

National Identity as a Useful Tool for Setting Limits to European Integration

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The European Union law, a new order of international law, permeates the legal orders of the Member States, binding not only states but also citizens. However, this permeation of the European Union law into the constitutional orders of the Member States is not unconditional. One of the limits is the national identity, understood as the constitutional identity. In legal terms, the concept of national identity is narrower than the one, characteristic for the national tradition. And it is the constitutional identity that shapes the relationship between the European Union and the Member States. The purpose of this study is to show the relationship between the European Union legal order and legal (constitutional) orders of the Member States. It will focus on such aspects as: national and constitutional identity, the concept of national identity shaped by the case law of the European Court of Justice and the significance of constitutional identity in the jurisprudence of constitutional courts.

Keywords: national identity, constitutional identity, constitutional courts, Court of Justice, EU

Introductory Remarks

The European Union (hereinafter: EU) is an international organization of a special and a unique character. It is characterized by its own legal order followed by the case law of the European Court of Justice (hereinafter: ECJ/Court), common institutions, and a well-established value system. It guarantees fundamental freedoms and rights of individuals, but first and foremost, it is a new and an autonomous legal order whose subjects are not only states but also citizens. However, an ever deeper integration does not change the fact that these are the Member States that are masters of the treaties. States—the high contracting parties, not only established the Communities (and then the Union), but they also advanced integration processes when amending the constituting treaties. So, these are the Member States that play the key role in deepening integration processes, states with their political systems, institutions, values, legal traditions, and political cultures as well as constitutions and constitutional courts whose task is to maintain the states' constitutional orders.

Principles underlying the EU legal order, along with the principles developed by the ECJ, enable the permeation of EU law into the legal orders of the Member States, thus making EU law a part of national legal orders. According to the ECJ Community law (now EU law) which is supreme, i.e. it is not confined to the very primacy, what in turn leads to collisions between EU law and laws of the Member States (including constitutions), respectively to the clash between the ECJ and the constitutional courts of the Member States. The ECJ justifies its decisions while referring to the necessity to ensure the uniform application of EU law,

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whereas the constitutional courts claim that national constitutions enjoy the highest status and their task is to guarantee the right implementation of constitutional provisions, thus setting limits to an uncontrolled permeation of EU law into national legal orders. Initially, constitutional courts referred to the need to maintain the right standard of protection of fundamental rights in the Communities (then in the EU), which would correspond to the level of protection inherent to the Member States, whereas later the constitutional courts challenged *ultra vires* acts of the EU institutions, and recently, they more and more refer to national identities in the meaning of constitutional identities.

National identity on the EU ground has a slightly different meaning than the one, national traditions prescribe. It is understood as a constitutional identity and shapes the relationship between the EU and the Member States legal orders. However, what makes the national identity so often raised by the Member States is the fact that national identity, in the meaning of an inviolate core of the Member States' constitutions, is a commitment the EU has assumed for itself¹.

The main objective of this study is to show the way the EU and national courts refer to the concept of national identity what in turn shapes the relationship between the EU legal order and legal (constitutional) orders of the Member States. For the purpose of this study, the following thesis has been adopted: The broad meaning of national identity makes it a useful formula, enabling the Member States to effectively protect their constitutional values, while setting limits for an uncontrolled permeation of EU law into national legal orders.

Protecting States' Constitutional Foundations

States participating in integration processes, on the one hand, agree on joint exercise of competencies and authority (even transfer or "renunciation" of some sovereign rights), whilst on the other, they are making efforts to ensure that EU law does not enter an area exclusively reserved for them, in other words, they want to maintain their constitutional foundations. In order to protect constitutional foundations, states developed ways or what can be referred to as material anchors of judicial protection of states' constitutional foundations to which belong: sovereignty, fundamental rights, and constitutional identity (Wójtowicz, 2012, p. 103). Moreover, the Member States are relying on the principle of attributed powers when questioning the *ultra vires* acts of the EU institutions.

