every natural or legal person subject to its law) to deviate from the fulfilment of the obligations arising from EU law (and, above all, from the principle of primacy).
11. Ultimately, protection of NCI presents a significant real opportunity for an incidental restriction of the particular Union law rules (ULR). This protection, however, remains just an extremely limited exception to the general operation (and *raison d'être*!) of EU law. Presumably, this is an exception that confirms the rule. And the rule undoubtedly remains that any ULR prevails over any MS's domestic law rule (DLR). Therefore, respect for NCI requires a European-law-friendly approach from the national jurisdictions (NJs) and an identity-friendly approach from the CJEU.

I will discuss these points briefly further on.[1]

[1] For a more detailed analysis, see Atanas Semov, *The Protection of the National Constitutional Identity under the EU Law (Understanding, Procedures And Legal Effects)*, forthcoming: College of Justice – European Policy Research Center in Warsaw, Poland.

I. Conception of the principle of respect for NCI

1. Respect for NCI is a *principle of the EU*

The EU is a unique construct founded on two apparently incompatible elements: the MSs transfer power but stay sovereign. The transfer of power[2] (conferral of competences, Article 1, sentence 1 TEU) undoubtedly limits sovereignty to a degree that it needs to be guaranteed. That is why Article 4(2) TEU simultaneously enshrines two principles:[3] the principle of MSs' reserved sovereignty (a confirmation that EU membership may not affect Statehood itself[4]) and the principle of respect for MSs' NCI (the Union is only possible when MSs' sovereignty and identity are respected).

1.1. A principle: one of the basic elements of the legal status of an integrated State and, within the framework of this status, a counterweight to the principles of integration (Article 1, sentence 1 TEU) and of sincere cooperation[5] (Article 4(3) TEU).

1.2. A principle inherent of the EU (reflecting essential peculiarities of the EU itself[6]) and not merely and not simply of EU law, and even less so a principle of application of EU law, despite the direct link between them.

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[2] I object to the expression "transfer of sovereignty".

[3] See Jean-Denis Mouton, "La défence de l'identité constitutionnelle, révélatrice de la nature de l'Union Européenne," in *Constitutional studies*, 2019, vol. 1, pp. 149–171.

[4] "[I]nherent in their fundamental structures, political and constitutional." I wonder why the MSs, which otherwise formulated several guarantees of that, did not simply write down in the Founding Treaties (FT) that the EU consists of sovereign States or that Member States stay sovereign.

[5] For the relationship between the principle of respect for NCI and the obligation of sincere cooperation, see Opinion of AG Wathelet, C-673/16, *Coman and Others*, EU:C:2018:2, p. 40.

[6] "The national identity … is not only one legitimate objective among others which may be taken into account when examining a possible justification for a restriction on the right to freedom of movement" – Opinion of AG Kokott, 15 Apr. 2021, *V.M.A. v Stolichna obshtina, rayon "Pancharevo"*, C-490/20, p. 82.

1.3. A core principle of the EU, and, as such, it operates transversally, with regard to all EU competences and activities and, accordingly, with regard to all its legal (and other!) acts. The EU may not adopt legal acts and any other measures that breach the principle of respect for the NCI of its MSs. I would venture to argue that a breach of the principle of respect for NCI should be regarded as grounds for invalidity of any EU legal act (further in II, 2.1).

1.4. Article 4(2) TEU must therefore be read as a rule enshrining an obligation of the EU (to respect MSs' sovereignty and NCI) and a right of MSs (a right to protection of NCI).

1.5. In any case, the peculiar nature of the EU and its legal order predetermine the impossibility of the principle (right) of respect for an MS's NCI calling into question the very foundation (or nature) of the Union legal order and making its existence meaningless. Advocate General Kokott argues that "only a conception of national identity which is consistent with the fundamental values of the European Union as enshrined *inter alia* in Article 2 TEU may be protected under Article 4(2) TEU"[7] and that "reliance on national identity must be weighed up against other interests, such as the fundamental rights of the Charter."[8]

In any case, the concept of identity in EU law must be viewed solely in a Union context[9] (see further in 6.1).

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[7] She recalls the Opinion of AG Villalón, C62/14, *Gauweiler and Others* EU:C:2015:7, p. 61, and CJEU, *Sayn-Wittgenstein*, C-208/09, 22 Dec. 2010, EU:C:2010:806, p. 89.

[8] Opinion of AG Kokott, p. 70.

[9] "An autonomous concept of EU law", ibid., p. 70.

2. Regulatory framework

2.1. The concept of national identity was introduced by the Maastricht Treaty.[10] The Treaty of Lisbon enshrined the **principle of respect for MSs' national identity** in Article 4(2) TEU as a counterweight to the principles of integration and of sincere cooperation.[11] That Treaty performed a dual constitutional function.

2.1.1. On the one hand, it reinforced the federal dimension of the Union construct. On the other hand, it categorically reaffirmed the sovereignty of Member States and clearly guaranteed that the EU is not turning into a federation. Apart from the new wordings of Article 1, 2 and 3 TEU, the Treaty of Lisbon enshrined a new Article 4, which builds on the first paragraph of Article 1 (principle of integration) and constitutes the pivotal provision of the entire Union law.

2.1.2. The Treaty of Lisbon re-regulated respect for NCI as a core principle of the EU and as a fundamental right of the integrated State.[12] It significantly modified the provision (including by moving it further up, to Article 4(2) TEU) and linked it directly to the constitutional concept of sovereignty[13] and thus established a formal (and therefore more stable) legal basis for respect for NCI.

2.2. This core principle of the EU which guarantees the fundamental right of the sovereign MS should be read within the context of the

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[10] Paragraph 3 of its Article F expressly stated that "the Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy."

[11] Until Lisbon, neither the MSs had invoked the "clause" nor the Court of Justice had found an occasion to apply it.

[12] Jean-Denis Mouton, "Vers la reconnaissance d'un droit au respect de l'identité nationale pour les *États* membres de l'Union," in *La France, L'Europe et le monde. Mélanges en l'honneur de Jean Charpentier*, Paris 2009, p. 409.

[13] See Jean-Marc Sauvé, "L'ordre juridique national en prise avec le droit européen et international: questions de souveraineté?, *Ouverture*, 10 April 2015, http://www.conseil-etat.fr/Actualites/Colloques-Seminaires-Conferences/L-ordre-juridique-national-en-prise-avec-le-droit-europeen-et-international-questions-de-souverainete (accessed 10 March 2021).

inherently democratic nature of the EU, which is explicitly reaffirmed by the Fundamental Treaties.[14]

2.3. The whole conception of the EU's obligation to respect the identity of its MSs is corroborated by the explicit reaffirmation of the "constitutional traditions common to the Member States"[15] as "core principles" – specifically of the EU itself.

2.4. The new wording of Article 4(2) TEU is narrower: while the TEU as formulated in Maastricht read that "the Union shall respect the national identities of its Member States," then the new wording limits the applicability of national identity to the fundamental, political, and constitutional structures of MSs.[16]

2.5. Thanks to the Court of Justice of the EU, this provision has become a viable legal rule (with regard to all sources of EU law, this principle operates as a "vector of interpretation", and with regard to the primary sources, it also serves as a benchmark of validity), and the conception of a link between national constitutional identity (in its politico-institutional dimension) and national cultural identity has taken hold.[17]

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[14] See Eric Elander Duque, *United In Diversity or Through Diversity? – National Identity As a Flexibility Clause – Granting Member States a Margin of Appreciation*, Lund University, JURM02 Graduate Thesis, Spring 2013.

[15] Article 6(3) TEU and more categorically in the fifth recital of the Preamble to the Charter of fundamental rights.

[16] According the AG Kokott, "the objective of national identity of preserving, as far as fundamental political and constitutional structures…" and "only that function of the clause safeguarding national identity can explain why Article 4(2) TEU has been limited in comparison with the previous provision contained in the Maastricht Treaty" – Opinion of AG Kokott, pp. 87–88.

[17] Jean-Denis Mouton, "Vers la reconnaissance de droits fondamentaux aux États dans le système communautaire" in *Les dynamiques du droit européen en début de siècle. Études en honneur de Jean-Claude Gautron*, Paris 2004, p. 467. See also Martin Sébastien, "L'identité de l'*État* dans l'Union européenne: entre 'identité nationale' et 'identité constitutionnelle'," *Revue française de droit constitutionnel*, 2012, vol. 3(91), pp. 13–44, especially p. 13.

3. Why do EU MSs need protection of their NCI?

A proper understanding of the essence and application of the principle of respect for MSs' NCI requires a rationalization of the underlying peculiarities of the EU and its legal order.

3.1. Essential peculiarities of the EU.

3.1.1. The EU is not an international organization: it is intended to lay down legal rules itself, it is vested with power (competences). The EU is *neither a State* nor *a federation*:[18] it is vested with power but does not possess sovereignty (and is by no means an entity fit to be sovereign).

3.1.2. What is the EU?[19] A structure of integration. A Union of law (governed by the rule of law), vested with power which it exercises (relatively) independently of the States, only up to an extent and within a scope defined by MSs' through the FTs, and only for the attainment of the objectives set by the FTs. **MSs are subordinated to a union which is subordinated to them**.[20] The principle of integration is particularized and framed by four other principles of the EU: *conferral* (which, after the Treaty of Lisbon, has been regulated explicitly in Article 1, sentence 1 and elaborated in Article 5(1) and (2) TEU and reaffirmed in Article 7 TFEU); *expediency* (Article 5(2), first sentence *in fine* and Article 7 TEU); *proportionality* (Article 5(4) TEU); and *subsidiarity* (Article 5(3) TEU).

3.2. Essential peculiarities of EU law.

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[18] We should avoid defining the EU as a federation of whatever kind, and the best thing would be to avoid using at all the concept of "federation" in reference to the EU: the EU is an entity that does not fit into any old terminological garb and does not feel comfortable in them. The concept of "federation" is tired… It rather harms the Union and its correct conceptualization and successful development. What the EU needs is speeding up rather than spelling out!

[19] I have proposed a detailed analysis of the essential peculiarities of the EU in my papers on the most important problems of EU law.

[20] "A structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States" – Opinion 2/13 of the CJEU (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms), 18 Dec. 2014, p. 167.

EU law is not international law but differs fundamentally from it, and its effect in an MS by no means depends on its will (direct applicability).[21] EU law is an autonomous legal system,[22] a "new kind of legal order."[23] EU law is a "system of legal rules binding on MSs and their citizens"[24] (and this is the most substantial reason why NCI needs to be protected). EU law "stems from an independent source of law" with its own "constitutional framework."[25] This autonomous legal order applies in an MS solely on the basis of its own principles of application: *primacy* over domestic law; *direct applicability*; *direct effect* and *indirect effect* (impact) in almost all areas of legal regulation[26] (even in matters that do not fall within the formal scope of competences conferred on the EU[27]). All natural or legal persons subject to the law of all MSs are bound by EU law in all situations covered by it.

It is exactly because of these peculiarities of the EU and its legal order that an understanding of the legal status of an EU Member State is of key importance.

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[21] That is why in Bulgaria Article 5(4) of the Constitution, which regulates the effect of international law, is inapplicable *vis-à-vis* EU law (see Constitutional Court Decision No. 7 of 19 April 2017 in Constitutional Case No. 7/2017) and, accordingly, the Constitutional Court may not review laws as to their compatibility with EU law (Constitutional Court Decision No. 8 of 30 June 2020 in Constitutional Case No. 14/2019).

[22] On p. 170 of Opinion 2/13, the CJEU emphasizes "the autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law!"

[23] Opinion 2/13, p. 158.

[24] CJEU Judgment in *Costa v E.N.E.L.*, 6/64, 15 July 1964.

[25] Page 163, where the CJEU also recalls the judgment where this was first formulated: *Les Verts v Parliament*, 294/83, p. 23. See also CJEU, Opinion 1/91, *European Economic Area*.

[26] See Allan Rosas, *When Is the EU Charter of Fundamental Rights Applicable at National Level?*, Mykolas Romeris University, Jurisprudence, 2012, vol. 19(4).

[27] CJEU, 2 March 2010, *Rottmann*, C-135/08, p. 41.

