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Marjan Kos[*]

The Relevance of National Identity in European Union Law and Its Potential for Instrumentalisation[**]

1. Introduction

The last couple of years have seen an expansion of the toolbox of populist governments, slowly leaning away from what are considered core European constitutional values, such as the protection of human rights, the rule of law and the principle of democracy. Most notably in connection with European Union (EU) law, we are witnessing various attempts by Member States to evade incumbent obligations. This paper studies one particular constitutional instrument—the concept of national identity—and its potential for (ab)use by these inventive governments. The concept itself has recently received notable academic attention but has also proved to be a tempting and possibly powerful legal tool, which illiberal populists seem to want to include in their arsenal.

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[**] The author's master's thesis *Constitutional Identity of EU Member State*, defended at the Faculty of Law, University of Ljubljana, in September 2015 served as the basis for sections 2, 3 and 4 of the paper. Research was duly updated.

A first draft of the paper was presented at the "Ljubljana – Catania Conference on Contemporary Issues of International and EU Human Rights Law", on 9 July 2018 at the Faculty of Law, University of Ljubljana. Comments made by contributors at the conference were used in the preparation of this paper, and for these I am very grateful.

An early version of the paper was prepared for the purpose of the 3rd level course Human Rights and was kindly read and commented on by prof. dr. Saša Zagorc. His remarks undoubtedly raised the quality of the paper, for which I am very grateful.

Final substantive updates of the text were made before final submission on 30 August 2019.

References to national identity have become more common as the Member States begin to identify the concept as a hub through which they can communicate their fundamental constitutional concerns regarding EU law. Its use in the dialogue at the highest judicial level is especially interesting, and the Court of Justice of the European Union (CJEU) slowly begins to engage in the debate as well. The judicial understanding of the concept will also serve as the basis for this discussion. However, a promising venue for constitutional cooperation could turn into its opposite as in the present unpredictable political atmosphere some Member States governments may try to apply it with a hope of evading EU law obligations.[1] The possibility of such application—labelled here as instrumentalisation—for political purposes calls for a closer look at the concept of national identity. To evaluate the existence of such risk, this paper approaches the topic by tackling ambiguities first, surrounding national and constitutional identity by providing an overview of the concept. I explain how national and constitutional identities are understood in national and EU *fora*, and what the perceived substance behind these concepts is, simultaneously trying to distil a general approach, hoping to bring some order into the chaos surrounding the concept. To evaluate the possibility of its instrumentalisation, the key points are the operationalisation and the possible roles of the identity clause from Article 4(2) TEU. This conceptual framework leads us to the second part, consisting of an illustration of the possible two-faced nature of national identity in EU law. I focus on two recent CJEU cases: The *Taricco* case(s) and the *Coman* case. I discuss possible implications of the two different uses of the concept by national courts for human rights protection in the EU. Based on *Coman*, where an attempt at circumventing EU law was made by way of Article 4(2) TEU, I arrive at the final part of the paper, where I position the concept in the context of the current political and constitutional atmosphere in the EU. Taking the example of Hungary, which essentially offers itself as an example, I look at the possibility of instrumentalisation of the arguments of national or constitutional identity, evaluate possible outcomes and consider the implications of instrumentalisation for the validity of constitutional identity-based arguments in the future. I argue that the possibility of a successful (ab)use of the concept for political expediency, resulting in the lowering of human rights protection, is highly unlikely.

2. National and Constitutional Identity in the EU

At the heart of this paper lies the first sentence of Article 4(2) of the Treaty on European Union (TEU), which encapsulates the so-called identity clause, stating that

[1] Kelemen, Pech, Why autocrats love constitutional identity and constitutional pluralism: Lessons from Hungary and Poland, Working Paper No. 2 – September 2018, URL: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf, pp. 9–11.

> "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."

A comprehensive differentiation between the notions of national and constitutional identity would exceed both the intention and the extent of this paper.[2] I proceed from the understanding of the term national identity as broader than, but encompassing, the notion of constitutional identity.[3] However, while national identity covers broader elements of a Member State's identity, constitutional identity only includes core elements of the Member States constitutional orders.[4] It is generally accepted that constitutional identity forms a part of national identity within the meaning of Article 4(2) TEU. This follows from the reference to "*fundamental structures, political and constitutional*" in the clause itself,[5] making it a constitutional, rather than a cultural concept.[6] This is also generally accepted by the national courts and the CJEU.[7] National apex courts[8] predominantly adopted the terminology of constitutional identity, comprising of fundamental constitutional values, pertinent to each Member State. The CJEU has so far followed this approach, accommodating these same values in within Article 4(2) TEU, as discussed below.

Since the aim of this paper is to present the possible uses of national constitutional arguments and their implications for the relationship between EU and the Member States,

2 For a more in-depth analysis, see: Reestman, The Franco-German Constitutional Divide (2009), pp. 375–384.

3 This follows the changes in the wording from the Treaty of Maastricht. See: Rodin, National Identity and Market Freedoms After the Treaty of Lisbon (2011), pp. 12–14.

4 Martí, Two Different Ideas of Constitutional Identity (2013), p. 20.

5 Besselink, National and Constitutional Identity Before and After Lisbon (2010), pp. 44, 47; von Bogdandy, Schill, Overcoming Absolute Primacy: Respect for National Identity (2011), pp. 1427, 1430; van der Schyff, The Constitutional Relationship Between the European Union and Its Member States (2012), p. 567; Rideau, The Case-law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the "German Model" (2013), p. 258; Konstadinides, The Constitutionalization of National Identity in EU Law and Its Implications (working draft), URL: https://ssrn.com/abstract=2318972, p. 3–4; Preshova, Battleground or Meeting Point? Respect for National Identities in the European Union (2012), pp. 273, 274; Dobbs, Sovereignty, Article 4(2) TEU and the Respect for National Identities (2014), p. 326.
This view is supported in AG opinions, for example AG Maduro in C-213/07 *Michaniki*, and AG Bot in C-399/11 *Melloni*, especially para. 142.
For (partially) differing views, see: Claes, National Identity: Trump Card or Up for Negotiation? (2013), p. 123–124, Guastaferro, Beyond the Exceptionalism of Constitutional Conflicts (2012), pp. 267, 309.

6 Faraguna speaks of the "constitutionalization of the concept of identity", see: Faraguna, Taking Constitutional Identities Away from the Courts (2016), p. 498. For a similar view, see: von Bogdandy, Schill, Overcoming Absolute Primacy: Respect for National Identity (2011), p. 1427.

7 Reestman, The Franco-German Constitutional Divide (2009), p. 381.

8 The highest national courts, competent to authoritatively interpret the constitution.

the central focus is on the part of national identity entailing constitutional identity and protected by Article 4(2) TEU. Therefore, the terms are used interchangeably, referring to core constitutional values of the Member States.

3. The Substance of Constitutional Identity Under Article 4(2) TEU

3.1. A (Con)textual Analysis

The first step in the effort to understand constitutional identity as part of Article 4(2) TEU has to be the textual interpretation of the said article. It can be divided into three parts,[9] of which the second is essential for the purposes of this paper. There, the reference to "*constitutional structures*" first implies that only arguments, which form a part of a national constitutional legal order are relevant. Second, it follows from the term "*fundamental*" that the clause is additionally limited to core elements of a national constitutional legal order.[10] This prevents the Member States from claiming special protection for less important parts of their constitutions. Therefore, TEU itself demands respect for some national constitutional elements, which are thereby lifted to the level of valid arguments within EU law and themselves form a part of EU law.[11]

Although not yet recognised in case law, at least two additional constraints follow from EU law. The first one is Article 2 TEU, as the Member States cannot invoke arguments, deviating from the fundamental values on which the EU is founded, listed in the article. Furthermore, it follows from Article 6 TEU that human rights standards from the Charter of Fundamental Rights of the European Union (EU Charter) should also be safeguarded. This is imperative for the present discussion, as it sets the floor, meant to prevent the lowering of EU's fundamental constitutional standards.[12]

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[9] The first part consists of the demand for equality among the Member States, the second demand for respect of national identities of the Member States, inherent in their fundamental structures, political and constitutional, and the third one for respect of essential State functions, highlighting national security.