As just said, one of the anchors of judicial protection of states' constitutional foundations is constitutional identity. According to the Advocate General (hereinafter: AG), Miguel Pózar Maduro national identity comprises constitutional identity of the Member States, what has been confirmed in art. I-5 of the Treaty establishing a Constitution for Europe and in art. 4 (2) of the Treaty on European Union (hereinafter: TEU) as amended by the Lisbon Treaty (hereinafter: TL), which states that the Union respects national identities of the Member States, inherent in their fundamental structures, political, and constitutional. What is more, the EU is obliged to respect constitutional identity of the Member States, an obligation, which has existed from the outset and which forms part of the very essence of the European project, and which consists of following the path of integration while maintaining the political existence of the states². And if respect for constitutional identity of

¹ Cf. opinion of Mr Advocate General Pózar Maduro delivered on 8 October 2008 in *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, case C-213/07 (2008) ECR I-09999, where in par. 31 we can read: "(...) European Union is obliged to respect the constitutional identity of the Member States", and in par. 32: "The Court has, indeed, expressly recognised that the preservation of national identity 'is a legitimate aim respected by the Community legal order'".

² Cf. opinion of Mr Advocate General Pózar Maduro delivered on 8 October 2008 in *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, case C-213/07 (2008) ECR I-09999, par. 31.

the Member States can constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law (now EU law), it can all the more be relied upon by a Member State to justify its assessment of constitutional measures; however, the respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules, and 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 order³.

According to Massimo La Torre, respect for national constitutional identities implies the assumption that there is a European constitutional law and that such law is built upon national constitutional laws (Torre, 2014, p. 423); what is more, national constitutional identity offers a shield with which to protect national constitutions from self-generated integrative pressures (Torre, 2014, pp. 423-424). Constitutional identity can be understood as the recognition of cultural and national distinctiveness by way of reflection on fundamental rights inherent to a given society (Zirk-Sadowski, 2012). In turn, national identity not only refers to culture, language, or customs, but is linked up to the state identity that results from the very existence of the state as a distinct entity (Wójtowicz, 2012, p. 118).

Constitutional identity is a narrower concept than national identity, since it refers to the constitutional values and state structures, whereas national identity comprises original, one can say pre-constitutional values and/or elements, such as common language, customs, history, etc. In other words, on the one hand, we are dealing with the civic whereas on the other with the ethnic concept of the nation.

National Identity Under EU Law

As has already been mentioned, respect for national identities in the meaning of constitutional identities is now a commitment under EU law. For the first time, the reference to national identity was made in the Treaty of Maastricht in art. F (1) TEU which says that the Union shall respect national identities of its Member States whose systems of government are founded on the principles of democracy. And now, the relevant provision is provided for in art. 4 (2) TEU (Lisbon), which states 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. Similar wording contains the Charter of Fundamental Rights (hereinafter: CFR/Charter) where in the preamble we can read that the Union contributes to the preservation and the 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, regional, and local levels.

Leonard Besselink draws our attention to the fact that national identity does not necessarily coincide with the identity of the state and the wordy formulation, which can be found in the TL emphasizes the political and constitutional aspects (Besselink, 2010). So, to the extent that the TL focuses on state structures, there is a shift in emphasis from national to constitutional identity (ibid.). Besselink also pays attention to the fact that the provision of art. 4 (2) TEU qualifies the primacy rule of EU law and modifies the case law under *Costa vs. ENEL*—the exception to the primacy of EU law (or precisely to the supremacy rule), which seems to be restricted to issues of constitutional identity, what in turn suggests that constitutional provisions which are not fundamental and hence do not contribute to the very identity of the constitution do not share in that privileged

³ Cf. opinion of Mr Advocate General Poiares Maduro delivered on 8 October 2008 in *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, case C-213/07 (2008) ECR I-09999, par. 33.

position vis-à-vis EU law (ibid.).

As just said, clarification (or rather explanation) of the meaning of the concept of national identity is the task left to the ECJ. In the 1989 ruling, the ECJ observed that although Irish is not spoken by the whole Irish population, the policy followed by Irish governments for many years has been designed not only to maintain but also to promote the use of Irish as a means of expressing national identity and culture⁴. The Court added that the European Economic Community Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State, which is both the national language and the first official language, however, the implementation of such a policy must not encroach upon a fundamental freedom, such as that of the free movement of workers, so the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States⁵.