4. Legal status of an integrated State[28] and right to protection of NCI as an element of that status

I already assumed that, undoubtedly, Member States are sovereign States. Just as undoubtedly, however, their sovereignty is functionally limited. They are "integrated States." NCI should be regarded and perceived precisely as an element of the legal status of an integrated State.

4.1. An integrated State is: a sovereign State (and the EU respects its sovereignty, Article 4(2) and Article 50 TEU); a constituent unit of the EU (first and second sentences of Article 1 TEU); a founder and "dominus" of the EU (Article 1; Article 4(1) and Article 5 TEU); a subordinate State (obliged to comply with all EU law rules: Article 4(3) and Article 19 TEU, including by not applying its own domestic rules that are contrary to EU law); a loyal EU member (Article 4(3)); with NCI that is guaranteed (respected by the EU) (Article 4(2)).

4.2. The integrated State has fundamental Union rights and obligations.

4.2.1. Union obligations: an obligation to assist the EU (in carrying out tasks for the attainment of its objectives); an obligation to comply (to apply ULRs by taking all general or particular measures), and an obligation to refrain (from applying any legal rules, whether national or international, that are contrary to Union rules).

4.2.2. Union rights: positive sovereign rights: a right to sovereignty (being a member as a sovereign State), a right of a founder (determines the objectives, powers and legal *modi operandi* of the EU), and a right to equal treatment in the EU; negative sovereign rights: a right to control over the exercise of the conferred competences (not

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[28] I am borrowing the concept of "status of an integrated State" from my inspired and inspiring tutor, Prof. Jean-Denis Mouton of the Centre Européen Universitaire in Nancy, France. See mainly in Mouton, *La défence*, and Mouton, *Vers la*.... I regard the assertion of this concept – and its understanding – as crucial for the successful development of the EU! See also Béligh Nabli, *L'état intégré. Contribution à l'étude de l'État membre de l'Union européenne*, Paris 2019, and Laurence Potvin-Solis (ed.), *Le statut d'état membre de l'Union Euorpéenne*, Bruylant 2018.

to comply with any ULR constituting an act *ultra vires*), and a right to identity (not to comply with any ULR that is contrary to its NCI).

4.3. Protection of NCI as an element of the status of an integrated State.

4.3.1. Respect for an MS's NCI manifests respect for its sovereignty, frames the conferred competences and the primacy,[29] and counterbalances (counterweighs) the principles of conferral, sincere cooperation,[30] direct applicability, direct effect and primacy. Owing to its reserved sovereignty, MSs may incidentally deviate from a Union obligation. Because they are loyal EU members, MSs can only do so with the assistance (approval) of the CJEU. And because the EU respects NCI, the CJEU endeavours to confirm respect for NCI – except where the unity and effectiveness of EU law are directly jeopardized.

4.3.2. On the face of it, this is a vicious circle which depends solely on the well-intentioned dialogue between the NJs and the Union jurisdiction. A dialogue requiring a "European-law-friendly" approach (*Europarechtsfreundlichkeit*[31]) from the national courts and an "identity-friendly" or "sovereignty-upholding" approach from the CJEU… This means that the national courts should invoke NCI only when they really find that this is substantially justified, and that the

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[29] See Armin Von Bogdandy, Stephan Schill, "Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty," *Common Market Law Review*, 2011, vol. 48, pp. 1417–1454, or Stefano Mangiameli, "The European Union and the Identity of Member States," *L'Europe en formation*, 2013, vol. 369(3), pp. 151–168.

[30] For the interconnection with the principle of sincere cooperation and with the principle of conferral in the EU, see particularly topical in the Opinion of AG Kokott, pp. 83–85. She clearly points out that "a reading of that provision in the context of Article 4 and the other provisions under Title I of the Treaty on European Union reveals that that concept also has a vertical dimension, that it to say the Treaties confer on it a role in the delimitation of competences between the European Union and the Member States" (p. 83).

[31] To use the term of the German Constitutional Court in BVerfGE 123, 267 – Lisbon Decision (Lissabon-Urteil). See, e.g., Elisabetta Lanza, "Core of State Sovereignty and Boundaries of Union's Identity in the *Lissabon – Urteil*," *German Law Journal*, 2010, vol. 11(4), pp. 399–418.

CJEU should always respect NCI whenever the foundations of the Union legal order are not substantially jeopardized.

Which, after all, means *very rarely* (lest the Union legal order be undermined) but *effectively* (lest MSs' sovereignty be undermined).

4.3.3. Sincere cooperation is a natural necessity for the EU. A reading of the CJEU's case-law clearly shows that the power of the EU does not impede the sovereignty of MSs and the sovereignty of MSs does not impede the EU. The primacy is an existential necessity.[32] But it is unfeasible unless it is limited functionally (it manifests itself only when a domestic law comes into conflict with it) and in terms of subject-matter (it does not apply in case of an act *ultra vires* or an infringed NCI[33]).

4.3.4. Therefore, *invoking NCI makes sense only for the purpose of deviating from primacy*: refusing to apply a ULR that is incompatible with NCI! But then, however, the only way to protect NCI is to obtain a ruling from the CJEU! (see further in II. 1).

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[32] "[T]the fundamental principle that the Community legal system is supreme" (CJEU, 10 Oct. 1973, *Variola*, 34/73) and "existential necessity for supremacy" (Pierre Pescatore, *L'ordre juridique des Communautés européennes*, Liège 1975, p. 209, esp. p. 227).

[33] I think it should be beyond dispute that every constitutional court is competent: to interpret (and to ask the CJEU to interpret) the FTs in accordance with the principle of respect for NCI and to review any Union legal act as to compliance with the limits of the competence conferred on the EU (review as to *ultra vires*) and as to respect for NCI (and, by a reference for a preliminary ruling, to ask the CJEU to declare invalidity). See, to this effect, the case-law of certain constitutional jurisdictions: Conseil constitutionnel de France, Décision no. 2004–505 DC, 19 Nov. 2004, § 10, 12–13; Décision no. 2006–540 DC, 27 July 2006, § 19; Décision no. 2006–543 DC, 30 Nov. 2006, § 6; Bundesverfassungsgericht, 2 BvE 2/08, 30 June 2009, § 234, 240, 332, 339; 2 BvR 2735/14, 15 Dec. 2015, § 44; Tribunal Constitucional de España, Declaración 1/2004, 13 Dec. 2004, § 35, 37–45, 58; Sentencia 26/2014, 13 Dec. 2014, § II.3.

See also Jan Komarek, "National constitutional courts in the European constitutional democracy," *International Journal of Constitutional Law*, 2014, vol. 12(3), pp. 525–544; and Laurent Dechatre, "Karlsruhe et le contrôle ultra vires: une 'source de miel' pour adoucir la très acidulée décision Lisbonne," *Revue des affaires européennes*, 2009–2010, no. 4, pp. 861–873.

5. In sum: respect for MSs' NCI in its two aspects (political-institutional and cultural-historical[34]) is a principle that is inherent to the nature of the integration construct and a fundamental Union right of the integrated State

Thus, there is a distinct boundary to the limitation of sovereignty and the primacy of EU law: they may not affect the essential elements of MSs' NCI.[35] But then, there is also a boundary to MSs' right to protect their NCI: it may not affect the essence, the raison d'*ê*tre and the core principles of the Union legal order!

At the end of the day, respect for NCI presents a significant tangible opportunity for an incidental restriction of the effect of particular ULRs. This protection, however, remains just an extremely limited exception to the general effect (and *raison d'être*!) of Union law. Presumably, this is an exception that confirms the rule. And the rule undoubtedly remains that any Union law rule prevails over any MS's domestic law rule.

This protection can only be implemented in practice if there is a conflict (with an essential element of identity – further in 6.3) and only provided that it is confirmed (recognized) by the CJEU (further in II. 1).

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[34] About e.g. linguistic identity, see further CFI, 20 Nov. 2008, *Italian Republic v European Commission,* T-185/05; CJEC, 5 March 2009, *UTECA*, C-222/07 (Opinion of AG Kokott); CJEU, 12 May 2011, *M. Runevič-Wardyn*, C-391/09, but also CJEU, 16 April 2013, *A. Las*, C202/11 (negative judgment!).

See also the landmark case CJEU, 8 March 2011, *Ruiz Zambrano*, C-34/09, in which the CJEU found against Belgium inferring arguments from … Belgian identity!

[35] Laurent Dechâtre, "L'identité constitutionnelle comme limite à l'ouverture au droit international et Euorpéen en Allemagne et en France," in É. Lagrange, A. Hamann, J.-M. Sorel (eds.), *Si proche, si loin: la pratique du droit international en France et en Allemagne*, Collection de l'UMR de droit comparé de Paris, Université de Paris 1, vol. 29, pp. 57–86.

"National identity … was conceived to limit the impact of EU law in areas considered essential for the Member States and not only as a value of the European Union which must be weighed against other interests of the same ranking" – Opinion of AG Kokott, p. 86.

6. Concept of national constitutional identity (scope)

The conception of respect for NCI as a core principle of the EU and an element of the legal status of a Member State, set forth here, necessitates an understanding of the concept of NCI in **three separate dimensions**: as an autonomous Union concept, as a comprehensive concept, and as a concept reflecting only specific material peculiarities of a particular MS.

6.1. For the purposes and within the framework of EU law, **NCI is solely and exclusively a Union concept**, which is based on the TEU but is fleshed out in the CJEU case-law.

6.1.1. Identity means one thing in EU law and another thing outside EU law, say, in national constitutional law. The meaning and understanding of identity outside EU law can only serve as a source of inspiration for its interpretation in a Union context (in EU law). What matters to EU law are only those NCI elements that are (or can be) relevant to EU law.[36] The criterion will be the conception of the scope of EU law. Reliance on a national constitutional rule for the protection of NCI will only be possible in case that rule falls within the scope of EU law.

6.1.2. The right to protection of NCI can only be exercised in case of a conflict. Therefore, even if they enshrine NCI elements, a number of provisions of the national constitutions, identifiable as they are as falling within the scope of EU law, cannot come into conflict, whether directly or indirectly, with any ULR.[37] A key tool for the

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[36] Thus, the Bulgarian Grand National Assembly is a typical example of a NCI element that is irrelevant to EU law. Such an institute does not exist in any other European constitution, but it is not linked to EU law. The Grand National Assembly is competent to amend some basic provisions of the Constitution, but it cannot fall within the scope of EU law and, respectively, cannot come into conflict with its rules.

[37] One interesting example is Article 1 of the Bulgarian Constitution. It defines Bulgaria as "a republic with a parliamentary system of government" (undoubtedly a national specificity) and states that

> "[t]he entire power of the State shall derive from the people," "[t]he people shall exercise this power directly and through the bodies established by this Constitution," and that "[n]o part of the people, no political party nor any other organization, state institution or individual shall usurp

avoidance of a conflict between a rule of the national constitution and EU law can (and must!) be the mechanism of interpreting the national rules in conformity with EU law.

6.1.3. The exact content of the concept may vary by MSs and, owing to its very nature, cannot be defined without taking into account the MSs' conceptions of their identities.[38]

6.2. **Identity is complex: "national identity" is constitutional, and "constitutional identity" is national.**[39] Even though the two concepts are used as synonyms,[40] I believe that a single concept is needed, combining both adjectives because of the material significance of each one of them.

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the expression of the popular sovereignty" (which is a direct flashback to the recent totalitarian past). Read broadly (including by the Constitutional Court – see Bulgarian Constitutional Court Decision No. 7 of 19 April 2018 in Constitutional Court No. 7/2017 (*CETA*)), these rules do not impede membership of the EU and the effect of EU law and cannot come into conflict with a EU law rule, even though they fall within the scope of EU law.

[38] "An autonomous concept of EU law.… The precise content of that concept is likely to vary…, cannot be determined without taking into account the Member States' conceptions of their national identities.… The obligation for the European Union to respect the national identities of the Member States may be understood as an obligation to respect the plurality of views and, therefore, the differences which characterise each Member State.… For that reason, the concept of national identity cannot be interpreted in the abstract at European Union level" – Opinion of AG Kokott, pp. 70–72.