[10] Von Bogdandy, Schill, Overcoming Absolute Primacy: Respect for National Identity (2011), pp. 1430–1431.

[11] Van der Schyff, The Constitutional Relationship Between the European Union and Its Member States (2012), p. 568; von Bogdandy, Schill, Overcoming Absolute Primacy: Respect for National Identity (2011), p. 1431.

[12] Von Bogdandy, Schill, Overcoming Absolute Primacy: Respect for National Identity (2011), p. 1430; Rodin, National Identity and Market Freedoms After the Treaty of Lisbon (2011), p. 15; Faraguna, Constitutional Identity in the EU – A Shield or a Sword? (2017), p. 1639.

3.2. How to Determine the Scope of Constitutional Identity?

An *in concreto* determination of the substance of constitutional identity has to be founded on two sources. The starting point is that while the CJEU is the authoritative interpreter of EU law—identity clause included—it is not competent to interpret national law.[13] Therefore, both the structure of EU law and the concept of national identity demand consideration of the interpretation of constitutional identity by the Member States, by which they themselves determine their own constitutional identities. A proper methodological approach would be, therefore, to allow the Member States to determine the substance, and the CJEU to determine the function of constitutional identity.[14] Defining the scope of national identity is, therefore, a collective task of both the national courts and the CJEU.[15]

3.2.1. The Member States and Constitutional Identity

From the perspective of the Member States,[16] any determination of the core of their constitutional orders has to consider the text of the national constitutions first.[17] A detailed comparative survey exceeds the scope of this paper. However, at least a methodological approach should be established.

The distinction between "ordinary" and "fundamental" constitutional provisions has been a traditional subject of constitutional law, and several venues for their identification have been developed. One should focus on (1) the initial statements of preambles of the constitutions, (2) the rules for constitutional amendment and (3) the "European clauses," [18] which all usually offer some indication of the "core" parts of the constitution.[19]

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13 Article 19 TEU.

14 See: Besselink, National and Constitutional Identity Before and After Lisbon (2010), p. 45; Claes, National Identity: Trump Card or Up for Negotiation? (2013), pp. 122–123; Wendel, Lisbon Before the Courts: Comparative Perspectives (2011), pp. 134–135. This approach is followed by the CJEU, for example in C-36/02 C-36/02 *Omega*, of 14 October 2004, para. 39.

15 Koncewicz, Constitutional Identity in the European legal space and the comity of circumspect constitutional courts (2015), p. 207.

16 For a comprehensive overview of national case law, see: Besselink, Claes, Imamović, Reestman, National Constitutional Avenues for Further EU Integration, URL: http://europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2014)493046.

17 Applicable to the Member States with a constitution in the formal sense.

18 For a comprehensive analysis, see: Claes, Constitutionalizing Europa at Its Source (2005), pp. 81–125; Albi, "Europe" Articles in the Constitutions of Central and Eastern European Countries, (2005), pp. 399–423.

19 See: Grewe, Methods of Identification of National Constitutional Identity (2013), p. 37; von Bogdandy, Schill, Overcoming Absolute Primacy: Respect for National Identity (2011), pp. 1431–1433; Martí, Two Different Ideas of Constitutional Identity (2013), pp. 24–30.

Since these provisions may prove to be too general to make definite conclusions, the pertaining case law of national apex courts serves as the second source. They are responsible for the interpretation of the constitution and so its core will often only be revealed by way of judicial interpretation of the text. In this context, the debate over constitutional limits to European integration, beginning with the "*controlimiti*" case law of the Italian Constitutional Court (ICC) (*Frontini,*[20] *Granital,*[21] *Fragd*[22]) and the "*Solange*" case law[23] of the German Federal Constitutional Court (FCC),[24] is very insightful, since in these decisions already specific fundamental constitutional values were put to the fore. Later on, in the wake of the Treaty of Maastricht, and especially since the Treaty of Lisbon, national apex courts in several Member States followed suit and defined where the final limitations to EU law lie,[25] including recently the Hungarian Constitutional Court (HCC).[26]

Focusing on the substance of constitutional identity as understood by the national courts, a certain degree of convergence is noticeable. Constitutional identity is regularly linked to the principles of sovereignty and independence, fundamental organisational aspects of the state, principle of democracy, fundamental rights, and the rule of law.[27] That notwithstanding, it is the individualities of these core principles that prove to be most contentious, as exemplified by *Taricco* case(s).[28]

In the functional sense, constitutional identity is understood by the Member States courts as a limitation on the substance of EU law, which is not allowed to interfere with their core constitutional values.[29] Importantly, the Member States courts often refer to

[20] *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372.

[21] Dec. No. 170 of 8 June 1984 *S.p.a. Granital v. Amministrazione delle Finanze dello Stato*.

[22] Dec. No. 232 of 7 April 1989 *S.p.a. Fragd v Amministrazione delle Finanze dello Stato*.

[23] BVerfGE 37, 271 2 BvL 52/71 (*Solange I*), of 29 May 1974 and BVerfGE 73, 339 2 BvR 197/83 (*Solange II*), of 22 October 1986.

[24] As noted by *von Bogdandy* and *Schill*, decisions on the relationship between EU law and domestic constitutional law play an important role, as they illustrate best the areas of conflict. Therefore, the decisions evolving around European integration are particularly useful in analysing the substance of constitutional identity. See: von Bogdandy, Schill, Overcoming Absolute Primacy: Respect for National Identity (2011), p. 1433.

[25] For an overview of these decisions, see: Claes, Constitutionalizing Europa at Its Source (2005), pp. 124–129.

[26] Decision 22/2016. (XII. 5.) AB.

[27] Von Bogdandy, Schill, Overcoming Absolute Primacy: Respect for National Identity (2011), pp. 1439–1440; Claes, Constitutionalizing Europa at Its Source (2005), p. 129.

[28] For an overview of areas of conflict, see: Albi, Erosion of Constitutional Rights in EU Law (2015), esp. pp. 159–160, 161–166, 175–182.

[29] Leading in this field is the FCC case BVerfG 2 BvE 2/08 (*Treaty of Lisbon*), of 30 June 2009, paras. 241, 339. The approach was followed by the Polish Constitutional Court, with a distinction as to the solutions to a possible conflict: K 32/09, of 24 November 2010; for a similar position of the Czech Constitutional court, see: Pl. ÚS 19/08 (*Treaty of Lisbon I*) of 26 November 2008.

Article 4(2) TEU as a supporting argument for their "identity review" of EU law and as a foundation for the obligation on behalf of the EU to respect their constitutional identity.[30] In this sense, it operates as a communication hub between the national courts and the CJEU. The national courts, putting forward national constitutional arguments, will often base their arguments on Article 4(2) TEU.

3.2.2. The Court of Justice and Constitutional Identity

As already pointed out, it is the CJEU which is competent to authoritatively the identity clause. The analysis of its case law should also look beyond mere references to identity since, like the national courts, the CJEU dealt with the question of accommodating national constitutional arguments without relying on identity.[31]

Without delving into the case law of the CJEU in detail, we can find that after the entry into force of the Lisbon Treaty,[32] the CJEU usually refers to Article 4(2) TEU when it is faced with national constitutional concerns.[33] As far as the success of those national arguments is concerned, the CJEU seems to narrow its application when national considerations pertain to (what it deems to be) less important constitutional concerns,[34] while on the other hand, it shows a willingness to accommodate clear and serious constitutional concerns, sometimes leaving the final decision to the national court.[35] In several

The positions of the French and the Spanish Constitutional courts, expressed when reviewing the Treaty establishing a Constitution for Europe, are similar. See: 2004-505 DC, of 19 November 2004 (France) and DTC 1/2004 of 13 December 2004 (Spain). For an overview of case law, see: Preshova, Battleground or Meeting Point? Respect for National Identities in the European Union (2012), pp. 278–284; Guastaferro, Beyond the Exceptionalism of Constitutional Conflicts (2012), pp. 266–271; Rideau, The Case-law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the "German Model" (2013), p. 244–258; von Bogdandy, Schill, Overcoming Absolute Primacy: Respect for National Identity (2011), pp. 1435–1439.