On the issue of national identity, the ECJ has also commented in the 1996 ruling. In the proceedings before the Court, the government of the Grand Duchy of Luxembourg maintained that teachers must be Luxembourg nationals in order to transmit traditional values and that in view of the size of the country and its specific demographic situation, the nationality requirement is an essential condition for preserving Luxembourg's national identity⁶. In turn, the Court observed that whilst the preservation of the Member States' national identities is a legitimate aim respected by the Community legal order, the interest pleaded by the Grand Duchy can, even in such particularly sensitive areas as education, still be effectively safeguarded otherwise than by a general exclusion of nationals from other Member States⁷, so the protection of national identity cannot justify exclusion of nationals of other Member States from all the posts in an area, such as education with the exception of those involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities⁸.

As well on the issue of national identity, the ECJ has commented in the 2010 ruling. This time, it was the Austrian government, which maintained that the provisions on the abolition of the nobility are intended to protect the constitutional identity of the Republic of Austria, hence the law, even if it is not an element of the republican principle which underlies the federal constitutional law, constitutes a fundamental decision in favour of the formal equality of treatment of all citizens before the law⁹. In this case, the Court shared the view of the Austrian government and ruled that in the context of Austrian constitutional history, the law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under EU law¹⁰.

⁴ Judgment of the Court of 28 November 1989, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, case C-379/87, ECR (1989) 03967, par. 18.

⁵ Judgment of the Court of 28 November 1989, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, case C-379/87, ECR (1989) 03967, par. 19.

⁶ Judgment of the Court of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxembourg*, case C-473/93, ECR (1996) I-03207, par. 32.

⁷ Judgment of the Court of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxembourg*, case C-473/93, ECR (1996) I-03207, par. 35.

⁸ Judgment of the Court of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxembourg*, case C-473/93, ECR (1996) I-03207, par. 36.

⁹ Judgment of the Court of 22 December 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, case C-208/09, ECR (2010) I-13693, par. 74.

¹⁰ Judgment of the Court of 22 December 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, case C-208/09, ECR (2010) I-13693, par. 83.

It must be clearly stated that national identity does not enjoy absolute protection under EU law but has to be balanced against the principle of uniform application of EU law—the task that rests both on the ECJ and the national constitutional courts as a part of a system of composite constitutional adjudication (Bogdandy & Schill, 2011, p. 1420).

Constitutional Identity in the Constitutional Courts' Judgements

As has been said, the Member States, or more precisely, the constitutional courts, refer to constitutional identity rather than to national identity. For the first time, the issue of constitutional identity was taken up by the French Constitutional Council (hereinafter: CC) in the 2006 decision. The CC then said that the transposition of a directive cannot run counter to a rule or a principle inherent to the constitutional identity of France, except when the constituting power consents thereto¹¹. So, there has been a narrowing of the understanding of the concept of constitutional identity to the most salient or the most essential questions that constitute the core of the constitution (Wójtowicz, 2012, p. 125). In turn, in the 2011 decision, the CC quoted a formula already included in the 2006 decision¹² and in the 2010 decision on the priority question on constitutional issues, the CC observed that in the absence of contestation of a rule or principle inherent to the constitutional identity of France, the CC is not competent to control the conformity with the rights and freedoms guaranteed by the Constitution of legislative provisions that are limited to the necessary consequences of unconditional and precise provisions of the EU directive, so in such a case, only the EU court to which a preliminary ruling has been referred to may control the conformity of the directive with the fundamental rights guaranteed by art. 6 of the TUE¹³.

On the issue of constitutional identity, it has also widely commented the German Federal Constitutional Court (hereinafter: FCC). In the ruling on the constitutionality of the Lisbon Treaty, the FCC observed that the Basic Law (hereinafter: BL) grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the EU, however, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral respecting the Member States' constitutional identity¹⁴. It must be said that in the German legal order, constitutional identity is closely linked to art. 79 (3) BL, which protects the substantive core of the Constitution from any change¹⁵. Relying on this legal basis, the FCC claimed the right to review whether the inviolable core content of the constitutional identity of the BL pursuant to art. 23 (1) third sentence in conjunction with art. 79 (3) of the BL is respected¹⁶. The FCC further said that the empowerment to embark on European integration permits a different shaping of political opinion-forming than the one determined by the BL for the German constitutional order and this applies as far as the limit of the inviolable constitutional identity (art. 79 (3) BL)¹⁷. The FCC has also commented on the issue of constitutional identity in the *Honeywell* ruling. This time, the FCC declared that it is empowered and even obliged to review acts of the European bodies and institutions with

¹¹ Décision n 2006-540 DC du 27 juillet 2006 (*Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*), 19ème considérant.