[39] For an original interpretation, see, e.g. Martin, *L'identité de l'État dans l'Union Européenne*.…

[40] See Denys Simon, "L'identité constitutionnelle dans la jurisprudence de l'Union européenne," in L. Burgorgue-Larsen (ed.), *L'identité constitutionnelle saisie par les juges en Europe*, Pedone 2011, p. 27; F.-X. Millet, "National Constitutional Identity as a Safeguard of Federalism in Europe," in L. Azoulai, L. Boucon, F.-X. Millet (eds.), *Deconstructing EU Federalism through Competences*, EUI Working Papers, Law 2012/06, p. 58; T. Konstadinides, "Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement," *Cambridge Yearbook of European Legal Studies*, 2010, vol. 131, p. 195, esp. p. 197; L.F. Besselink, "National and Constitutional Identity before and after Lisbon," *Utrecht Law Review*, 2010, vol. 6, pp. 36, 37 and 43–44; M. Claes, "Negotiating Constitutional Identity or Whose Identity Is It Anyway?" in M. Claes, M. De Visser, P. Popelier, C. van De Heyning (eds.), *Constitutional Conversations in Europe*, Brussels 2012, pp. 205–206, 218 and 221.

6.2.1. In my opinion, the correct concept (and the actual institute of Union law) is precisely **"national constitutional identity"**. Constitutional identity is nationally driven, and national identity is constitutionally expressed. The national identity of every State is based on (and is not merely a part of) its constitutional identity. Conversely, the constitutional identity of every State is a prime exponent of its identity as a nation State. Constitution and nation are in a direct and close dialectical link. The State is a legal form of the nation.[41] The constitution is a basic act of the established national identity and a basic tool for its preservation. In turn, national identity is the core and, in value and historic terms, the *raison d'être* of the constitution.

Therefore, the **EU actually respects the historic and legal Trinity of "nation-identity-State"**. The expression "The Union shall respect … their [MSs'] national identities, inherent in their fundamental structures, political and constitutional" should be understood in no other way but as a principle of respect for MSs' national identity in its constitutional manifestation.

6.2.2. Identity, as referred to in Article 4(2) TEU, is an identity of the State per se, and not an identity of any individual State structures or of the nation itself.

6.3. Identity manifests:

- in a formal aspect: political-institutional constitutional specificities (form of State and form of government, including regional and local autonomy and/or self-government, and political regime),

[41] Certainly, history knows examples of state entities that were not based on a distinct nation. And, conversely, the French State is an *état-nation* (nation state). See, e.g., M. Wendel, "La jurisprudence du Conseil constitutionnel français et du Tribunal constitutionnel fédéral allemand sur l'évolution des traités européennes. Un conte d'aiguilleurs et de gardiens du droit," in É. Lagrange, A. Hamann, J.-M. Sorel (eds.), *Si proche, si loin: la pratique du droit international en France et en Allemagne*, Collection de l'UMR de droit comparé de Paris, Université de Paris 1, vol. 29, pp. 87–125.

- and in a value aspect: history, culture (including linguistic diversity or a monolingual regime), traditions and more generally an internal idea of national identity.

Hence the **Union concept of NCI** is not based on a general or abstract conception of identity but is **limited to the constitutionally-expressed national identity elements**. All elements of constitutional identity are national, but not all elements of national identity are constitutional. In the EU, protection is only enjoyed by those national identity elements that are enshrined/expressed in the national constitution. What is protected is not national identity in general (with all possible conceptions and outlines) but only the constitutionally objectified national identity. In its settled case-law, the CJEU has recognized only such national identity elements that are objectified in the national constitution.

6.4. **Identity reflects only *particular peculiarities of a particular State*.**

6.4.1. In all cases, "identity" solely and precisely implies "difference", specificity, peculiarity, own characteristic, a distinguishing feature. The dissimilar rather than the similar! Not in the sense of "integrating factor" or "common identity" but in the sense of "standing apart" and even "unique".[42]

6.4.2. The national identity of an MS is what essentially/substantially differentiates it from the other States. A peculiarity that is inherent precisely to that MS[43] on account of its historical, cultural, political or legal traditions and/or specificities, not necessarily all

[42] Whether the CJEU always recognizes a NCI element of a MS specifically in the sense of a unique distinguishing peculiarity is an entirely different matter. In *Omega*, for example, the national peculiarity of protecting human dignity is strongly overrated – this is undoubtedly a principle that is inherent to a sufficiently equal degree to all democratic constitutions…

[43] I would use, as a point of reference, Article 36(1) of the Bulgarian Constitution, which defines the study and use of the Bulgarian language as "a right and an obligation of every Bulgarian citizen."

at once. There are two keywords here: "essentially" (inherently) and "differentiates".[44]

6.4.3. The CJEU's settled case-law lacks examples of a "group identity" being recognized to several MSs. Such an option, though, should not be ruled out. I think it should be beyond doubt that, say, religion could be a differentiating factor common to several MSs for identifying NCI elements of each one of them. As we have already seen, features of an NCI element – for one or more MSs with a delicate ethnic balance of the nation or a particular cultural and historical trails – can be found, say, in the treatment of migrants, in connection with the ethnic as well as the religious or cultural characteristics of the migrating groups of people.[45] The shared communist past of twelve EU MSs, too, can be a factor for identifying NCI elements of several of these MSs: certainly, again only in the context of the constitutional expression of these elements.[46]

6.4.4. It is because of its nature of an essential/inherent element of the Constitution that NCI enables the individual MS – incidentally and only that MS! – to deviate from Union law. Even a fundamental right, like the protection of human dignity, which is otherwise protected by every democratic constitution, may have different national dimensions according to the CJEU. And, in some MSs, may be a manifestation/element of their NCI (the CJEU already held that with regard to Germany and Austria in *Omega*[47] and *Wittgenstein*[48] precisely because of their common historical legacy of the fascist regime, which affects their national conception of human

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[44] "[t]he objective of national identity of preserving, as far as fundamental political and constitutional structures are concerned, the particular approaches specific to each Member State" – Opinion of AG Kokott, p. 87.

[45] See, e.g., Pietro Faraguna, "Constitutional Identity in the EU – A Shield or a Sword?" Special Issue, "Constitutional Identity in the Age of Global Migration," *German Law Journal*, 2017, vol. 18(7), p. 1617.

[46] Similarly, it seems to be beyond doubt that common elements in the constitutional identity of several MSs which not too long ago were more or less under the rule of the Ottoman Empire can be identified and stood up for.

[47] CJEU, 14 Oct. 2004, *Omega*, C-36/02.

[48] CJEU, 22 Dec. 2010, *I. Sayn-Wittgenstein*, C-208/09.

dignity), whereas the same cannot be established (proved) with regard to other MSs…

6.4.5. NCI reflects precisely what is specific to the individual State,[49] whereas what is common is enshrined in the formula of "constitutional traditions common to the Member States".

6.4.6. NCI is always protected through an identified element. There is no such thing as "NCI in general", and nobody could formulate it in general terms. NCI always manifests itself specifically: as an enhanced protection of human dignity;[50] an enhanced protection of the national language;[51] or, conversely, a monolingual regime;[52] constitutional protection (status) of the family and the different sex of the individuals who are marrying (and/or of the parents), which would be the case, say, with the Bulgarian Constitution (a highly topical issue – see in the Conclusion); the constitutional status of religion – or the complete lack of such status (in the secular State, as in France), etc. Therefore, NCI should always be invoked before the CJEU by arguing that a specific NCI element has been affected and not NCI as a whole/in principle. Accordingly, the reliance should be on a specific – and moreover constitutional – manifestation of NCI.

6.4.7. Only an essential NCI element may be relied upon for the exercise of the right under Article 4(2) TEU. To qualify as essential, an element should be *explicitly enshrined in the national constitution or should be inferable from its spirit* on the basis of historical, cultural and other factors, including traditions, national character and value system.

6.4.8. The content of NCI (even of an individual MS) may not be determined in advance, abstractly or in principle. It is determined on a case-by-case basis, proceeding from *two cumulative*

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[49] "Within the scope of national identity within the meaning of Article 4(2) TEU, which means that EU law must respect differences in values and views" – Opinion of AG Kokott, p. 98.

[50] CJEU, 14 Oct. 2004, *Omega*, C36/02, and CJEU, 22 Dec. 2010, *I. Sayn-Wittgenstein*, C-208/09.

[51] CJEU, 12 May 2011, *M. Runevič-Wardyn*, C-391/09.

[52] CJEC, 5 March 2009, *UTECA*, C-222/07 (Opinion of AG Kokott).

assessments: a national assessment (above all by the NJs and in the first place by the constitutional jurisdiction) and by the Court of Justice of the EU. Invoking an essential NCI element, however, "cannot be subject to a review of proportionality (a step of which involves analyzing the necessity of a measure in the light of the objective pursued)."[53]

6.4.9. The NJs' assessment is leading, whereas the CJEU's assessment is decisive. Hence – over and over again… – the dialogue between the NJs and the CJEU is uncircumventably important for the certainty and effectiveness of the Union legal order.

It is exactly this conception that calls for a clear reading of the mechanisms for the exercise of the right to protection of NCI and their consequences (further in II and III).

6.5. **The principle enshrined in Article 4(2) TEU is a principle precisely of respect for MSs' NCI.** The expression "the Union shall respect" (*l'Union respecte*) denotes a state of compliance, of inviolability. The principle finds expression in a right to protection of NCI: a Union right of the MSs which is exercised before/through the CJEU (and, preceding that, by and/or before the national bodies – see in II). When a Union legal act "disregards" NCI, that act breaches the principle – and hence violates the right to protection. To that extent, it is possible to speak of a "principle of respect for NCI", as well as of a "right to protection of NCI" (as an implementation of the principle).

6.6. The CJEU's assessment inevitably depends on the regime of the EU's competences – and the scope of the conferred competence regarding the matter at issue. It should be beyond doubt that the options for protection of NCI are considerably broader in the areas outside the exclusive competences of the EU. These options are broadest in the

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[53] Opinion of AG Kokott, p. 107. "If the obligation to respect national identities within the meaning of Article 4(2) TEU is therefore intended to preserve the fundamental political and constitutional structures specific to each Member State and thus demarcates the limits of the European Union's integrative action, it follows that the Court may carry out only a limited review of the measures adopted by a Member State for the purposes of safeguarding its national identity. By contrast, a review of the proportionality of those measures would reduce national identity to a mere legitimate objective" (p. 90).

matters of support, coordination or supplement (Article 6 TFUE).[54] The assessment as to whether and with regard to which matters the MS has "reserved competences"[55] will obviously be leading.

6.7. At the end of the day, **respect for NCI** enables an individual MS (and the natural or legal person subject to its law) to deviate incidentally from obligations which arise out of EU law: to fail to apply ULR, to apply a DLR which is contrary to EU law, to disobey the principle of sincere cooperation (by failing to take all appropriate measures to ensure fulfilment of EU law or to take measures which could jeopardize the attainment of the Union's objectives). That is why it is crucial to ensure a balance between the exercise of the right to protection of NCI, on the one hand, and the unity and effectiveness of EU law and the fundamental values of the EU, on the other hand.[56]

Which casts the Court of Justice of the EU in an uncircumventable role. That is why in II I will discuss the mechanisms for the exercise of this right before the CJEU.

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[54] "It may be inferred from the Court's judicial practice that the intensity of the review of national measures restricting fundamental freedoms depends, in general, on the degree of harmonisation of the matter in question. In so far as a matter has not (yet) been the subject of harmonisation at European Union level or falls within the competence of the Member States, the Court grants the Member States a broad discretion" – Opinion of AG Kokott, p. 89.

[55] "The situation is different, however, where the act requested on the basis of EU law is actually capable of altering the national institution or conception, thus encroaching on the exclusive competence of the Member States in the area concerned. That may be the case in particular where the rules which are at the heart of the conception that the Member State concerned is seeking to protect as its national identity are at issue.… In the case of such a fundamental expression of national identity, it is therefore necessary to restrict the intensity of the review in order to preserve the existence of areas of substantive powers reserved for the Member States within the scope of EU law" – ibid., pp. 95–96. See, to this effect, also Opinion of AG Maduro, C-135/08, *Rottmann*, EU:C:2009:588, pp. 24–25.