30 BVerfG 2 BvE 2/08, of 30 June 2009, para. 240 (Germany); SK 45/09, of 16 November 2011 (Poland); in the context of Article I-5 of the Treaty establishing a Constitution for Europe, also: 2004-505 DC, of 19 November 2004 (France); DTC 1/2004 of 13 December 2004 (Spain); Decision 22/2016. (XII. 5.) AB. of 30 November 2016, paras. 54, 62 (Hungary).

31 C-213/07 *Michaniki*; C-36/02 *Omega*.

32 Most relevant cases before the Treaty of Lisbon: C-379/87 *Groener,* C-473/93 *Commission v. Luxembourg*, C-36/02 *Omega* and C-213/07 *Michaniki*.

33 Before the Treaty of Lisbon entered into force, CJEU explicitly referred to the identity clause only in C-473/93 *Commission v. Luxembourg*, while either the parties or the advocates general referred to the clause in at least seven cases. It should be noted here that at the time the article was not subject to jurisdiction of the CJEU, as defined in Article 46 TEU.

34 Such cases include C-213/07 *Michaniki* and C-393/10 *O'Brien*.

35 In two cases, the final decision was left to the national court: C-391/09 *Runevič-Vardyn*, and C-438/14 *Bogendorff von Wolffersdorff*. The CJEU also showed deference in C-51/08 *Commission v. Luxembourg* and in C-208/09 *Sayn-Wittgenstein*.

cases (*Omega*[36], *Sayn-Wittgenstein*[37], *Runević-Vardyn*[38], *Bogendorff von Wolffersdorff*[39] and in *M.A.S. and M.B.*[40]) national constitutional identity was successfully invoked as an argument to modify (or derogate from) obligations under EU law.

In material terms, the CJEU considered national constitutional arguments under the identity clause when dealing with national cultural issues (language),[41] fundamental state structures,[42] fundamental rights and fundamental constitutional values.[43] The understanding of national identity by the CJEU coincides with the understanding of constitutional identity by national courts in the sense that (only) core constitutional values are protected by Article 4(2) TEU. Additionally, when the CJEU allowed for limitations, first, it determined whether these pursue goals corresponding to the goals of the EU.[44]

It follows from the above discussion that national constitutional courts invoke certain core aspects of their constitutional order against the EU (including fundamental constitutional values and fundamental rights) and that the CJEU will consider these arguments in the context of the identity clause and, in cases of serious concerns, accommodate them within EU law.

4. The Operationalisation of Constitutional Identity through Article 4(2) TEU

After having identified the substance of constitutional identity, the next step is to analyse the function of Article 4(2) TEU. The question here is: In what way does the CJEU accommodate national identity within EU law?

In the functional sense, a distinction has to be made between primary and secondary EU law. With regard to primary law, the identity clause can be used either as an interpretation tool or as a separate base for derogation from primary law obligations.[45] When

36 C-36/02 *Omega*.

37 C-208/09 *Sayn-Wittgenstein*.

38 C-391/09 *Runevič-Vardyn*.

39 C-438/14 *Bogendorff von Wolffersdorff*.

40 C-42/17 *M.A.S. and M.B*.

41 C-391/09 *Runevič-Vardyn*; C-202/11 *Anton Las*; C-51/08 *Commission v. Luxembourg*.

42 C-208/09 *Sayn-Wittgenstein*.

43 C-208/09 *Sayn-Wittgenstein*; C-399/11 *Melloni*; C-42/17 *M.A.S. and M.B.*

44 Konstadinides, The Constitutionalization of National Identity in EU Law and Its Implications (working draft), URL: https://ssrn.com/abstract=2318972, p. 5; Besselink, Case note: CJEU (Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*: respecting constitutional identity in the EU) (2012), p. 681.

45 Note that this does not mean an exception to the principle of primacy, rather than an accommodation of national considerations into EU law. Such a derogation is not contrary but in line with EU law.

it comes to secondary law, an excessive interference with constitutional identity may cause an annulment of an EU act or, more interestingly, a derogation from an obligation stemming from secondary law, which would cause the disapplication of the said act in the concrete case–and a possible exception to the principle of primacy.[46] For a practical application of these possibilities, we must again look at the relevant national and the CJEU case law.

It is well established that for national apex courts, the core of national constitutions is the final limit to European integration. They reserve (as *ultima ratio*) the right to review EU law and its compatibility with the national constitution. This is an understandable position, as it can hardly be expected from the national courts to allow what they understand to be a violation of their own constitutional provisions. In this regard, Article 4(2) TEU brings nothing new to the table, apart from its functionality mentioned above as a communication hub and a corresponding change in terminology.

The main area for debate is the case law of the CJEU.[47] From a relatively limited number of cases, it can nevertheless be inferred that the CJEU seems to be responsive to national constitutional identity arguments. Therefore, at least a rough framework of the CJEU's methodology can be distilled. Following from *Sayn-Wittgenstein* (reaffirmed in *Bogendorff von Wolffersdorff* and in *Coman*), national identity claims fall under the public policy exemption. They must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. Furthermore, it may only be relied upon if there exists a genuine and sufficiently serious threat to a fundamental interest of society.[48] Regarding specific circumstances of each case, the CJEU accords the national authorities a certain discretion within limits laid down in the Treaties.[49] The CJEU will first consider, whether the proposed limitations on EU law can be deemed to pursue legitimate aims, and subsequently subject them to

[46] On the debate around the principle of primacy, see: von Bogdandy, Schill, Overcoming Absolute Primacy: Respect for National Identity (2011), p. 1419; Kumm, The Jurisprudence of Constitutional Conflict (2005), p. 303; Kumm, Ferreres Comella, The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the EU (2005) 2–3, p. 479; Besselink, National and Constitutional Identity Before and After Lisbon (2010), pp. 47–48. There is no case yet where this would happen, however, *von Bogdandy* and *Schill* mention C-213/07 *Michaniki* and C-165/08 *Commission v. Poland* as examples, where the CJEU left the door open.

[47] For a comprehensive overview of case law, see: Burgorgue-Larsen, A Huron at the Kirchberg Plateau or a Few Naïve Thoughts on Constitutional Identity in the Case-law of the Judge of the EU (2013), pp. 275–304.

[48] C-208/09 *Sayn-Wittgenstein*, para. 86; C-438/14 *Bogendorff von Wolffersdorff*, para. 67; C-673/16 *Coman*, para. 44.

[49] C-36/02 *Omega*, para. 31; C-208/09 *Sayn-Wittgenstein*, para. 87; C-438/14 *Bogendorff von Wolffersdorff*, para. 68.

a proportionality analysis.[50] Relating to the question of legitimacy, the importance of the requirement that the invoked constitutional value must, to be deemed legitimate, "be compatible with EU law"[51], can hardly be overstated. Although the CJEU never directly stated that the Member States arguments must comply with Article 2 TEU values (or Article 6 TEU guarantees), this requirement carries the message that national constitutional arguments, aimed at a deviation from the core constitutional values of the EU, will not be accepted as valid grounds for derogation.