¹² Décision n 2011-631 DC du 09 juin 2011 (*Loi relative à l'immigration, à l'intégration et à la nationalité*), 45ème considérant.

¹³ Décision n 2010-79 QPC du 17 décembre 2010 (*M. Kamel D.*), 3ème considérant.

¹⁴ BVerfG, 2 BvE 2/08 vom 30.6.2009 (*Lissabon-Urteil*), Rn 226.

¹⁵ Art. 79 (3) BL states: "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible".

¹⁶ BVerfG, 2 BvE 2/08 vom 30.6.2009 (*Lissabon-Urteil*), Rn 240.

¹⁷ BVerfG, 2 BvE 2/08 vom 30.6.2009 (*Lissabon-Urteil*), Rn 219.

regard to whether they take place on the basis of manifest transgressions of competence or on the basis of the exercise of competence in the area of constitutional identity which is not assignable and where appropriate to declare the inapplicability of such acts for the German legal order¹⁸.

It should also be said that the FCC has been referring to the issue of constitutional identity in its much earlier rulings. In the *Internationale Handelsgesellschaft (Solange I)* ruling, the FCC referred to constitutional identity while stating that art. 24 BL nullifies any treaty amendment that would jeopardize the identity of the existing constitutional structure, as well as that art. 24 BL does not cover the transfer of legislative powers to an international organization, which would change the German constitutional identity, since this would require changes to the Constitution¹⁹. In a similar vein, the FCC has spoken up in the *Wünsche Handelsgesellschaft (Solange II)* ruling. This time, the FCC referred to the limits that define the identity of the German constitutional order. We learn from the judgment that the authorization under art. 24 (1) BL is not free from constitutional restrictions, since this provision does not empower, by granting sovereign rights to intergovernmental organisational entities, to nullify the identity of the existing constitutional order of the Federal Republic of Germany²⁰. And as for to the recent financial crisis in the euro area, it must be said that the FCC in the rulings concerning the financial aid for Greece²¹ and the euro rescue package²² has qualified the budget autonomy of the German parliament as a fundamental part of the constitutional identity and declared the Bundestag's overall fiscal autonomy as inalienable (Huber, 2015).

In turn, the Italian Constitutional Court (hereinafter: ICC) has referred to the legal order (fundamental constitutional principles) and the inalienable human rights, which set the limits for the interference of Community law (now EU law) into the internal legal order. In the *Frontini* ruling, the ICC reserved for itself the right to control the Community secondary law with the fundamental principles and values of the Italian constitutional order qualifying them as norms of a higher status than the ordinary constitutional norms²³. And though EU law may differ from ordinary constitutional provisions, supra-constitutional principles act as counter-limits in relation to EU law, so the EU institutions cannot violate the basic principles of the Italian constitutional order. In a similar way, this time in the *Fragd* ruling, the ICC set limits for the application of the principle of primacy, which are fundamental constitutional principles and inalienable rights of individuals²⁴.

In turn, the Spanish Constitutional Court (hereinafter: SCC), having spoken up in 2004 on the compatibility of the Constitutional Treaty with the Spanish Constitution, has broadened the meaning of the integration clause materially. According to the SCC, art. 93 of the Constitution comprises impliedly also the material limits of integration that cannot be violated which are: state sovereignty, fundamental constitutional structures, fundamental values and principles, and above all fundamental rights²⁵.

On the issue of national (constitutional) identity, it has also commented the Polish Constitutional Court (hereinafter: PCC). In the ruling on the European Arrest Warrant, the PCC emphasised that constitutional law

¹⁸ BVerfG, 2 BvR 2661/06 vom 6.7.2010 (*Honeywell-Beschluss*), Rn 55.

¹⁹ Beschluß des Zweiten Senats vom 29. Mai 1974, BvL 52/71, BVerfGE 37, 271 (*Solange I*), Rn 43.