[56] See Opinion of AG Villalón, C62/14, *Gauweiler and Others*, ECLI:EU:C:2015:7, p. 59.

II. Application of the principle of respect for NCI

1. Is seizing the CJEU mandatory?

1.1. **The determining factor here is the requirement inherent to EU law for uniform application in all MSs**,[57] without which it would lose its *raison d'être*.[58] It is the reason for the CJEU to rule that there is an absolute boundary to respect for NCI: it cannot undermine the unity and primacy of EU law.[59]

1.1.1. Protection of NCI without a ruling by the CJEU would constitute an infringement of EU law.

1.1.2. Without a ruling by the CJEU, invoking NCI would remain an unlimited and unlimitable option that MSs would be able to exercise arbitrarily – which, beyond a doubt, would substantially undermine the unity and primacy of EU law. If a ruling by the CJEU is considered optional, States would undoubtedly prefer to exercise their right to protection of NCI without resorting to it.… And the presumption of the national judge's "ethics of responsibility"[60] is far from sufficient.

1.1.3. NCI reflects… the national conception, but can perform its Union function (to impede the primacy) only when it fits into the general context of EU law which can only be provided with a binding reading by the CJEU. Which is the reason why NCI cannot

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[57] See further in CJEU, 1 Dec. 1965, *Firma Schwarze*, 16/65. See also Marco Darmon, *Opinion*, *Johnston,* 222/84; *San Michele*, 9/65, p. 35, and *Kreil*, C-285/98.

[58] Back since the landmark and, therefore, historic judgment in *Costa v E.N.E.L.*, 4/64, and even with regard to national constitutions back since CJEC, 9 March 1978, *Simental*, 106/77.

[59] CJEU, 26 Feb. 2013, *Melloni*, C-399/11, p. 59, where the Court held that even respect for national constitutional identity cannot be allowed to impede the unity and primacy of EU law! In my opinion, though, the view that the primacy cannot be affected is debatable: after all, the protection of NCI makes practical sense specifically in escaping from the primacy and, to this effect, from the unity of EU law…

[60] See J.-M. Sauvé, Introduction, in *La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*, Table ronde organisée par le Conseil des barreaux européens, 20 May 2011, Luxembourg.

always be respected – because a balance needs to be found (see *Melloni*[61]).

1.2. **The CJEU is the only one that can make a supranational assessment of national identity.** In the first place, by establishing objectively whether a "peculiarity" of a particular State applies and, in the second place, by determining whether the deviation from a Union obligation jeopardizes its unity and *raison d'être*.[62]

1.3. That is why I consider it essential to assume that **the protection of NCI in the EU is only possible with the approval of the CJEU**. Why should we feel ill at ease using this expression or replace it with euphemisms like "assistance"? Without the CJEU's approval, EU law would be infringed…

1.4. That is why, procedurally burdensome as it may be, **each particular instance of a conflict between a ULR and an NCI element**[63] must be referred to the CJEU except where the identity is obviously complete.[64]

1.5. **The CJEU may not review *proprio motu* the Union legal acts as to compliance with the principle of protection of NCI** (above all because of the material significance of the national assessment). Respect for NCI is an obligation of the EU itself rather than of the CJEU.[65] An obligation of the CJEU arises only if a Union act/rule/measure is challenged before it as coming into conflict with Article 4(2) TEU.

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[61] CJEU, 26 Feb. 2013, *Melloni*, C-399/11.

[62] And, probably, also in order to reaffirm its monopoly over the assessment of NCI, the CJEU evinced a demonstrative inclination to act with utmost responsibility when handling every case in which NCI is invoked, and even went so far as to "flirt" with the national jurisdictions (especially the constitutional ones): landmark in CJEC, 14 Oct. 2004, *Omega*, C-36/02, and CJEU, 22 Dec. 2010, *I. Sayn-Wittgenstein*, C-208/09…

[63] A ULR may be in conflict with a NCI element in a particular situation and not in conflict in another particular situation…

[64] But even then, yet again the Commission can find that the situation is not identical and bring an action under Article 258 TFEU, so that the CJEU would rule whether the situation is identical (and, respectively, whether the State can benefit from its previous ruling) or not, whereupon, acting on a new plea, it would assess whether the NCI of that MS is affected or not…

[65] See E. Cloots, *National Identity in EU Law*, Oxford University Press, 2015.

The CJEU may rule only on an NCI element that is explicitly referred to. Inferring such an element on its own initiative would be tantamount to admitting that the CJEU is competent to interpret the national constitutions, but such competence would be incompatible with its powers and role. Recognition of NCI is initiated at the national level and is assessed at the Union level (by the CJEU).[66]

2. The right to protection of NCI can be exercised in the presence of three prerequisites and one condition:

2.1. Prerequisites for the exercise of the right to protection of NCI:

- the national constitution, rather than any other domestic rule whatsoever, has been affected,
- a particular NCI element (a particular NCI manifestation)[67] has been affected,
- and there has been a conflict (the affected NCI element has to be impaired/infringed/jeopardized).

2.2. Condition: the unity of EU law must not be substantially undermined.[68]

In any case, the recognition of NCI of one MS may not justify *per se* the deviation of another MS from its Union obligations. Even where the relevant constitutional rules in the two States' constitutions are completely identical.[69]

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[66] "The starting point for interpreting Article 4(2) TEU is the information provided by the referring court and the Member State concerned, which has a broad margin of discretion in that regard" – Opinion of AG Kokott, p. 73.

[67] Accordingly, a clear reference to a particular NCI element is key whenever the CJEU is seized.

[68] I reiterate that, in my opinion, undermining the primacy *per se* does not suffice to disregard NCI because NCI's *raison d'être* lies nowhere else but in an incidental escape from the primacy (see above in 4.3).

[69] Precisely because the common conception of NCI presupposes an element of "own specificity", whereupon one and the same rule can even textually express a NCI element of one MS but not a NCI element of another MS. I am afraid that constitutional rules regarding human dignity are a case in point (upheld for

3. Mechanisms to call for a ruling by the CJEU (exercise of the right to protection of NCI)

In my opinion, protection of NCI can be implemented in **only three proceedings before the CJEU**. I do not subscribe to the view that reliance on NCI is also possible in the procedure under Article 7 TEU because I do not think it is conceivable that an MS would invoke an element of its NCI to justify a "serious breach of the values of the EU"…

3.1. **Action for annulment (Article 263 TFEU).** This option is unknown in the CJEU's case-law, but I regard it as feasible.

3.1.1. The legal basis is an "infringement of the Treaties", as provided for in the second paragraph. If we assume that protection of NCI is a principle of the EU or at least a right of an MS (above in I. 1 and 4), its breach should undoubtedly be treated as a "breach of the Treaties".[70]

3.1.2. The right to bring an action will, needless to say, belong exclusively to an MS (under the second paragraph) and to any individual (under the fourth paragraph).

3.1.3. The legal capacity to be a defendant and the subject-matter of the case are unchanged: any act of an institution, body, office or agency of the Union will be subject to review under the first paragraph (instituted on an action brought by an MS) or under the fourth paragraph (instituted on an action brought by a natural or legal person).

3.1.4. The jurisdiction is unchanged: the rules of Article 256 apply.

3.1.5. The procedural time limits and rules are unchanged, too.

3.1.6. The petitum (plea), however, is undoubtedly specific: an essential peculiarity of the principle/right under the second paragraph of

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Germany and Austria on account of their recent historical and political past, but probably not for another MS in respect of which the same grounds cannot be admitted. After all, it could be argued that a typical rule-of-law principle like human dignity has a nuanced reading … in each MS!)…

[70] In my opinion, it can be qualified as "unconstitutionality", if we assume that protection of NCI is an element of the "basic constitutional charter" of the EU as a "Community based on the rule of law."

Article 4 TEU is that NCI is always assessed subjectively, with regard to a particular MS (or, possibly, several), which is why solely relative ineffectiveness can be claimed by an action under Article 263, i.e. invalidity limited to a particular State (a relative invalidity).

3.1.7. The CJEU's ruling has *effect inter partes* and a *relative effect erga omnes* (further in III).

3.1.8. In my opinion, this view can be adopted without a need to supplement the FTs. It appears feasible, considering the CJEU's well-intentioned approach so far to the invocation of NCI, so all it takes is for somebody to bring such an action…

3.1.9. I believe that (precisely because NSI is a peculiarity of the individual MS), whenever it is seized under Article 263 on the grounds of NCI, the CJEU must seek the opinion of/consult the constitutional jurisdiction of the MS concerned (under the procedure of Article 23 of the Statute of the CJEU, by giving a broad interpretation, or at least freely, using the *amicus curiae* mechanism).

3.2. **Objection (Article 277 TFEU) in proceedings for infringement (258 TFEU).**

3.2.1. Legal basis. Any failure to fulfil a Union obligation constitutes an infringement of EU law within the meaning of Article 258 TFEU.[71] In proceedings before the CJEU, the respondent State has the right to bring an objection of illegality (Article 277 TFEU).

3.2.2. The right to bring an action belongs to the Commission (and, as an exception, to another MS under Article 259, to the ECB or to the EIB under Article 271 TFEU). The Commission has discretion to decide whether or not to bring the matter before the CJEU.[72] This discretion is not subject to judicial review: the possibility of proceedings for failure to act is excluded,[73] and an action for annulment of its acts in a pre-litigation phase is inadmissible because

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[71] See, e.g. CJEC, 1984, *Commission v Italy*, 166/82.

[72] It is not obliged to commence proceedings, see, e.g. CJEC, 1989, *Star Fruit v Commission*, 247/87.

[73] This issue was clarified at the very beginning of the integration process: CJEC, 1966, *Lütticke*, 48/65.

these acts *per se* do not entail direct legal consequences.[74] The MS may not sue for damages based on acts of the Commission in the pre-litigation phase.[75] Should it decide to *seize* the CJEU, the Commission does not have to show that there is a specific interest in bringing an action.[76]

3.2.3. In the pre-litigation phase of the proceedings, in response to a letter of formal notice and/or a reasoned opinion, the State may invoke its NCI. In my opinion, the Commission is not competent to find on its own that NCI has been affected (and to cease the pre-litigation proceedings for lack of infringement) but is obliged to bring the matter before the CJEU.[77]

3.2.4. The legal capacity to be a respondent is not affected: only the MS itself (and, as an exception, the national central bank under point (d) of the first paragraph of Article 271 TFEU) is a respondent in cases over an infringement of EU law under Article 258 or 259 TFEU.

3.2.5. The subject-matter of the proceedings (and the petitum of the action) are not affected, either: the Commission asks the CJEU to find an infringement within the meaning of Article 258 TFEU.[78]

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[74] CFI, 2009, *Arizmendi and Others v Council and Commission*, Joined Cases T-440/03, T-121, 171, 208, 365 and 484/04.

[75] Ibid., p. 62.

[76] Settled case law, e.g. CJEC, 1995, *Commission v Germany*, C-422/92; CJEC, 2001, *Commission v France*, C-333/99; CJEC, 2002, *Commission v Spain*, C-191/95 and many others.

[77] In my opinion, reliance on NCI is the only situation in which the Commission is obliged, without discretion, to bring the matter before the CJEU. If it fails to do so, the Commission would usurp the function of the CJEU as a sole interpreter of EU law, and moreover in a matter that is particularly sensitive for the uniform application of EU law.

[78] Any disregard of a Union law rule should be treated as an infringement: secondary source – binding act of an EU institution: exceedingly abundant case-law, for its principles see CJEC, 2000, *Commission v Austria*, C-205/98, p. 43, international treaty of the EC/EU, CJEC, 1996, *Commission v Germany*, C-61/94. Even a failure to act will qualify as an infringement: when an international treaty (the Agreement on the European Economic Area) requires from a MS to adhere to another treaty (the Berne Convention) – CJEC, 2002, *Commission v Ireland*, C-13/00, p. 20. See also CJEC, 2004, *Commission v France*, C239/03, pp. 22–31. For the fundamental legal principles recognized by the CJEU and, among them,

3.2.6. The jurisdiction is unchanged: the rules of Article 256 TFEU apply and the case is heard by the Court of Justice only (in single-instance proceedings).