When the CJEU acknowledges the national constitutional value as a legitimate aim for interference with EU law, it has three options. It may decide to carry out the proportionality analysis by itself and confirm[52] or reject[53] the national argument, thereby making the final decision, or (in a preliminary ruling procedure) it can leave the final decision to the national court.[54] It is already implicit in this that the CJEU does not accept the absolute nature of constitutional identity. Although a specific value or right belongs to the core of a Member State's constitution, it will still be subjected to a proportionality analysis to determine if it warrants a derogation from EU law.[55] Such an analysis will also include an allocation of the weight to the national argument of constitutional identity and in that sense, the CJEU will evaluate whether the invoked value is actually a part of the constitutional identity of the Member State.[56] Seemingly, the CJEU may here be stepping on thin ice as to the respective competences of the CJEU and national courts, however, this approach shows its value in the wake of recent attempts of instrumentalisation of the mechanism. Therefore, the CJEU's proportionality analysis will include the consideration of the relevance of the national constitutional provision,[57] as well as the importance of the EU provision and the level of unification in the respective field.[58] The

[50] Von Bogdandy, Schill, Overcoming Absolute Primacy: Respect for National Identity (2011), pp. 1441–1446; van der Schyff, The Constitutional Relationship Between the European Union and Its Member States (2012), p. 579; Rodin, National Identity and Market Freedoms After the Treaty of Lisbon (2011), pp. 29–34.

[51] C-438/14 *Bogendorff von Wolffersdorff*, para. 71. See also: C-208/09 *Sayn-Wittgenstein*, para. 91.

[52] C-36/02 *Omega*; C-208/09 *Sayn-Wittgenstein*.

[53] C-51/08 *Commission v. Luxembourg*; C-202/11 *Anton Las*.

[54] C- 391/09 *Runevič-Vardyn*; C-42/17 *M.A.S. and M.B.*

[55] Although his may at first seem a provocative standpoint, it is predominantly accepted, as Article 4(2) TEU would otherwise give a *carte blanche* to national courts to tailor the application of EU law according to their preferences.

[56] In C-213/07 *Michaniki* and in C-393/10 *O'Brien* CJEU rejected constitutional arguments as part of the Member State's constitutional and national identity.

[57] Examples of this are C-208/09 *Sayn-Wittgenstein*, where it applied a very deferential proportionality analysis, and C-202/11 *Anton Las*, where it rejected the Member State's arguments.

[58] Van der Schyff, The Constitutional Relationship Between the European Union and Its Member States (2012), pp. 580–582.

result is that in certain well-founded cases, the CJEU allows for a differentiated application of EU law between the Member States. This is confirmed by the abovementioned condition that constitutional identity may only be validly relied on if there is a genuine and sufficiently serious threat to a fundamental interest of society.[59]

As noted above, although the CJEU has yet to state that in a case, the result of the described process cannot be in contradiction with the fundamental values of the EU, set out in Article 2 TEU.[60] The Member States are also bound by the EU Charter when implementing EU law, which means that the human rights standards set by the CJEU and, taking note of Article 6 TEU and Article 51 of the EU Charter, ECtHR, form the "final frontier".[61]

5. The Oscillatory Nature of Constitutional Identity

To show the possible Janus-faced nature of the identity clause and its potential implications for the protection of human rights, I look at two recent CJEU cases, which hallmark judicial cooperation at the highest level.[62]

5.1. Constitutional Identity as a Positive Force in Protecting Individual Rights

The *Taricco* cases show the possible use of constitutional identity as an argument to raise the level of human rights protection. In the "*Taricco I*" case[63] the Grand Chamber held that Italian courts were to disapply the provisions of the Italian Penal Code, regulating the statute of limitation on fraud affecting the EU, thus enabling them to complete their (otherwise lengthy and complicated) trials. They had to do this in cases where the national provisions would "prevent the imposition of effective and deterring punishments in a significant number of cases of serious fraud, affecting the financial interests

59 C-208/09 *Sayn-Wittgenstein*, C-673/16 *Coman*.

60 This is also the position of the European Parliament. See: Situation of fundamental rights: standards and practices in Hungary. European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), statements K, M.

61 C-673/16 *Coman*, para. 47. This does not mean human rights will always trump constitutional identity claims. This follows from C-391/09 *Runevič-Vardyn* (where minority language rights and rights to private life were affected by national identity claims) and C-208/09 *Sayn-Wittgenstein*, reaffirmed in C-438/14 *Bogendorff von Wolffersdorff* (where the principle of equality took precedence over the right to private life). See: van den Brink, What's in a Name? Some Lessons for the Debate Over the Free Movement of Same-Sex Couples Within the EU, (2016), pp. 441–443.

62 Both cases were decided within the preliminary ruling procedure by the Grand Chamber and both procedures were initiated by national constitutional courts.

63 C-105/14 *Taricco*.

of the EU" (the so-called *Taricco* rule),[64] based on Article 325(1) of the Treaty on the Functioning of the European Union (TFEU).

The Italian Supreme Court and the Milan Court of Appeals were unimpressed by this interpretation and referred the trials under their jurisdiction to the ICC. The main concern was that rules on the statute of limitation in the Italian legal system fall within the substantive limb of criminal law and are thus covered by the principle of legality. They especially highlighted the principle of non-retroactivity and the demand for the certainty of criminal law. The ICC referred the case to the CJEU, highlighting that the *Taricco* rule could violate Arts. 25(2) and 101(2) of the Italian Constitution.[65] It proposed an interpretation of the ruling as allowing the national courts to exclude its application in cases, where it would violate the constitutional identity of the Member States.[66] It sought confirmation for its view[67] that EU law should, according to Article 53 of the EU Charter and Article 4(2) TEU, allow a higher level of protection than granted by Article 49 of the EU Charter and Article 7 of the European Convention on Human Rights (ECHR), expressly pointing out that this interpretation does not question the principle of primacy.[68]

In its second ruling *M.A.S. and M.B.* ("*Taricco II*"),[69] the CJEU followed the ICC's lead. It recognised that national courts should not follow the first ruling if that would lead to a violation of the principle of certainty of offences and punishments or of the prohibition of retroactivity.[70] It left it to the national courts to decide whether the *Taricco* rule was incompatible with these supreme principles of the Italian Constitution.[71]

In its judgment, the ICC held that the references by the two Italian courts were unfounded since the *Taricco* rule cannot be applied retroactively.[72] Regardless, it went on to hold that in any case Article 325(1) TFEU and the corresponding *Taricco* rule evidently lacked legal certainty. Moreover, it is not for the courts to pursue a criminal policy independently of the law they are bound to respect.[73]

Regarding the role of constitutional identity in the field of human rights, the Taricco saga represents a welcome development, which anyone familiar with the *Melloni*[74] case

64 Ibid., para. 52.

65 Order No. 24, Year 2017, para. 2.

66 Ibid., para. 6.

67 Ibid., para. 7.

68 Ibid., para. 8.

69 C-42/17 *M.A.S. and M.B.*

70 Ibid., para. 47.

71 Ibid., para. 59.

72 This meaning to cases in which the facts had occurred prior to the publishing of *Taricco I* on 8 September 2015.

73 Judgment No. 115, Year 2018, para. 11.

74 Sarmiento, To bow at the rhythm of an Italian tune, URL: https://despiteourdifferencesblog.wordpress.com/2017/12/05/to-bow-at-the-rhythm-of-an-italian-tune/.

can appreciate. It follows from *Taricco II* that the CJEU will allow a certain degree of constitutional exceptionalism in the sense that EU law will be interpreted to accommodate core constitutional values of the Member States. This will be granted when the Member States are left some discretion in the field of application of the relevant rule. In the present case, if the CJEU decided to disregard the national constitutional concerns, it would mean a lowering of the standard of human rights protection in Italy. However, the CJEU accepted Italian arguments, and eventually even seemed to find that EU law warrants the same level of protection.[75]

The result leaves the door open to a differentiated application of EU law among the Member States, so that national law, granting more rights to individuals, may be allowed to override EU law. Although the practical implications are limited when the EU Charter demands the same level of protection, the case shows that constitutional identity may counteract EU law obligations.