²⁰ Beschluß des Zweiten Senats vom 22. Oktober 1986, 2 BvR 197/83, BVerfGE 73, 339 (*Solange II*), Rn 104.

²¹ Urteil des Zweiten Senats vom 7. September 2011, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10.

²² Urteil des Zweiten Senats vom 18. März 2014, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvR 1824/12, 2 BvE 6/12.

²³ Corte Costituzionale, sentenza 183/1973, 18 dicembre 1973, 9 considerato.

²⁴ Corte Costituzionale, sentenza 232/1989, 13 aprile 1989, 3.1 considerato.

²⁵ Declaración del Pleno del Tribunal Constitucional 1/2004, de 13 de diciembre de 2004, pkt 2 (BOE núm. 3, de 4 de enero de 2005).

cannot be ignored even if it is contrary to EU law²⁶. In turn, in the ruling on the constitutionality of the TL, the PCC stated that constitutional identity is a concept which determines the scope of excluding from the competence to confer competences the matters which constitute “the heart of the matter”, i.e., which are fundamental to the basis of the political system of a state²⁷. According to the PCC, the constitutional courts share, as a vital part of European constitutional traditions, the view that the constitution is of fundamental significance as it reflects and guarantees the state’s sovereignty and the constitutional judiciary plays a unique role as it regards the protection of constitutional identity of the Member States, which at the same time determines the treaty identity of the EU²⁸. In the PCC’s opinion, the sovereignty of the Republic of Poland is expressed in the inalienable competences of the organs of the state constituting the constitutional identity of the state²⁹. The PCC also shares the view expressed in the doctrine that the competences under the prohibition of conferral manifest a constitutional identity, and thus, they reflect the values the Constitution is based on³⁰. In the 2013 ruling, the PCC stated that the conferral of competences should always be assessed from the point of view of principles that shape the constitutional identity³¹ and in the 2015 ruling, the PCC affirmed that interpretation sympathetic to European law cannot lead, in any situation, to results contrary to the clear wording of constitutional norms and impossible to agree with the minimum guarantee functions realized by the Constitution³².

In turn, the Czech Constitutional Court (hereinafter: CCC) in the first constitutional ruling on the TL stated that respect for the rule of law and the rights and freedoms of the individual is the essence of the republic and is thus beyond the reach of the constitutional legislator. The CCC also pointed out that the transfer of powers of the Czech Republic bodies cannot go so far as to violate the very essence of the republic as a sovereign and a democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and of citizens or to make a change in the essential requirements for a democratic state governed by the rule of law³³. In a similar vein, the CCC ruled in the *Slovak Pensions XVII* judgment confirming its earlier stance articulated in the *Treaty of Lisbon I* judgment. The CCC stated that it retains the right to control the EU institutions in three cases: non-functioning of the institutions, protection of the material core of the Constitution not only in relation to European law but also to the particular application thereof, and finally function as *ultima ratio*, i.e., reviewing whether an act of EU bodies exceeded the powers that the Czech Republic transferred to the EU under art. 10a of the Constitution³⁴.

The Constitutional Court of Hungary (hereinafter: CCH) also expressed its opinion on constitutional identity—the concept which interprets as Hungary’s self-identity. According to the CCH, the constitutional self-identity of Hungary is not a list of static and closed values, however, many of its important components are identical with the constitutional values generally accepted today³⁵.

²⁶ CT judgment of 27 April 2005, Ref. No. P 1/05, par. 4.2 and 4.3 part III (OTK ZU nr 4/A/2005, poz. 42).

²⁷ CT judgment of 24 November 2010, Ref. No. K 32/09, par. 2.1 part III (OTK ZU nr 9/A/2010, poz. 108).

²⁸ CT judgment of 24 November 2010, Ref. No. K 32/09, par. 3.8 part III (OTK ZU nr 9/A/2010, poz. 108).

²⁹ CT judgment of 24 November 2010, Ref. No. K 32/09, par. 2.1 part III (OTK ZU nr 9/A/2010, poz. 108).

³⁰ CT judgment of 24 November 2010, Ref. No. K 32/09, par. 2.1 part III (OTK ZU nr 9/A/2010, poz. 108).