3.2.7. The procedural time limits and rules are unchanged, too. The proceedings go through a pre-litigation (mandatory) phase and a litigation phase (which, in my opinion, is also mandatory when the State has invoked NCI before the Commission).

3.2.8. When the Commission has brought an action, it is incumbent on the respondent State to adduce arguments in its defence.[79] These arguments should contest convincingly and specifically the facts alleged by the Commission or the consequences flowing therefrom (the infringement).[80] One of the available legal remedies[81] is pleading the ground (objection, Article 277 TFEU[82]). In my opinion, this can be defined as a "plea of relative illegality (unconstitutionality)", based precisely on the principle of respect for NCI enshrined in Article 4(2) TUE.

3.2.9. One thing needs to be specified in connection with the admissibility of the plea. The CJEU's case-law on the admissibility of pleas is ambivalent and, on the whole, restrictive (because of the risk "to jeopardize the stability of the EU legal system and the principle

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the fundamental rights see *Society for the Protection of Unborn Children Ireland*, C-159/90, p. 31. The infringed rule must be binding on the MS concerned.

[79] CJEC, 1988, *Commission v Greece*, 272/86, p. 21.

[80] CJEC, 2005, *Commission v Ireland*, C-494/01, pp. 46–47; CJEC, 2009, *Commission v Italy*, C-249/08, pp. 45–46. That obligation rests with the MS not only because of its own interest in defending itself but also under the duty of sincere cooperation (Article 4(3) TEU) throughout the procedure – CJEC, 2007, *Commission v Italy*, C-135/05, p. 32.

[81] When the MS does not claim a complete lack of infringement, say, because the ULR is inapplicable, the consequences of applicability of that ULR alleged by the Commission are dismissed, or a plea of illegality is brought on other grounds.

[82] According to Article 277 TFEU, the grounds pleaded are those specified in the second paragraph of Article 230 TFEU for the annulment of an act, including illegality due to a conflict with a higher-level source of law: both written and unwritten rules, such as the general principles – see, e.g. CFI, 2001, Joined Cases T-222/99, T-327/99 and T-329/99, *Martinez and de Gaulle v Parliament*, p. 141 et seq.

of legal certainty upon which it is based"[83]): a plea is inadmissible if the State was entitled to bring an action for annulment under Article 263 and did not exercise that right[84] or exercised it unsuccessfully.

The CJEU admits a plea of illegality *vis-à-vis* acts (directives[85] or individual decisions[86]) addressed to an MS only in extremely exceptional cases (if the act contains such a serious defect that it could be deemed non-existent by the Court[87]). The Court takes a more liberal approach when the opportunity to challenge a regulation[88] has been missed. The CJEU is "liberal" only in cases where a Union

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[83] Settled and abundant case-law: CJEU, 1983, *Commission v France,* 52/83; CJEU, 2004, *Commission v Austria*, C-194/01 and many others.

[84] CJEU, 1979, *Simmenthal*, 92/78 and many others.

[85] It is settled case law of the CJEU that a MS cannot plead the invalidity of a directive – CJEC, 1992, *Commission v Germany*, C-74/91; CJEC, 2004, *Commission v Austria*, C194/01, p. 48.

[86] This is a typical act addressed to a MS which it could have contested – settled case law: CJEC, 1993, *Commission v Greece*, C-183/91; CJEC, 2000, *Commission v Portugal*, C-404/97 etc. See also CJEC, 1988, *Commission v Greece*, 226/87, CJEC, 2001, *Commission v France*, C-1/00, p. 101. See also CJEC, 2002, *National Farmers' Union*, C-241/01, p. 39. The CJEU applies a restrictive reading even with regard to a decision addressed to all MS and, as such, fit to be considered an act of general application – CJEC, 2002, *National Farmers' Union*, C-241/01, p. 58.

[87] CJEC, 2000, *Commission v Portugal*, C-404/97. The CJEU holds that a decision which has not been challenged (or which has been challenged unsuccessfully) by its addressee becomes definitive as against that person: CJEC, 15 Nov. 1983, *Commission v France*, 52/83, p. 10; CJEC, 9.3.1994, *TWD Textilwerke Deggendorf*, C-188/92, p. 13, and CJEC, 15 Feb. 2001, *Nachi Europe*, C-239/99, p. 29.

An argument that "a measure is non-existent" with regard to a directive has been upheld on a single occasion so far: CJEU, 29 July 2010, *Commission v Austria*, C-189/09, p. 10, 16–17.

[88] CJEC, 1986, *Commission v Germany*, 116/82, CJEC, 2003, *Commission v European Central Bank*, C-11/00. Another example, of 2008, is particularly interesting: when Spain raised a plea against a regulation whose annulment it had already sought but its action had been dismissed – CJEC, 2008, *Spain v Council*, C-442/04. Moreover, in its plea Spain invoked the same arguments on which its action for annulment had been based (p. 23), but the objection of illegality is not in breach of the principle of *res judicata* if the Court did not rule on the merits in the annulment proceedings (because it dismissed the action as inadmissible, p. 25).

legal act is declared wholly void,[89] which is completely irrelevant to the conflict with the principle of respect for NCI (that can only result in unenforceability).

Owing to the peculiar role of the principle of respect for NCI, MSs' pleas that rely on it should, in my opinion, be always admitted, all the more so if, contrary to the view taken in 2.1, it is assumed that an impairment of NCI does not justify declaring invalidity under the second paragraph of Article 263. In the same vein, I believe that unlimited admissibility should apply to any plea against an act *ultra vires*, to the extent that it, too, affects the fundamental principles of the EU.

3.2.10. The action can be directed against an act or a particular provision.[90]

3.2.11. Certainly, the grounds for an impaired NCI are not monitored by the Court *proprio motu* and they must be stated by a party to the case.[91]

3.2.12. Time limit: a plea of illegality of a ULR/act applicable in the case[92] must be brought as early as possible.

3.2.13. Form: The CJEU is usually tolerant of the way the plea is formulated.[93] In my opinion, though, if the plea is based on an argument of NCI, this must be explicitly indicated and, moreover, be reasoned.

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[89] CJEC, 1988, *Commission v Greece*, 226/87. See also CJEC, 2003, *Commission v Spain*, C-404/00, pp. 40–41. But not in the cases of manifest nullity: a particularly serious and manifest defect which cannot possibly excuse the State concerned for failing to bring an action for annulment under Article 263 (and within the prescribed time limit) – CJEC, 2004, *Commission v Greece*, C-475/01.

[90] Whereupon it will be inadmissible *vis-à-vis* other provisions which are irrelevant to the main action (act), even if they also manifestly contain the same defect – CFI, 2001, *Kik v OHIM*, T-120/99, p. 26.

[91] For the requirement to state explicitly the ground of a plea, whatever it may be, see further in CJEC, 1959, *Fonderies Pont-à-Mousson v H.A. ECSC*, 14/59. The Member State concerned is not in duty to put forward, during the pre-litigation procedure, all the arguments in its defence – CJEC, 1999, *Commission v Spain*, C-414/97, p. 19.

[92] CJEC, 1963, *Barge v H.A. ECSC*, 18/62.

[93] Explicit, implicit or "indirect", implied by the grounds of the plea – see, e.g. CFI, 1996, *Baiwir v Commission*, T-262/94.

3.2.14. Here, I do not think that the CJEU should necessarily consult the constitutional jurisdiction of the MS concerned whenever it gives a ruling under Article 258 or 259. If the respondent State does not invoke arguments adduced in any rulings of its constitutional jurisdiction (given on the same or another occasion), or if no such arguments are available, this concerns only that State's defence. The CJEU can neither restrict nor impose any remedies. Again, however, I consider it appropriate (even though it is the government that solely represents the State before the CJEU) that the Court should ask the opinion of its colleagues of the national constitutional jurisdiction (using the *amicus curiae* mechanism[94]).

3.3. **Preliminary ruling (Article 267 TEU).**

This remedy for NCI must undoubtedly be regarded as strongly recommended as most effective because it can help a State avoid a failure to fulfil an obligation within the meaning of Article 258 and overcome the limitations to the *locus standi* and the short mandatory time limit in the annulment proceedings under Article 263.

Any situation in which the validity or at least the interpretation of an applicable Union rule raises a reasonable doubt naturally imposes an obligation to *seize* the CJEU.

The right to protection of NCI in the Union legal order is a substantive right of the State and of every natural or legal person under its jurisdiction.[95]

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[94] For no other reason than to be able to clarify in depth for itself the interpretation and application of the relevant constitutional provisions and to assess whether it is faced with an essential NCI element and whether that element is infringed (conflict).

[95] While in the proceedings under Article 263, protection of NCI is invoked directly in the relations between the EU and a State or a private individual, and while in the infringement proceedings under Article 258 and 259 TFEU this protection is invoked entirely in the relations between the EU and the MS concerned, the practically broadest option (and, in the vast majority of cases, the only one) to exercise the right to protection available to a private person is to invoke NCI before a national court.

3.3.1. The right to protection of NCI in the domestic legal order of an MS can be exercised by a natural or legal person, public or private, by an act or a failure to act.

3.3.2. In any case, the matter must be referred to a national jurisdiction.[96] The NJ *seiz*ed is obliged to bring the matter before the CJEU if it wishes the arguments for NCI to be upheld. In my opinion, it should be assumed that **no national jurisdiction (be it a court of last instance or not) has discretion to determine whether it needs a preliminary ruling if it holds that an applicable ULR affects NCI**. The discretion of the NJ is limited to dismissing allegations of encroached NCI.

3.3.3. Reference for a preliminary ruling on an action. Any natural or legal person may bring an *action* against a public or private person *for annulment* of any DLR applying EU law in contradiction with NCI. The plea in law is illegality – a conflict with the Constitution and/or with Article 4(2) TEU. The court *seiz*ed – even at first instance! – is obliged to ask the CJEU for a preliminary ruling on an assessment of the validity of the ULR concerned or at least on an interpretation.

3.3.4. Reference for a preliminary ruling on a plea of illegality. Any natural or legal person may plead against a domestic or Union rule on the grounds that it affects NCI. One or more specific rules of the Constitution need to be invoked or, as a last resort, its spirit (but "read" in specific provisions).

3.3.5. Here, the question arises again as to whether the person, if they were entitled to bring an action for annulment under Article 263 and did not exercise that right (or exercised it unsuccessfully), will be entitled to bring an action under their domestic law for annulment of an act/rule applying that ULR or, respectively, to bring a plea of illegality of the ULR concerned (and, accordingly, to request a preliminary ruling on validity).[97] In my opinion, this

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[96] Unless the private person is entitled to bring an action under Article 263 TFEU.

[97] The CJEU does not admit a reference for a preliminary ruling on validity when the applicant in the main proceedings could have sought an annulment of the act – see also CJEC, 1994, *Textilwerke*, C-188/92 and settled case law.

question must be answered in the affirmative, especially if the person has not invoked NCI in the proceedings under Article 263, and the CJEU does not monitor *proprio motu* for such a defect.

3.3.6. Both situations represent an instance of a **manifest doubt regarding the interpretation or validity of a ULR because it can reasonably be assumed that the NCI is encroached**.

3.3.6.1. In the first place, a doubt as to whether there is a conflict between the ULR concerned and the national Constitution. This question comes first in time. **Protection of NCI is necessary (and possible) only when an applicable ULR comes into conflict with the national constitution.**

3.3.6.2. In the second place (after the first doubt or in parallel with it), a doubt as to whether the constitutional rule expresses NCI. Bringing the matter before the CJEU will not be necessary if the judge does not find that the constitutional rule concerned expresses NCI (and will be obliged to leave it unapplied on an equal footing). If the judge has any doubts, they must consult their constitutional jurisdiction before seizing the CJEU.