5.2. Constitutional Identity as a Negative Force in Protecting Individual Rights

Conversely, the *Coman* case[76] reveals that national identity could also be employed as a justification for the lowering of the standard of rights protection.[77] Although the case does not directly deal with a fundamental human right, the human rights overtone is clear.[78]

Mr. Coman, a Romanian and an American citizen, and Mr. Hamilton, an American citizen, married in Brussels. In December 2012 they inquired with the Romanian authorities about the possibilities of Mr. Hamilton obtaining the right to reside lawfully in Romania for more than three months as Mr. Coman's family member. Romanian authorities took the view that since marriage between people of the same sex was prohibited, he could only reside in Romania for three months and would not be granted family reunification rights. The applicants argued before the courts that the Romanian Civil Code was unconstitutional and the Constitutional Court referred to the CJEU regarding the interpretation of the Citizens' Rights Directive.[79]

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75 ICC interpreted it in this way as well. See: Judgment No. 115, Year 2018, para. 14.

76 C-673/16 *Coman*.

77 *Van den Brink* shows how this may not be a new development, since already in C-391/09 *Runevič-Vardyn* and in C-208/09 *Sayn-Wittgenstein*, the CJEU, by granting deference to Member States based on national identity claims, indirectly enabled them to use it to the detriment human rights. See: van den Brink, What's in a Name? Some Lessons for the Debate Over the Free Movement of Same-Sex Couples Within the EU, (2016), pp. 441–443.

78 For a detailed analysis, see: Dunne, Coman: vindicating the residence rights of same-sex "spouses" in the EU (2018), pp. 383–389.

79 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the terri-

The question was whether Article 21(1) TEU precludes the Member States to refuse to grant Mr. Hamilton a right of residence, based on the ground that national law does not recognise marriage between persons of the opposite sex. The CJEU decided that the term "spouse"[80] is gender-neutral, covering same-sex marriages as well.[81] Furthermore, a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State.[82] The refusal to recognise such a marriage may interfere with the exercise of the right to move and reside freely in the territory of the Member States.[83] Such a restriction could only be justified if it was based on objective public-interest considerations and if it was proportionate to the legitimate objective pursued.[84]

Public interest considerations raised by several Governments were considered unfounded. The Latvian government, intervening in the case, argued that such an interpretation of the term spouse is in conflict with Article 4(2) TEU, as it violates Latvian constitutional identity.[85] The CJEU, recalling that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society,[86] stated that the recognition of same-sex marriage, for the sole purpose of granting a derived right of residence to a third-country national, does not interfere with the constitutional identity of the Member States, since it does not require of a Member State to provide for the institution of such marriage in national law.[87]

This conclusion, which I am in full support of, nevertheless raises some questions. It seems that the CJEU decided here that the constitutional arguments presented by the Latvian government did not qualify to be considered under Article 4(2). The conclusion is based on the fact that the CJEU expressly limits the scope of the consequences of this case to a demand for recognition of a same-sex marriage "*for the sole purpose of granting a derived right of residence*". First, it is questionable whether the effects of such a ruling will remain so constrained in the future.[88] Regardless, the brief rejection of national constitu-

tory of the Member States, OJ L 158 30.4.2004, p. 77.

80 Citizens' Rights Directive, Article 2(2)(a).

81 C-673/16 *Coman*, para. 35.

82 Ibid., para. 36.

83 Ibid., para. 40.

84 Ibid., para. 41. Also see: C-208/09 *Sayn-Wittgenstein*, para. 86.

85 C-673/16 *Coman*, para. 42. It is noteworthy that Latvia has an explicit constitutional provision specifying marriage as a partnership between a man and a woman.

86 Ibid., para. 44.

87 Ibid., paras. 45, 46.

88 Although the CJEU uses the phrase "for the sole purpose of granting a derived right of residence" several times in its judgment, the underline reasoning of the Court regarding Article 21 TEU may leave the door open to granting all rights following from Article 21(1) TFEU or at least those

tional arguments, in this case, may not be the best way to go. First, it is not completely clear from the judgment, whether the argument is refused because the invoked value is not considered to form a part of the national identity of a Member State, or because the interference is considered marginal. Since no proportionality analysis is mentioned, the answer seems to be the former. However, it is hard to imagine how an obligation to recognise same-sex marriages, if only to award a derived right to residence, does not interfere with the Member States understanding of the institution of marriage, which is founded on a constitutional provision that directly prohibits the marriage of persons of the same sex.[89] It could probably be assumed that such prohibition is intended to protect the institution of marriage on the substantive level, the rationale being that rights, awarded to married couples of different sexes, should not be granted to couples of the same sex.

The CJEU would perhaps have done better if it conceded that its interpretation of the term spouse and the ensuing award of a derived right to residence interfere with the constitutional identity of the states[90] with explicit constitutional provisions in the sense that Latvia does[91] and then consider the interests at stake by performing a proportionality analysis. This way, a certain degree of deference would be shown to what are probably legitimate national constitutional considerations. Following the above theoretical constructions behind Article 4(2) TEU, the result would be in all likelihood the same, presuming that the court would accept that the outcome of the weighing could not result in the lowering of standards of human rights protection below the ECHR thresh-

stated in the Citizens' Rights Directive, considering especially the principle of non-discrimination. Anything less would still interfere with the right to move and reside in the EU, since denying some rights to same-sex couples in some of the Member States would dissuade them from enjoying their rights.

89 Article 110 of the Latvian Constitution, as modified in 2006, URL: https://likumi.lv/ta/en/en/id/57980. During the amendment procedure, MPs were reported saying that the constitutional change was needed, as they "were concerned that since Latvia has joined the European Union, EU laws will enable gay people to gain rights including the right to marry." Sheeter, Latvia cements gay marriage ban (2005), URL: http://news.bbc.co.uk/2/hi/europe/4531560.stm.

90 These go to the core of how Member States define themselves and therefore present legitimate arguments to interfere with the freedom of movement. Van den Brink, What's in a Name? Some Lessons for the Debate Over the Free Movement of Same-Sex Couples Within the EU, (2016), pp. 440–441.

91 Currently: Bulgaria, Latvia, Lithuania, Poland, Hungary and Croatia. In Romania, a referendum to change the constitution and define marriage as an institution between a man and a woman failed, since the turnout did not reach the 30 % threshold. Illie, Romanian constitutional ban on same sex marriage fails on low voter turnout, URL: https://www.reuters.com/article/us-romania-referendum/romanian-constitutional-ban-on-same-sex-marriage-fails-on-low-vote-turnout-idUSKCN1MH0XI?il=0; Tryfonidou, Awaiting the ECJ Judgment in Coman, URL: http://eulawanalysis.blogspot.com/2017/03/awaiting-ecj-judgment-in-coman-towards.html?m=0.

old.[92] The CJEU actually seems to have recognised this as a supporting argument in its judgment, stating that a national measure, liable to obstruct the exercise of freedom of movement for persons, may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter.[93] It pointed out the right to family and private life as a fundamental right,[94] highlighting that same-sex partnerships fall within the notion of private and family life. In doing this, the CJEU might have already implied that the Member States arguments would not survive the proportionality analysis. This approach was followed by the Romanian Constitutional Court, which in the interpretation of the Civil Code followed the CJEU's ruling, adding that homosexual couples have equal rights to a private and family life as heterosexual couples under Article 26 of the Romanian Constitution.[95]

In any case, the lesson is that the Member States will argue in cases that affording certain rights to individuals might interfere with their constitutional identity, thereby trying to lower the standards of rights protection. This was rejected by the CJEU, *obiter dicta* maintaining the existing level of human rights protection as a limit to national arguments.

6. The Curious Case of Hungary

The pertinence of the above discussion is exemplified by the significant political and constitutional changes, taking place in several Member States. Hungary seems to be offering itself for discussion, as the recent political and constitutional developments,[96] encroaching upon fundamental rights, judicial independence and fair elections,[97] have prompted the European Parliament to adopt a Resolution regarding the initiation of the Article 7(1) TEU procedure.[98] The case is especially relevant since Hungary openly

92 EU Charter, Article 53.

93 C-673/16 *Coman*, para. 47.

94 Ibid., paras. 48–50.

95 Decision No. 534 of 18 July 2018, paras. 40.–42. See: Hein, A Constitutional Ban on Same-sex Marriage, URL: https://constitutional-change.com/a-constitutional-ban-on-same-sex-marriage-romania-is-about-to-entrench-its-homophobic-worldview/.