³¹ CT judgment of 26 June 2013, Ref. No. K 33/12, par. 6.4.1 part III (OTK ZU nr 5/A/2013, poz. 63).

³² CT judgment of 11 March 2015, Ref. No. P 4/14, par. 4.5 part III (OTK ZU nr 3/A/2015, poz. 30).

³³ Ústavní soud České republiky, 2008/11/26-Pl. ÚS 19/08 (*Treaty of Lisbon I*), par. 97.

³⁴ Ústavní soud České republiky, 2012/01/31-Pl. ÚS 5/12 (*Slovak Pensions XVII*) VII.

³⁵ The Constitutional Court of Hungary, Decision 22/2016 (XII. 5). *AB on the Interpretation of Article E (2) of the Fundamental Law*, par. 65; https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf.

And also in the recent judgement, the Belgian Constitutional Court (hereinafter: BCC) commented on the issue of national identity. The BCC stated that when the legislator gives assent to a treaty, it must comply with art. 34 of the Constitution according to which the exercise of specific powers may be conferred by a treaty or by a law on institutions of public international law, however, art. 34 of the Constitution cannot be considered as conferring a blank check nor on the legislature when it gives its assent to the treaty nor on the institutions when exercising the powers assigned to them; art. 34 of the Constitution in no way authorizes a discriminatory attack on the national identity inherent in the fundamental, political and constitutional structures or the fundamental values³⁶.

It must be said that despite some differences in emphasis and in the degree of the subject-matter differentiation, the constitutional courts of the Member States share similar understanding of national (constitutional) identity. In their common understanding, national identity requires the protection of the statehood, the protection of the form of government and of the central principles of state organization (e.g., federalism, regional, and municipal self-government), the protection of democracy, of the rule of law, and of the essence of fundamental rights (Bogdandy & Schill, 2011, pp. 1439-1440).

Concluding Remarks

The constitutional courts of the Member States have seized the opportunity that was the linkage in art. 4 (2) TEU of national identities of the Member States with their fundamental political and constitutional structures, and thus not only they fill the content of the concept of constitutional identity but also by transforming the treaty national identity into a constitutional identity they justify their right to control both the extent of the Union's competences transferred and the way of using them (Wójtowicz, 2012, p. 128).

Another important observation is that we can see the change in the language used, namely, the narrative referring to identity (and precisely to constitutional identity) replaces the narrative referring to sovereignty. What's more, the TL having reformulated the identity clause in art. 4 (2) TUE, thus codified national constitutional identity (Fraguna, 2016). We can also speak about the Europeanization of the counter-limits by art. 4 (2) TEU, what in turn implies the recognition by the EU of a constitutional core integrated by the fundamental political and constitutional structures of the Member States that must be preserved (Callejón, 2017).

The concept of national identity being common to all Member States can be applied in a uniform way, whereas the concept of constitutional identity can have (and does have) a variable content, thus individualizing each and every state (Martin, 2012). And so, the German tradition focuses on eternity clause and the political value of the right to vote, the French tradition on the essential characteristics of the state, whilst the British tradition on a strict separation of powers (Konstadinides, 2015).

It must also be said that even long before the national identity clause was established, the ECJ could justify non-uniform application of EU law while referring to the public interest permissible (or express) derogations, such as public policy, public security, and public health. It also referred to legitimate interests such as the respect for cultural diversity and the fundamental rights protection. And apart from the provision of art. 4 (2) TEU which qualifies the primacy rule of EU law, it can be equally well argued that it also qualifies the said

³⁶ Cour constitutionnelle de Belgique, Arrêt n 62/2016 du 28 avril 2016, par. B.8.7; <http://www.const-court.be/fr/common/home.html>.

derogations.

The broad meaning of the concept of national identity makes it a useful formula, which allows the Member States to effectively protect their constitutional values by setting the limits to the uncontrolled permeation of EU law into the national legal orders. The codification of national identity on the EU level and its certain ambiguity allows the national constitutional courts to fill the content of the clause; what is more, the very clause becomes the widest reference point for constitutional courts in the proceedings before the ECJ. And as can be well seen, integration is an ongoing process that largely takes place in the courts common and constitutional.

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