3.3.7. *De lege ferenda*, I consider it necessary that **provisions should be made to enable MSs themselves to make a reference for a ruling (obviously not a preliminary one) to the CJEU**, at least when a directive is transposed. It would be better to clarify the question in advance so as to avoid a situation in which the State faithfully transposes the directive but, subsequently, in connection with the application of the transposing domestic rules, some national jurisdictions refers the matter to the CJEU or the Commission brings proceedings under Article 258 TFEU over the MS's failure to fulfil an obligation (if these rules are not applied). Only when it lays down transposing rules, the State will be able to establish a specific encroachment on NCI which it was unable to establish when the act was adopted (especially if it did not participate in that adoption, as is the case with an act of the Commission, the ECB, etc.). This is all

the more necessary when the directive concerns a subject-matter on which the national Constitutional Court has already ruled…[98]

4. Who is obliged to seize the CJEU, and does a failure to make a reference for a preliminary ruling infringe EU law?

4.1. In the light of the foregoing considerations about the significance of seizing the CJEU and if we acknowledge that a breach of the principle of respect for NCI is a defect within the meaning of the second paragraph of Article 263 TFEU, then the understanding in the CJEU case law that a request for a preliminary ruling on validity is mandatory (at every instance)[99] will apply as well. A failure by the court of last instance to make a reference for a preliminary ruling on interpretation should also be treated as a failure of the NJ to fulfil a Union obligation within the meaning of Article 263.[100] Especially if, in order to protect NCI, the NJ leaves a ULR unapplied.

Certainly, an obligation is out of the question (and a reference would be inadmissible) if the CJEU has already ruled – but only *vis-à-vis* the same NCI element (if the NJ relies on another NCI element, the reference would be admissible).

In any case I believe that if it has a reason to doubt (or it is convinced) that the NCI is affected, any NJ (and not just the court of last

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[98] Like, for example, the Bulgarian Constitutional Court concerning the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) – Decision No. 13 of 27 July 2018 in Case No. 3/2018.

[99] Settled case law: CJEC, 1987, *Foto-Frost*, 314/85; CJEC, 1997, *Bakers of Nailsea*, C-27/95; CJEC, 2007, *Lucchini*, C-119/05, p. 53. This case law was codified in paragraph 7 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01).

[100] See the landmark judgment in which the CJEU found against the French Council of State for failing to make a reference for a preliminary ruling on interpretation – CJEU, 4 Oct. 2018, *European Commission v France*, C-416/17, ECLI:EU:C:2018:811.

instance) *must* seize the CJEU (even if a failure to do so is not treated as a failure to fulfil a Union obligation).[101]

4.2. It is debatable whether a failure to make a preliminary reference for recognition of NCI constitutes *per se* an infringement of EU law under Article 263.[102] In a complete analogy with the obligation to make a reference for a preliminary ruling whenever a doubt about the validity of a ULR[103] arises, this will be a doubt about unenforceability.

4.3. Undoubtedly, **the NJ is not obliged to seize the CJEU if** the CJEU has already ruled (e.g. on a reference from the Constitutional Court or from another NJ of the same MS) on the same plea, or if the NJ has no reason to doubt that NCI is affected (whether because the Constitutional Court has ruled to that effect or whether because the NJ does not find an essential plea even without a Constitutional Court ruling).[104]

5. Is every national jurisdiction obliged to monitor for NCI *proprio motu* and to seize the constitutional jurisdiction?

In my opinion, both questions must be answered in the affirmative. Each jurisdiction is obliged to monitor for any conflict between a ULR applicable in the case and the national constitution. It is just as obliged to monitor *proprio motu* for compatibility with EU law of each DLR

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[101] If anything, because the obligation of sincere cooperation under Article 4(2) TEU includes an obligation of a "dialogue between the national jurisdictions and the CJEU". In my opinion, this obligation must be shared by the national constitutional jurisdictions as well.

[102] As it is in a number of other cases – see, e.g. CJEC, 1982, *Waterkeyn*, Joined Cases 314–316/81, p. 14; CJEC, 2003, *Köbler*, C-224/01; CJEC, 2003, *Commission v Italy*, C-129/00.

[103] Further in CJEC, 1987, *Foto-Frost*, 314/85, and settled case law: CJEC, *Bakers of Nailsea*, C-27/95; CJEC, *Lucchini*, C-119/05, p. 53 and many others.

[104] It is quite possible, though, that the NJ may ask the CJEU to interpret an applicable/relevant ULR for no reason other than to establish whether the case is relevant to EU law – see CJEU, 26 Feb. 2013, *Åkerberg Fransson*, C617/10.

applicable in the case.[105] A conflict of a ULR with the Constitution directly affects the supremacy of the Constitution.[106] The constitutional jurisdiction must be *seiz*ed whenever it is established that the Constitution is affected – and, above all, in any case where NCI is affected. In order to find a way to avoid a situation, which is intolerable in a constitutional state, of the Constitution being violated or disregarded for whatever reason, be it a EU reason. And in order to enable the constitutional jurisdiction to give the constitutional rule affected with consistent interpretation and thus to eliminate any doubts about a conflict with EU law.

Constitutional jurisdictions "are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect."[107]

Undoubtedly, the **NJ can by itself dismiss an invoked conflict with the Constitution** (regardless of whether NCI is involved or not) for lack of any reasonable doubt about a conflict. If, however, the NJ finds or doubts that there is a conflict, it has the following options:

5.1. Ask the Constitutional Court for a ruling (which I consider essential). For its part, the Constitutional Court can:

5.1.1. Find that the applicable ULR is not in conflict with the Constitution. The referring court will then apply this ULR and the domestic rules on its application.

5.1.2. Provide a consistent interpretation,[108] as a result of which there will be no conflict (and, in my opinion, the Constitutional Court should always seek such an interpretation first!). If needed, the Constitutional Court itself can call the CJEU for an interpretation of the relevant ULR.

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[105] Back since CJEC, 22 Oct. 1987, *Foto-Frost*, 314/85 and settled case law.

[106] In Bulgaria, also its direct effect, Article 5(1) and (2) of the Constitution of the Republic of Bulgaria.

[107] Opinion of AG Maduro, CJEC, 7 Sept. 2006, *Marrosu*, C-53/04, p. 40.

[108] In the sense of Europarechtsfreundlichkeit – see GFCC, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08.

5.1.3. Find (especially after the CJEU has given an interpretation) that a consistent interpretation is impossible (*contra legem*), whereupon the Constitution is violated.

- If it finds the Constitution violated but NCI is not affected, the NJ will be obliged to apply EU law and leave the Constitution unapplied/non-complied with. The national constitutional legislator will have to immediately amend the Constitution.
- If, however, the Constitutional Court finds an NCI element is affected, it can (and, in my opinion, it must) ask the CJEU for interpretation or validity of the relevant ULR. The CJEU may declare that the NCI is affected (so the relevant ULR is inapplicable to that MS) or may reject the arguments for NCI (with the above-mentioned consequences).
- If the Constitutional Court finds the NCI affected without seizing the CJEU, the NJ will be obliged to do so in order to be able to validly leave the ULR unapplied/non-complied with.

5.2. **Not ask the Constitutional Court for a ruling and itself refer the matter to the CJEU**, so as to be able to validly leave the EU law unapplied. It is quite possible that the NJ may have no doubt whatsoever, considering it obvious that the ULR is in conflict with NCI. In *most cases* so far, the CJEU has given rulings regarding respect for NCI on references for a preliminary ruling made by the NJ without a ruling by the constitutional jurisdiction.

5.2.1. **However, none other than the Constitutional Court is better placed to assess the expressions of NCI in the Constitution.** That is why its ruling could help the NJ in reasoning of its future reference to the CJEU, adducing its (more) convincing arguments, but it will also be more engaging for the CJEU itself.

5.2.2. **The most compelling reason** why the NJ should consult the Constitutional Court whenever it doubts (and all the more is convinced) that there is a conflict between a ULR and the Constitution is **the possibility to furnish the constitutional rules affected with a consistent interpretation** and, thus, eliminate the conflict.

III. Consequences of the CJEU's ruling on national constitutional identity

Applying the principle of respect for NCI is only possible through the approval of the CJEU.

1. General consequences

1.1. Any ruling given by the CJEU regarding an MS's NCI has a *res interpretata* effect (*force de chose inerpretée*) *erga omnes*; an effect *inter partes* (with regard to a respondent Member State under Article 258 and 259, with regard to the applicant under Article 263 or with regard to the parties to the case before the NJ in which a reference for a preliminary ruling has been made under Article 267), and a relative effect *erga omnes* (with regard to any natural or legal person in a situation that is identical or sufficiently similar in the same MS).

1.2. If the CJEU upholds the arguments about NCI, the *MS* concerned (*and every* private person *subject to its law*) *will be able to validly divert* from its Union obligation (further p. 3). If the CJEU does not uphold the arguments about NCI, this will imply that the Court finds the *prerequisites* for the exercise of the right to protection of NCI *not available* or *the condition that the unity of EU law should not be undermined*[109] *not fulfilled* (above in II.2).

1.3. In the latter case, the MS concerned will be in breach of EU law (or the natural or legal person would be in such a breach if they fail to apply the relevant ULR). Certainly, it is possible that *nobody will bring an action before the CJEU* under Article 258 or 259 TFEU. It is also possible for the CJEU to be *seiz*ed and find a breach (dismissing the arguments about NCI) but *no action for sanctions* (under Article 260 TFEU)[110]

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[109] Which exactly seems to be the CJEU's conclusion in *Melloni*…

[110] The pursuit of such a case is within the discretion of the Commission which, so far, has on numerous occasions turned a blind eye in cases of clear-cut breaches (albeit not declared by the CJEU) and even of a MS's breach declared by the CJEU

is claimed. If, however, sanctions are imposed, the State will inevitably cease the breach (including, if necessary, by amending its constitution…), unless it decides to withdraw from the EU…

2. Consequences of CJEU's ruling according to the kind of proceeding

2.1. On an action for annulment under Article 263 TFEU.

2.1.1. If the CJEU upholds the action on the grounds of respect for NCI, the only legal consequence of its judgment will be a relative invalidity of the contested ULR (act). The judgment will have effect *inter partes* and a relative effect *erga omnes*. The invalidity declared will have effect *ex tunc* (Article 264) unless the case is referred to in sentence 2. The contested ULR will not be annulled, but the obligations arising out of it will be unenforceable against the applicant – and against any other natural or legal person in an identical situation.

2.1.2. If the CJEU does not uphold the action, the contested ULR/act will continue to entail legal consequences *vis-à-vis* the applicant and any other natural or legal person.

2.2. On an MS's objection in a proceeding under Article 258 or 259 TFEU.

2.2.1. If the CJEU dismisses the MS's objection, the consequences will be the same as upon any breach found by the CJEU under Article 258–260 TFEU. The Court's judgment is *declaratory*, but the State (Article 260, sent. 1) is required to comply with it: to take all necessary measures for compliance with the judgment[111] and to do so within reasonable time.[112] The Commission does not

(see, e.g. a Bulgarian case CJEU, 14 Jan. 2016, *European Commission v Bulgaria*, C-141/14, ECLI:EU:C:2016:8, in which the CJEU found a number of breaches but the Commission has not been proposing sanctions for five years now).

[111] See, e.g. CJEC, 1993, *Commission v Italy*, C-101/91, etc.

[112] The Treaties do not specify such a period, nor does the Court have power to grant a period of time for compliance with its judgment (CJEC, 1996, *Commission*

have to ask the Court to order interim measures,[113] but if there is non-compliance it may bring a case for imposing sanctions (under Article 260(2) TFEU).

2.2.1.1. The obligation to comply with the decision of the Court binds all the institutions of the MS concerned.[114] The measures must be effective and comprehensive (respecting the principle of legal certainty,[115] repealing a domestic rule would not suffice in some cases, a new framework would have to be introduced as well[116]) and must not be imaginary or fraudulent.[117] If the MS nevertheless considers that the ULR at issue is in conflict with its NCI (probably only if this has been declared by the constitutional jurisdiction), this will entail *disregard of the Constitution, which is intolerable in a constitutional State*. So the national constitutional jurisdiction will have to give the constitutional rule affected a consistent interpretation (unless it has already ruled that such an interpretation would be *contra legem*) or (and especially when the constitutional jurisdiction has already declared consistent interpretation impossible!) the national constitutional legislator will have to amend the constitutional rule concerned. The State withdrawing from the EU is also an option…

2.2.1.2. The CJEU's judgment *does not have effect erga omnes*: the duty to comply with it is only on the State whose conduct is held

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v Luxembourg, C-473/93, p. 52), but it holds that taking the necessary measures "must be initiated at once and must be completed as soon as possible" (CJEC, 1988, *Commission v France*, 169/87), *inter alia*, in relation to the obligation of sincere cooperation (settled case law: CJEC, 1988, *Commission v France*, 169/87, p. 14; CJEC, 1993, *Commission v Germany*, C-345/92, p. 5, etc.).