96 For an overview of the recent constitutional developments in Hungary, see: Sólyom, The Rise and Decline of Constitutional Culture in Hungary (2015), pp. 16–29.

97 López Garrido, López Castillo, The EU framework for enforcing the respect of the rule of law and the Union's fundamental principles and values, URL: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2019)608856, p. 31.

98 The situation in Hungary. European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

adopted a strategy of instrumentalisation of constitutional identity in an attempt to avoid obligations under EU law.[99]

On 20 June 2018, the 7th amendment[100] to the Fundamental Law of Hungary[101] was adopted to protect Hungarian constitutional identity against the EU.[102] One of the latter's provisions now states, that "The protection of Hungary's self-identity and its Christian Culture is the duty of all state institutions." As pointed out by *Halmai*, this amendment could be used as a basis for the review of constitutionality of any legal norm, violating the Hungarian Christian culture and is an overt attempt to bypass any EU attempts at resolving the refugee crisis, which would not suit Hungary's current government.[103] The amendment was preceded by the HCC's decision from 2016,[104] in which (indirectly dealing with the EU asylum seeker's quota system) it already developed competence to review EU law because of Hungarian constitutional identity, understood in a similar way that is now inscribed in the constitution.[105] The change follows a pop-

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99 This is probably best exemplified by the 2016 quote from Viktor Orbán 2016: »I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary's constitutional identity. This means that the cabinet cannot support a decision made in Brussels that violates Hungary's sovereignty.« Translation by: Halmai, Abuse of Constitutional Identity (2018), p. 36. Also see: The chief goal of the seventh amendment to the Constitution is the protection of national sovereignty, URL: https://www.kormany.hu/en/ministry-of-justice/news/the-chief-goal-of-the-seventh-amendment-to-the-constitution-is-the-protection-of-national-sovereignty.

100 This was the second attempt to adopt the amendment, the first failing in 2016. See: Halmai, Abuse of Constitutional Identity (2018), pp. 28–29; Kelemen, Pech, Why autocrats love constitutional identity and constitutional pluralism: Lessons from Hungary and Poland, Working Paper No. 2 – September 2018, URL: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf, pp. 13–14.

101 Bill T/332, Seventh Amendment of the Basic Law of Hungary (unofficial translation), URL: https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf.

102 Ibid., Detailed reasoning, Article 2.

103 Halmai, Fidesz and Faith: Ethno-Nationalism in Hungary, URL: https://blogs.eui.eu/constitutionalism-politics-working-group/founding-members/descriprion/. For a genesis of this newly found tool for the government's anti-migration policy, see: Halmai, Abuse of Constitutional Identity (2018), pp. 26–29; Halmai, From a Pariah to a Model? Hungary's Rise as an Illiberal Member State of the EU (2017), pp. 36–38. For an in-depth analysis of the recent developments in Hungary, see: Körtvélyesi, Majtényi, Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary (2017), pp. 1733–1743.

104 Decision 22/2016. (XII. 5.) AB.

105 Halmai, National(ist) Constitutional Identity?, URL: https://ssrn.com/abstract=2962969, pp. 12–14; Halmai Abuse of Constitutional Identity (2018), pp. 29–36; Kovács, The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts (2017), pp. 1712–1716; Kelemen, The Hungarian Constitutional Court and the Concept of National Constitutional Identity (2017), pp. 23–33.

ulist agenda, in line with which, according to Halmai, "immigrants, refugees and minorities are perceived as threats to constitutional identity of the people" and a danger to political unity.[106] It could also be expected that in line with their coordinated response to the refugee crisis,[107] (at least) the other three countries of the Visegrád group, also redefining their constitutional identity along ethnocultural (stressing religion, culture and language) lines,[108] could invoke similar arguments as Hungary.[109] It may prove that when illiberal governments dislike the scolding by the EU, be it in the field of asylum or judicial reforms, they would attempt to take refuge under the coat of Article 4(2) TEU.[110] After having established the contours of the identity clause, we should now be able to evaluate whether such attempts could fall on fertile ground. It should, of course, be emphasised that the analysis is hypothetical, and any concrete conclusions will only be possible when a case comes before the CJEU.

It can first be established that constitutional identity is now firmly rooted in the text of the Hungarian constitution. Nominally, Hungarian ethnocultural Christian tradition is part of the country's constitutional identity which, following the HCC's reasoning,[111] can be invoked as an argument to deflect EU law obligations. The intention of Hungary, therefore, seems to be to reinforce the arguments against the application of EU law it might consider politically inopportune. As established, the CJEU will consider such arguments as national identity claims under Article 4(2) TEU. First, it will have to establish, whether the arguments are legitimate and compatible with EU law. Generally, cultural considerations may be considered as part of a Member State's national identity.[112] However, as pointed out above, the demand for respect of core constitutional values from Article 2 TEU could already be included at this point, dismissing arguments aimed at weakening the rule of law or human rights. Furthermore, constitutional

106 Halmai, Conclusive Remarks (2018), p. 483.

107 Joint Statement by the Prime Ministers of V4 Countries on migration (19 July 2017), Budapest; see: Kovács, The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts (2017), p. 1704.

108 Kovacs, The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts (2017), p. 1706.

109 For an overview of the problem, including the Polish case, see: Kelemen, Pech, Why autocrats love constitutional identity and constitutional pluralism: Lessons from Hungary and Poland, Working Paper No. 2 – September 2018, URL: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf, pp. 11–21.

110 Kelemen, Pech, Why autocrats love constitutional identity and constitutional pluralism: Lessons from Hungary and Poland, Working Paper No. 2 – September 2018, URL: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf, p. 6.

111 Decision 22/2016. (XII. 5.) AB. paras. 54, 69.

112 For a critical view on the HCC judgment on "Migrant Quotes" in this respect, see: Halmai, Abuse of Constitutional Identity (2018), p. 40, asking what "fundamental interests of society" can legitimately trump the requirement of sincere cooperation in this case.

identity claims are not absolutely protected. The CJEU would apply a proportionality analysis of the interference, which, considering the goals of recent constitutional reform in Hungary, probably would be a strict one. The CJEU's first consideration would then be whether national constitutional arguments can genuinely be considered as part of the Member State's constitutional identity. Because of express constitutional provisions, the answer is probably in the affirmative, although, if in a bold mood, and taking into account the evolution of the identity narrative in Hungary, the CJEU should probably also address the question of the abuse of the process. Even if accepted, the next step would be to evaluate the relevance of conflicting interests, put forward by the government. Since exceptions to EU law obligations will only be granted if there is a genuine and sufficiently serious threat to a fundamental interest of society, it could reasonably be assumed that cultural (or other constitutional) arguments, when put in the broader context, would be unsuccessful.

Regardless of the methodological approach, the CJEU would take in such a situation, the final result will have to comply with the fundamental values, enshrined in Article 2 TEU. Additionally, Article 6 TEU, coupled with Article 53 of the EU Charter, should present a second hurdle specifically related to the human rights dimension. Since the aim of Hungary's current government is precisely to evade obligations, following from these principles, I would argue that such attempts would be of a short breath. There are mechanisms put in place, most following directly from the CJEU case law, that are sufficient to tackle attempts of instrumentalisation of the identity clause. Solely because the concept of national or constitutional identity seems to be very inviting for abuse,[113] this is not yet reason enough for the abolishment of the dialogue. What follows from this is that even employing the existing mechanisms from the CJEU's case law, illegitimate constitutional identity claims will not be accommodated by the CJEU, in the sense that it would allow Hungary (or any other country, mimicking a similar path) to deviate from its primary or secondary EU law obligations. This is legally (and politically) sound as any country that wishes to form a part of the EU community has to respect the fundamental principles, the community is based upon. *A contrario*, there is no place to be held for a country, which does not.