113 CJEC (Order), 1980, *Commission v France*, Joined Cases 24 and 97/80 R, p. 19.

114 Including the national courts – back since CJEC, 1982, *Waterkeyn*, Joined Cases 314/81, 315/81, 315/81 and 83/82.

115 CJEC, 1988, *Commission v France*, 169/87, p. 12.

116 CJEC, 1988, *Commission v Belgium*, 391/85, p. 17.

117 CJEC, 1997, *Commission v Belgium*, C-263/96.

to be a breach (under Article 260(1) TFEU). It can, however, be regarded as a *source of interpretation*.[118]

2.2.2. If the CJEU upholds the MS's objection, its judgment will be *declaratory*, too, and the established inapplicability of the ULR at issue will have effect *inter partes* only, i.e. limited to the MS concerned. The inapplicability will have an effect *ex tunc* – if any legal consequences have ensued at all:[119] the State has not infringed EU law, it can validly deviate from the obligations arising from the ULR, and may continue to pursue the course of the conduct (an act or a failure to act) which the Commission (or another MS) alleged as an infringement in its action before the CJEU. More specifically, this means that:

- the ULR concerned (in conflict with NCI) may be left unapplied in that MS – albeit only in the cases falling within its scope and then only in the cases where the NCI element upheld is affected,
- the obligations arising from the ULR concerned will become unenforceable against the respondent MS and against any private person under its jurisdiction in an identical legal situation,
- any DLR applying the same ULR can be left unapplied and, accordingly, any DLR in conflict with the ULR concerned can be applied,
- a consistent interpretation of a DLR will not be due.

2.3. **On a preliminary ruling under Article 267 TFEU.**

2.3.1. On a preliminary ruling on validity. The CJEU's ruling follows the general economy of the proceedings under Article 263. If the

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[118] Each national court in another MS can conclude that the same arguments are inapplicable in the respective other MS, but this does not automatically imply that the same arguments are unfit *vis-à-vis* another MS.

[119] The CJEU may "exceptionally" limit the effects in time of the judgment in the interest of legal certainty (CJEC, 2002, *Commission v Greece*, C-426/98, p. 42) subject to two conditions: a risk of serious economic repercussions (CJEU, 15 Dec. 2009, *Commission v Finland*, C-284/05, p. 57) and reasonable doubts about the effect of the ULR that is non-complied with (CJEU, 15 Dec. 2009, *Commission v Sweden*, C294/05; in the case CJEC, 2009, *Commission v Poland*, C-475/07, the CJEU dismissed Poland's application that the decision be limited to an *ex nunc* effect, arguing that the applicant did not convincingly invoke an "ambiguous framework" in its response to the Commission's letter of formal notice).

CJEU does not find that the relevant ULR is in conflict with a NCI element (whether because there is no conflict at all or the conflict is not with a constitutional rule expressing NCI), that ULR will remain applicable (with all obligations arising). If the CJEU finds that the relevant ULR is in conflict with NCI, the consequences will be completely identical with those when invalidity is declared under Article 263 TFEU. Again, the Court's judgment (as under Article 263) will have *effect inter partes* (with regard to the parties to the case before the NJ) and *quasi erga* omnes (with regard to all natural or legal persons in an identical situation in the same MS and as a *source of interpretation* in other situations in the same MS or in quite similar situations in another MS).

2.3.2. On a preliminary ruling on interpretation. In fact the reference for preliminary ruling on interpretation ultimately seeks an interpretation as to whether an applicable *ULR is in conflict with NCI*. If the CJEU finds a conflict, the consequences will be the same as upon a reference on validity.

3. To sum up, in my opinion, whenever the CJEU finds a conflict of a ULR with the NCI of a particular MS (in each of the proceedings discussed):

- That ULR will be inapplicable (without being annulled, and even less *erga omnes*).
- The inapplicability, though, will be: *relative*, i.e., limited to that MS, and *partial*, i.e., limited to cases falling simultaneously within the scopes of that ULR and of the constitutional rule expressing the NCI element affected.[120]
- The inapplicability will have an effect *ex tunc*, unless the CJEU states explicitly that the legal consequences entailed (or a part

[120] The inapplicability operates only when the situation/rule is identical *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci*.

of them) are considered as definitive (under Article 264, sent. 2 TFEU).

- The inapplicability of a ULR in conflict with NCI turns free the concerned MS to not fulfil the obligations arising from that ULR for the MS (and, as the case may be, for any natural or legal person).
- The CJEU's ruling will have effect *inter partes* (with regard to the MS under Article 258–259 or to the applicant under Article 263), a relative effect *erga omnes* (with regard to any natural or legal person in a situation that is identical or sufficiently similar in the same MS), and an effect of a source of interpretation (*erga omnes*).
- The recognition of NCI of one MS does not justify another MS's deviation from Union obligations without an explicit ruling of the CJEU (*vis-à-vis* the latter). Such recognition, though, can (only) serve as a source of interpretation ("of inspiration") with regard to similar situations in the same or another MS.

IV. The identities and Bulgarian identity

National identity has not only a legal dimension but also a psychological and nation-psychological dimension, which should necessarily be kept in mind when defining any national constitutional identity element for the purposes of EU law and the application of the principle enshrined in Article 4(2) TEU.

Human identity may have multiple dimensions: sex, age, ancestry, region (we know how emotional relations can be between particular regions within the same State: Germany, France or Italy being a case in point), ethnicity, nationality, State (citizenship), race. In addition, identity may be associated with one's financial situation (rich–poor: "we're poor folks down here" – "they, the rich…"), culture and aesthetics (we remember entire hard-rock generations in certain countries), politics (left–right, pro-Russian and anti-Russian), sports ("We are Man

United"[121] is a distinct and enduring self-identification of a large group of people both inside and outside the United Kingdom). Identity may be moral/ethical. Undoubtedly religious. Certainly linguistic (both in terms of national languages and in terms of regional dialects – even today in Bulgaria, a dialect is a tell-tale sign of the region from where its speaker comes).

Some of these dimensions can be fluid in time: age, gender (provisional as it may be), financial situation, religion or political persuasions, culture and aesthetics, sports, or identifications along other lines. Other dimensions are pre-determined: ancestry, race, ethnicity, nationality, and, yes, (biologically determined) sex. In this sense, some of these dimensions depend entirely on the will and judgment (self-sense or self-definition) of the individual, whereas other dimensions are entirely beyond the person's control and will.

National identity is inevitably integral and much more enduring. It is defined by several cardinal and several additional (and relatively variable) factors:

Cardinal (invariable) factors: historical, geopolitical (neighbours undoubtedly play a role in shaping the national character – the multi-century Bulgarian example with Turkey (the Ottoman Empire) is clear enough, the Russian and German formative influence on the Polish national psyche has been well-researched, and some years ago I became aware of the Austrian influence on the Croatian soul…). Geography is a powerful invariable factor – climate and nature determine probably the most obvious peculiarities of mentality: could anyone possibly compare Arab indolence with Scandinavian vitality, or the work ethic of mountain nations with the laid back *laissez-faire*[122] of littoral fishing nations? And, considering the distinct mark they leave on outer appearance (just compare the faces of a person from Siberia and a person from Algeria…), could anyone possibly deny that climate factors also have a significant impact on the soul?…

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[121] An apt pun on the full name of the Manchester United Football Club…

[122] Essentially, "never mind", "whatever", "anything will do"…

Additional (variable) factors: citizenship, language, religion, political regime. Long-lasting dictatorships in a people's life undoubtedly reflect, but also shape, its character. Short-lived vile regimes also shape the national character – a typical example is the Germans' present-day tolerance, at times going to extremes, which found its most readily identifiable expression in the geopolitically absurd polite invitation extended by German Chancellor Angela Merkel, telling migrants that they were all welcome during the refugee crisis in 2015. And it is no accident that the CJEU held that the apparently neutral constitutional rule in the German Basic Law, stating that "[h]uman dignity shall be inviolable," is an expression of German national constitutional identity! The opposite is just as true: the fact that the German Constitution is the only one in the world whose very first article enshrines human dignity can be explained directly by the country's recent political past, and the position assigned to that provision in the structure of the constitutional text is undoubtedly intended to express a categorical renunciation of the defects of that past.

Even a State's accession to the EU, for instance, also gradually influences national identity: there is no doubt that a number of peoples that were part of the "communist bloc" for a certain period of time perceive and feel the new European identity as a renunciation of the undesired legacy of the recent past! For a number of East European peoples, being "Europeans" is an act of coveted and achieved rejection of "all things Soviet".

The significance of these factors, especially of the historical and geopolitical ones, is enormous and underestimating it dooms the European project to cataclysms.

For a number of peoples that have recently created an independent State of their own for the first time, sovereignty is a supreme value, while the right to self-determination is the right that is most actively safeguarded. And it is, therefore, deeply rooted in their national constitutional identity (and clearly expressed in the positions of their national constitutional jurisdictions). And their resentment of any pushes for "federalization" is bitter and even extreme.

The over-1,000-year-old Poland sings *Jeszcze Polska nie zginęła* – as an expression of proven national ability to survive numerous excruciating challenges to keeping the State's sovereignty. In neighbouring Estonia (whose territory has been under Polish, Danish, Swedish, German, and Russian control throughout the centuries), the State sovereignty regained just three decades ago (in 1990) is a fundamental constitutional value zealously protected by, among others, the Constitutional Court. Undoubtedly, though, the souls of both peoples carry indelible marks of the deal struck at Yalta! Which means nothing to ordinary French or Italians…

There is no way Americans or Germans could understand the Serbs' dramatic sentiment about "the cradle of their nation" – when the Battle of Kosovo took place, the present-day American or German lands were far from any idea of statehood…

There is no way the French (ardent devotees of the idea of a nation-State – État-nation – as they are) could understand the nation-building role of the memory of the blinded soldiers of the Bulgarian Tsar Samuil, because of whom the Byzantine Emperor Basil II was nicknamed "the Bulgar Slayer" – no ruler has ever come even close to victories that would earn him the nickname of "the Frank Slayer", a Duke of Wellington is not enough for the French to realize why the dispute between Bulgaria and North Macedonia is a matter of national identity, memory and honour… Nor is Marshal Pétain's collaborationist regime sufficient for the French to understand the servile collaborationism of the communist regimes to the East of Berlin…

Incidentally, in much the same way the impetuous and not necessarily sophisticated "Western" political Russophobia cannot understand the Bulgarians' reverence for their Russian liberators: London or Brussels have never been liberated by Russian or other heroes… Nor have they had to be liberated at all! When in 1878 the Bulgarian people restored its statehood after five centuries of foreign slavery, the Americans enthused about the first safety bicycle… There is no way the fundamental dimension that the Bulgarian Constitution additions to freedom could be found in the American, the French, the German, and many other constitutions…

The sovereign Belgian State was established 1,150 years after the Bulgarian one… But all Belgians speak at least two languages, most of them even three or four and all Dutch and Danes also speak English or German as well – hence, it is unsurprising that they will find it difficult to understand the national identity enshrined in our country's constitutional provision about the Bulgarian language…

No other people has rituals like the ones performed by the Bulgarians on 2 June (the day of remembrance of those who sacrificed their lives for the Fatherland) and 24 May (a celebration of literary and spiritual culture) – celebrations that in themselves are enduring elements of Bulgarian national identity, which are undoubtedly embodied in the value-fabric of the national constitution.

Underestimating these factors of the Bulgarian national psychology – and hence of the national identity which is inevitably embodied in the national constitution – dooms the European integration process to difficulties, not to say tensions. Underestimating the significance of the national character in the supposedly unifying globalism is manifestly inappropriate. National psychology is an extremely resilient trait! It can be identified even in the behaviour of citizens resident in another EU Member State – and undoubtedly in the behaviour of Bulgarians.