Apart from what has already been discussed, several additional general concerns arise about this newly found approach to European constitutional exceptionalism. First, it may come to the CJEU deciding on what are essentially politically rooted issues. The battlefield of further EU cooperation, seemingly at a crossroads, might move, as it ap-

[113] Kelemen, Pech, Why autocrats love constitutional identity and constitutional pluralism: Lessons from Hungary and Poland, Working Paper No. 2 – September 2018, URL: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf, pp. 9–11.

pears, to courtrooms.[114] Judging by what was explained above the arguments will not succeed before the CJEU, which makes this approach all the more questionable. It is implausible that the government is unaware of this fact, and therefore it seems that the whole process is being instrumentalised to strengthen a political position. On top of that, taking note of HCC's newly formed case law, that would not be the end of the problem. The court would namely be under the (self-inflicted) obligation to protect Hungary's constitutional identity (understood in an ethnocultural sense, encompassing religion), meaning it would adopt the identity review and probably disapply relevant EU law.[115] The consequences following from this are unpredictable.

On a more theoretical note, it is most problematic that this approach undermines the moral foundation of the demand for respect of national identity.[116] The latter was founded in recognition of the importance of accommodation of diversity to promote unity and, as was rightfully pointed out by *Kelemen* and *Pech*, is based on the premise of sincere cooperation.[117] However, when a Member State (or several Member States) decides to use the identity argument with an already established (publicly proclaimed) intention of disapplication of EU law, even changing its constitution for this purpose, it undermines the basic intention of the clause and goes most clearly against the principle of loyal cooperation.[118] Instead of promoting cooperation between legal orders, this would push for exceptionalism, promoting dis-unity and further mistrust.[119]

A venue of constitutional dialogue is suddenly transformed into a venue of politicisation and abuse of constitutional law. Consequently, the approach of the CJEU to nation-

[114] On 11 July 2019, a Hungarian judge stayed criminal proceedings to pose a preliminary question to the CJEU about the independence of the state's judiciary. See: Szabó, A Hungarian Judge Seeks Protection from the CJEU – Part, URL: https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/.
The Commission also decided to initiate an infringement procedure against Hungary regarding its treatment of asylum seekers. See: Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones, URL: https://europa.eu/rapid/press-release_IP-19-4260_en.pdf.

[115] In doing so, the court would promote an "unconstitutional national constitutional identity". Halmai, Constitutional Court Decision on the Hungarian Government's Constitutional Identity Defence, URL: https://blogs.eui.eu/constitutionalism-politics-working-group/constitutional-court-decison-hungarian-governments-constitutional-identity-defense/.

[116] On the moral underpinnings of national identity, see: Cloots, National Identity, Constitutional Identity, and Sovereignty in the EU (2016), pp. 86–94.

[117] Kelemen, Pech, Why autocrats love constitutional identity and constitutional pluralism: Lessons from Hungary and Poland, Working Paper No. 2 – September 2018, URL: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf, p. 8.

[118] Halmai, Conclusive Remarks (2018), p. 483; Halmai, Abuse of Constitutional Identity (2018), pp. 14–16.

[119] For a similar conclusion, see: Halmai, Abuse of Constitutional Identity (2018), pp. 41–42.

al constitutional considerations will become more reserved, resulting in a negative impact on genuine and legitimate constitutional identity claims by other Member States.[120]

7. Conclusion

The aim of this paper was to present the concept of national identity and the role it may play in constitutional disputes, provoked by recent Hungarian Government's attempts to use the concept to evade EU law obligations. Although the concept is quite ambiguous, at least some clarity regarding the substance and functionality may be brought about by studying the current set of national and especially the CJEU case law. The findings concerning the CJEU's methodology in identity-oriented disputes show that although the idea behind national identity may prove by itself prone to abuse, there are seemingly sufficient safeguards put in place in the existing case law of the CJEU. The last and perhaps vital step would be for the CJEU to formally recognise that national constitutional arguments can never cause the sliding of fundamental values from Article 2 TEU, including fundamental human rights, below the levels, set by EU law.

As long as we do not have a concrete case before the CJEU, it is hard to make definite conclusions. However especially considering the political context, surrounding the endeavours of Hungary and other countries, which may soon follow, attempts of instrumentalisation of the identity clause in judicial proceedings are likely to fail. In any case, the usually calm summer months nevertheless brought two new cases to Kirchberg's courtrooms, where it seems that both Hungary and the CJEU will have to reveal their cards and eventually determine the validity of this paper's conclusions. Regardless of the outcome, attempts of abuse are problematic both in terms of the political roots of the problem, since the courts are probably not the *forum* for resolving disputes such as these, as well as because they undermine the moral foundations of the demand for respect for national identity. In that way, the EU's commitment to respect and protect the Member States' national identities could, as recent developments sadly show, become an instrument of alienation instead of unification of the nations of Europe, which is the opposite of the initial intentions and certainly goes counter to the idea of European integration.

[120] Halmai, Conclusive Remarks (2018).

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Pomen nacionalne identitete v pravu Evropske unije in njen potencial za instrumentalizacijo

(povzetek)

Namen prispevka je v predstavitvi potencialne zlorabe identitetne klavzule iz drugega odstavka 4. člena PEU s poudarkom na varstvu človekovih pravic. Z namenom vzpostavitve okvirja za osrednji del razprave prvi del prispevka obravnava konceptualna vprašanja, povezana z nacionalno identiteto. Kljub nejasnostim, ki pojem zaznamujejo tako na ravni akademskih razprav kot tudi v sodni praksi, je mogoče vzpostaviti vsaj osnovni pojmovni okvir in metodološki pristop k reševanju sodnih sporov, povezanih z ustavno identiteto.

Nacionalna identiteta in ustavna identiteta sta ločena, toda medsebojno tesno prepletena pojma. V skladu s prevladujočim stališčem teorije in sodno prakso pa ne glede na to ni dvoma, da je ustavna identiteta del nacionalne identitete, kot je ta opredeljena v drugem odstavku 4. členua PEU. Ta se namreč neposredno sklicuje na temeljne ustavne strukture držav članic EU. Pojem ustavne identitete kot del nacionalne identitete obsega temeljne (jedrne) dele ustavnih redov držav članic in je prek drugega odstavka 4. člena PEU postal del prava EU in v tem okvirju veljaven pravni argument. Koncepta nacionalne oziroma ustavne identitete za namene prispevka uporabljam kot soznačnici, ki označujeta jedro ustavnega reda posameznih držav članic.

Pri določitvi vsebine in funkcije koncepta nacionalne identitete v povezavi s pravom EU je nujno upoštevati tako pogled držav članic kot tudi pogled EU. V prispevku se pri tem osredotočam na vsebino in funkcijo, ki jo konceptu pripisujejo pristojna nacionalna sodišča in Sodišče Evropske unije, torej sodni koncept ustavne identitete. Z vidika držav članic je prvi korak preučevanje nacionalnih ustavnih besedil in pripadajoče sodne prakse najvišjih nacionalnih sodišč. Pri analizi se pokaže določena stopnja konvergence pri vsebinskem razumevanju ustavne identitete. Najvišja nacionalna sodišča držav članic namreč v povezavi z ustavno identiteto poudarjajo podobne ustavne vrednote. Najpogosteje se ta povezuje s suverenostjo in neodvisnostjo, temeljnimi organizacijskimi elementi države, demokratičnostjo, človekovimi pravicami in načelom pravne države. Tudi v razumevanju funkcionalnega vidika ustavne identitete se stališča pretežno pokrivajo, saj je ta razumljena kot omejitev prava EU, ki mu ni dovoljeno poseganje v temeljne nacionalne ustavne vrednote. Z vidika EU je po drugi strani ključna sodna praksa Sodišča EU. Kljub nejasnostim, povezanim z nacionalno identiteto, je mogoče na njeni podlagi vzpostaviti vsaj grob oris metodološkega pristopa Sodišča EU pri reševanju zadev, ki se nanašajo na spoštovanje temeljnih ustavnih struktur držav članic. Analiza pokaže, da je Sodišče EU sledilo nacionalnim pogledom na materialni vidik ustavne identitete ter da je sprejelo nacionalne pomisleke kot del tega pojma na področjih kulture (predvsem jezika), temeljnih državnih struktur ter temeljnih ustavnih vrednot, vključno s pravica-