One possible mistake is to regard everything that is typically national as national identity. Not every peculiarity is identity, nor is every identity constitutional. The Bulgarian system of religious practices (by the way, weak on religion, strong on culture, and almost entirely centred on meal-sharing) is undoubtedly a remarkable Bulgarian national peculiarity, but it has absolutely no constitutional dimension or relevance.

Conversely, **limiting the national constitutional identity to elements explicitly enshrined in the Constitution is unproductive**. In Bulgaria, for instance, the attitudes towards teachers and education lack an explicit constitutional expression but are deeply rooted in the Bulgarian national character – and if a Union occasion presents itself, they must be read in the spirit of the Bulgarian Constitution.

The enduring factors and their expression in the constitutional provisions are leading in identifying (determining) the specific elements of the integral national identity.

Bulgarian national identity is undoubtedly Christian – but this combines naturally with an unquestionable religious tolerance (itself also a legacy of a complicated historical past and the present-day reality of a substantial Muslim population).

The Bulgarian national spirit is undoubtedly strongly patriotic (especially sensitive to national memory and to national identity itself) – this is deeply rooted in memory as well as in contemporary public life (feasts, traditions and rituals unfamiliar to other peoples – for example, the profound, "set-in-stone" commemoration of the national heroes on 2 June, the nationwide celebration of Alphabet and Culture Day on 24 May, the solemn roll call of prominent Bulgarians on the national day and other public holidays; the numerous historical monuments; even the popular observance of Women's Day on 8 March, to mention but a few).

Hence, the archetypal Bulgarian is undoubtedly a Christian and a patriot, but also just as undoubtedly exceedingly tolerant of population groups that can be differentiated along ethnic and/or religious lines.

Can there be any dispute, for instance, that the treatment of Jews (without doubt a major problem in Europe in the recent past and, to a certain extent and at least in certain social groups, to this very day) is nation-specific? And, in the case of Bulgaria, undoubtedly an element of the national value system and, hence, of national identity?

The treatment of foreigners is, of course, a benchmark against which distinct peculiarities of the national mentality of different States can be identified – and they have clearly manifested themselves in the recent decade in connection with the migrant crisis. Xenophobia is an undeniable fact in certain societies that are moreover highly advanced and undoubtedly democratic, but is practically unknown in Bulgaria. Whereas certain social groups in certain West European countries are even now visibly intolerant of, say, people of African descent, this is an entirely unknown phenomenon in Bulgaria – not least because

of the simple and objective fact that such people have been almost totally absent in the past as well as in the present demographic reality of this country.

The dimensions of the Bulgarian national constitutional identity, too, undoubtedly need an *ad hoc* assessment. Without prior commitment, I think that several apparently obvious elements of the Bulgarian national constitutional identity can be listed as starting point for reflections:

- A particular sensitivity towards any external intervention in a statehood that has been won back twice after two strenuous foreign dominations (of which one is defined as slavery), and which can also be seen today, prompted by fears of a loss of sovereignty as a result of the forthcoming introduction of the euro.
- The Bulgarian national constitutional identity has an exceptionally strong spirit of democracy and tolerance.
- The survival of the nation is one of the vertebrae in the backbone of the Bulgarian national spirit (and one of the essential elements of our identity).
- And, for that reason, the attitude towards the family (in its propagative and nation-reproductive function), work (as a guarantee of personal and national survival), education (as the prime tool for preserving national memory), the Bulgarian language (in the words of national poet Ivan Vazov, "sacred" and, moreover, "tongue of my ancestors"), religion (Bulgarians are strongly tolerant in religious terms but are also strongly protective of Eastern Orthodox Christianity as a powerful identifying and nation-preserving factor), and a number of others.
- Positive national traits do not exhaust the national identity elements. Bulgarians regard power and the State as belonging to somebody else rather than to themselves.
- The Bulgarian proverb "The law is a gate in an open field" speaks volumes: it is hardly something to be proud of, but must be taken into consideration.

In the final analysis, we have to acknowledge the fact that some national identity elements can be enshrined/expressed in the national

constitution, while others cannot. For the time being, I deem it as established that the EU is only obliged to respect (and a Member State can only rely on) the national identity elements that are constitutionally expressed, i.e., the constitutional national identity proper. Outlining the elements of that identity, however, requires reckoning with all factors that have shaped the national character, the national identity, and national constitutionalism.

So that the protection of the EU Member State's national constitutional identity can be simultaneously efficient and European-law-friendly.

General conclusion

Respect for NCI of an MS (in its two aspects: political-institutional and cultural-historical) is a **principle that is inherent to the nature of the Union**. And a **fundamental right of the sovereign MS of the EU**.

There is a distinct boundary to the operation and the primacy of EU law: they may not affect the essential elements of NCI. But there is also a boundary to MSs' right to protect their NCI: it may not affect the raison d'être and the core principles of the EU legal order!

This is an **obligation of the EU** and a **right of MSs**. A right to incidental deviation from an EU obligation. A right that is exercised as an exception – an exception that confirms the rule. And the rule remains **effectiveness, unity, and primacy of EU law**. Which is why that right can be exercised only when a particular ULR is in conflict with a particular identity element. And moreover only before the CJEU.

Therefore, respect for NCI requires a European-law-friendly approach from the NJs and an identity-friendly approach from the CJEU.

Invoking national constitutional identity is an entirely feasible option,[123] **but it is also a limited option.**[124] The CJEU has already demonstrated on numerous occasions that it is feasible – but should not be overrated. Nor should it be underrated, and it should be known and resorted to whenever this is appropriate. One more reason why the dialogue between the national judge and the Union judge is not only necessary but of key importance. Hence, it is essential to be thoroughly familiar with the CJEU's criteria for recognizing or rejecting particular NCI elements.[125]

If definitions should be formulated, I would suggest the following:

Respect for national constitutional identity is one of the core principles of the EU. Respecting this principle is an obligation of the EU and of all its structures.

Protection of national constitutional identity is a fundamental Union right of the EU Member State, an element of the legal status of the integrated State. Exercising this right enables the State, relying on a ruling of the Court of Justice of the EU, to deviate incidentally from the fulfilment of a Union obligation without impairing the unity and effectiveness of EU law. The national constitutional identity is protected entirely according to a Union procedure.

The national constitutional identity of an EU Member State is a set of the fundamental distinctions, as enshrined or expressed in its Constitution, embodying the political, institutional, cultural, historical, national psychology and value essence of the State. The national constitutional identity manifests itself and is protected through its specific identifiable elements. The concept of national constitutional identity is an autonomous Union concept.

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[123] The Bulgarian Constitutional Court has already opened the door to it – see, e.g., Decision No. 7 of 19 April 2018 in Constitutional Case No. 7/2017 concerning the Comprehensive Economic and Trade Agreement (CETA).

[124] It cannot discourage the national jurist to regard the primacy as a primordial and essential feature of the Union legal order.

[125] Only some points of departure can be found in case-law so far (will be addressed by a separate analysis).

In conclusion, I would venture to share my understanding that respect for national constitutional identity is a core principle of the EU, whereas the protection of national constitutional identity is a fundamental right of the Member State. Protection of national constitutional identity manifests and guarantees the Member State's sovereignty. It is only possible to the extent that it does not affect significantly the unity and effectiveness of EU law: protecting national constitutional identity without restriction would render meaningless the EU. Reading the unity and effectiveness of EU law too narrowly would enervate the Member State's identity and sovereignty.

Hence, the wisdom of the Court of Justice of the EU is key for finding a reasonable balance in each particular case!

In the event of an irreconcilable conflict between the identity of the State and the identity of the Union, respectively, between the CJEU and the State, the only solution is cessation of membership of the EU.

Which brings us back to the wisdom of the CJEU…

In any case, I believe that whenever the CJEU rules regarding an element of NCI of an MS, it must by all means take into consideration the opinion of the national constitutional jurisdiction (or, if such an opinion is unavailable, it must ask for one). From then on, there are two obvious options: the CJEU either accepts (in whole or at least to a certain extent) its colleagues' understanding or rules that the national understanding is "incompatible with the unity and effectiveness of EU law."

I therefore insist on the crucial necessity of seeking and moreover making the most of judicial dialogue.

Because if that dialogue proves futile, too, the only option left is amending the national constitution or… withdrawal from the EU…

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… While I was finishing this paper, Advocate General Juliane Kokott made known her Opinion[126] on the first Bulgarian reference for

[126] Opinion of AG Kokott.

a preliminary ruling relying on NCI elements. The case is largely similar to a Polish case which is also currently pending before the CJEU.[127] The essential point is whether the CJEU will recognize the conception of the so-called "traditional family", expressed in the Bulgarian Constitution, as a value protected as an element of national identity within the meaning of Article 4(2) TEU[128] and with what consequences. The Advocate General emphasizes that

> [t]his is a very sensitive matter, given the exclusive competence of the Member States in the area of nationality and family law and the considerable differences that exist, to date, within the European Union in respect of the legal status of and the rights conferred on same-sex couples.[129]

At the same time a case dealing with the notion of "sex" under the Bulgarian constitution is pending before the Constitutional Court of Bulgaria.[130] Being obviously linked to the "traditional understanding" of family in the Constitution the question is inevitably neighbouring the one that the EU Court of Justice should answer.

This is one more occasion to ask (in general) which decision is better to be first: that of the national constitutional jurisdiction – so that the CJEU takes it in consideration and gives a ruling really in conformity of the EU's duty to respect the NCI, or that of the CJEU – so that the national constitutional jurisdiction takes it in consideration and gives a consistent interpretation of the national constitution?

And what does "better" finally mean? Does "better for the EU" always mean "good for the Member State"?

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[127] CJEU, *Rzecznik Praw Obywatelskich*, C-2/21, whose "legal and factual context" is "very similar" and "which, in part, raises almost identical questions," in Kokott's words.

[128] Meanwhile, the Bulgarian Constitutional Court is examining a case on an interpretation of the concept of "sex" in the Constitution…

[129] Opinion of AG Kokott, p. 4.

[130] Bulgarian Constitutional Court, case 6/2021 (pending) – see Konstitutsionen sŭd na Republika Bŭlgariya [Конституционен съд на Република България] (constcourt.bg).

And is the national vision of "good for the Member state" supple or stiff (unchangeable)? We know well how dynamic (if not arbitrarily), for example, is the "national interests" formula used, especially in the political discourse… Can we, for example, say that the Serbian understanding of "national interests" is the same in the 1990s (under Milosevic) and today? Can we say that the Bulgarian understanding of "national interests" concerning the EU membership of the Republic of North Macedonia has always been the same?

And the same general question is more or less pertinent for any country…

Is the EU itself "better in general" for the people of any Member state – at least better than the politically-fluctuating vision for "national interests"?

Or the opposite: isn't the EU a "space of shared national interests" – shared but also guaranteed?…

And finally and again "what else if not the CJEU's wisdom?"…

The reasons for choosing this topic stem from the fact that the Central European countries (both those that are EU Members and those aspiring only to accession) share, on the one hand, common historical experiences related to the past communist era and the need to build, after the Iron Curtain was pulled down, the democratic system, and on the other hand, in many cases, common problems characteristic of post-communist reality. These conditions make the constitutional identity of the indicated states somewhat similar (which can be seen in the preambles to the constitutions of the said states), which is expressed in the fact that the systemic solutions functioning in their legal orders constitute a kind of mixture of regulations being the legacy of the past (from the communist and interwar period), regulations based on Western European patterns and used as part of the political transformation, or newlybaked regulations, created with the intention of meeting the problems that arise in practice, but also the modernization and reform challenges of the country. This circumstance, it can be assumed, creates a good starting point for carrying out multidimensional research aimed at determining what the constitutional identity of individual Central European countries is and which of its elements may be considered compatible with EU values, and which are in contradiction to them. What is more, it also makes it possible to explain how deep the EU's influence is when it comes to shaping the legal institutions that make up their constitutional structure, and what in this context the contemporary idea of the European integration process means.

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