mi. V funkcionalnem smislu Sodišče EU nacionalno identiteto iz drugega odstavka 4. člena PEU razume kot upošteven argument za omejitev obveznosti, ki izhajajo iz prava EU. Pri tem argumente ustavne identitete običajno uvrsti med izjeme javnega reda. Te razlaga ozko, tako da njihovega obsega ne more enostransko določiti država članica, nanje pa se je mogoče sklicevati le, če obstaja resnična in dovolj resna grožnja temeljnemu interesu družbe. Sodišče EU najprej oceni legitimnost cilja, ki ga država članica z omejitvijo prava EU zasleduje, pri čemer mora biti ta cilj v skladu s pravom EU. Nadalje izvede analizo sorazmernosti posega, pri čemer o sorazmernosti odloči samo in argument države sprejme ali zavrne ali pa končno odločitev prepusti nacionalnemu sodišču. V okviru ocene o sorazmernosti Sodišče EU odloča tudi o upoštevnosti argumenta ustavne identitete in njegovi teži v primerjavi s prizadeto vrednoto, iz česar seveda izhaja, da ne priznava absolutne narave ustavne identitete posamezne države članice. Čeprav v sodni praksi Sodišče EU tega še ni ugotovilo, se zavzemam, da bi skrajne meje upoštevnim argumentom ustavne identitete predstavljale temeljne vrednote iz 2. člena PEU in določba 6. člena PEU.

Pokaže se, da lahko argument ustavne identitete služi različnim ciljem. Temu je namenjen drugi del prispevka, ki se osredotoča na dve aktualni zadevi pred Sodiščem EU, ki zadevata vprašanje varstva človekovih pravic in to načelo ponazarjata. Prva je zadeva *Taricco*, pri kateri je prišlo do nenavadne situacije, ko je Sodišče EU v svoji prvi odločbi, povezani s to zadevo, odločilo, da morajo italijanska kazenska sodišča, če je to potrebno, zaradi zagotavljanja učinkovitosti prava EU prezreti nacionalne določbe o zastaralnih rokih. Italijansko ustavno sodišče se je še drugič obrnilo na Sodišče EU in ga, z argumentom, da bi sicer prišlo do kršitve načela zakonitosti kot dela ustavne identitete Italije, prepričalo. Sodišče EU je tako sprejelo nacionalni argument ustavne identitete kot razlog za odstop od zahtev primarnega prava EU, kar je vodilo k ohranitvi višje ravni varstva pravic v Italiji. Po drugi strani zadeva *Coman* kaže na obraten poskus. Latvija je namreč kot intervenientka v zadevi, ki je sicer povezana s priznavanjem istospolnih porok v Romuniji, ugovarjala stališču Sodišča EU, da morajo države članice zgolj za namen podelitve izvedene pravice do prebivanja priznati veljavnost v tujini veljavno sklenjene zakonske zveze dveh oseb istega spola, z argumentom, da krši njeno ustavno identiteto. S sklicevanjem na lastno ustavo je želela doseči, da bi te osebe na ozemlju Latvije uživale manj pravic kot v preostalih državah članicah EU. Sodišče EU je ta argument zavrnilo, saj da ne gre za poseg v ustavno identiteto, pri čemer je *obiter dictum* omenilo, da mora tudi sicer vsaka omejitev svoboščin po pravu EU spoštovati standarde varstva človekovih pravic po Listini EU o temeljnih pravicah.

Opirajoč se predvsem na poskus v zadevi *Coman* in predhodne ugotovitve v zvezi s konceptom ustavne identitete v pravu EU, v zadnjem delu obravnavam primer Madžarske. Ta je leta 2018 sprejela ustavni amandma, s katerim je med drugim izrecno zapovedala zaščito ustavne identitete vsem državnim organom. Sprejetje amandmaja je

sledilo odločbi madžarskega ustavnega sodišča, ki je že pred tem vzpostavilo pristojnost presoje skladnosti prava EU z madžarsko ustavno identiteto. Madžarska vlada je pri sprejemanju amandmaja povsem odkrito pojasnila, da je njegov namen zavarovanje pred pravom EU. Upoštevaje politični kontekst zadeve, gre v tem primeru za jasen poskus instrumentalizacije ustavne identitete za doseganje političnih ciljev. Ob upoštevanju okoliščin sprejetja ustavnega amandmaja in predstavljenih izhodišč v zvezi s konceptom ustavne identitete ugotavljam, da taka zloraba koncepta ustavne identitete pred Sodiščem EU ne bo uspešna. Sodišče EU je namreč že vzpostavilo mehanizme, s katerimi bi kakršenkoli poskus sklicevanja na ustavno identiteto z namenom izigravanja prava EU lahko preprečilo. To še zlasti velja v primerih, ko bi bile posledice sklicevanja na ustavno identiteto znižanje ravni zaščite temeljnih ustavnih vrednot EU, vključno z ravnjo varstva človekovih pravic, kot jo zagotavlja Listina EU o temeljnih pravicah. Vse ugotovitve v zvezi s situacijo na Madžarskem so seveda, vsaj do odločitve v dveh novih zadevah, ki sta se v povezavi z obravnavanimi vprašanji nedavno pojavili pred Sodiščem EU, zgolj hipotetične.

Ne glede na končni rezultat takega sodnega spora ima poskus instrumentalizacije ustavne identitete tudi druge škodljive posledice. Sodišča namreč niso najprimernejši forum za reševanje problemov, ki izvirajo iz političnih nesoglasij. Poleg tega taki poskusi spodkopavajo moralne temelje ideje o obveznosti spoštovanja nacionalnih identitet držav članic, ki je bila namenjena krepitvi ideje o združevanju evropskih narodov ob spoštovanju njihove različnosti. Taki poskusi so v nasprotju z načelom lojalnega sodelovanja in bi lahko negativno vplivali na prihodnje utemeljene poskuse držav članic, da zaščitijo svojo ustavno identiteto pred posegi EU.

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Marko Kos

Pomembnost nacionalne identitete v pravu Evropske unije in možnost njene instrumentalizacije

Namen prispevka je predstaviti koncept ustavne identitete in njegovo vlogo v ustavnih sporih. Kljub nejasnostim, povezanim s tem pojmom, je mogoče na podlagi sodne prakse nacionalnih ustavnih sodišč in Sodišča EU vzpostaviti vsaj splošni okvir vsebine in funkcije nacionalne identitete v okviru prava EU. Pokaže se, da kljub navidezni dovzetnosti koncepta nacionalne identitete iz drugega odstavka 4. člena PEU za zlorabe v praksi Sodišča EU obstajajo ustrezne varovalke, ki lahko preprečijo njegovo instrumentalizacijo. Trenutni poskusi, kot so na primer na Madžarskem, da bi koncept zlorabili z namenom izogibanja obveznostim po pravu EU imajo zato zelo malo možnosti za uspeh pred Sodiščem EU.

Ključne besede: Evropska unija, nacionalna identiteta, ustavna identiteta, drugi odstavek 4. člena PEU, človekove pravice, sorazmernost, Madžarska, Sodišče Evropske unije, *Coman*, *Taricco*.

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The Relevance of National Identity in European Union Law and Its Potential for Instrumentalisation

The aim of the paper is to present the concept of national identity and its role in constitutional disputes. Despite its ambiguity, based on national constitutional courts' and the CJEU's case law, at least a general framework concerning its substance and function in EU law can be established. It demonstrates that although the concept of national identity from Article 4(2) TEU may be prone to abuse, sufficient safeguards exist to prevent the instrumentalisation of the concept. Current attempts, particularly in the case of Hungary, to (ab)use the concept in order to evade EU law obligations are, therefore, highly unlikely to succeed before the CJEU.

Keywords: European Union, National identity, constitutional identity, Article 4(2) TEU, human rights, proportionality, Hungary, Court of Justice of the European Union, *Coman*, *Taricco*.