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CONSTITUTIONAL IDENTITY AND THE PRIMACY OF EU LAW: CONFLICT, BALANCE, AND LIMITS

Introduction. The concept of constitutional identity functions as a legal instrument that channels constitutional conflicts and promotes constitutional dialogue, making it a significant reference point for shared normativity between European and national legal orders. This issue is highly complex and multidimensional. Numerous researchers have addressed this topic [1], emphasizing that various national and European Union actors participate in interpreting constitutional identity and assessing potential mechanisms for its enforcement and accommodation within the European Union. The purpose of this article is to provide a concise overview of the case law of both European Union and national courts, illustrating how constitutional identity is primarily invoked by national law to safeguard domains of national competence that are beyond the reach of European Union legislation.

National identity or constitutional identity. The starting point is Article 4(2) of the Treaty on European Union, introduced by the Treaty of Lisbon. This provision 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. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State [2].

The concept of national identity is not, however, a legal concept in the strict sense, but is extra-legal and multidimensional. It refers to the national community understood as a cultural, historical or political community. It comprises elements such as language, tradition, religion and customs. One must agree with Armin von Bogdandy, who pointed out that, in the context of the European Union, this concept must be interpreted within the framework of constitutional pluralism, as Member States differ from one another in terms of their political systems. The Union comprises both monarchies and republics, parliamentary and semi-presidential systems, as well as unitary and federal states. These differences form the basis of the European Union's motto, which is in *varietate concordia*, meaning "united in diversity".

In legal practice, the concept of national identity is very closely linked to the concept of constitutional identity, which refers to the fundamental principles of a state's political system. It is worth noting that the jurisdiction of the Polish Constitutional Tribunal indicates that the Tribunal uses the aforementioned concepts interchangeably in its judgments. An example of this is the reasoning in the Constitutional Tribunal's judgment with case no. K 3/21 [3, p. 1426], in which the aforementioned phenomenon occurs. This is noted in a dissenting opinion to the judgment by Constitutional Tribunal judge M. Muszyński, who firmly points out that – contrary to what is stated in the reasoning – the institution of "constitutional identity" does not exist in the EU treaties. The Treaty on European Union contains only the concept of national identity, and its linkage to constitutional identity is the product of national constitutional case law. In Judge Muszyński's view, this constitutes a repetition of the Constitutional Tribunal's judgment of 24 November 2010, case no. K 32/09. In point 4.1 of his dissenting opinion, however, the judge noted that national identity is a broader concept than constitutional identity. In legal doctrine itself, in

line with Judge Muszyński's opinion, it is accepted that national identity is a broader concept, and that constitutional identity forms part of it [4, p. 37]. This is also confirmed by the opinion of Advocate General M. Poiares Maduro in case *Michaniki* [5]. That case concerned a conflict between EU law – primarily a piece of secondary legislation, namely the Council Directive 93/37 – and the constitutional provisions of Greece. Greek law, derived from the Constitution and Law no. 3021/2002, prohibits the combination of activities in the media sector with participation in public procurement. The aim was to prevent conflicts of interest and excessive media influence on the state. The Advocate General pointed out that national identity encompasses constitutional identity, but is not limited solely to it. This fact is confirmed, where necessary, by the attempt to specify the elements of national identity in Article I-5 of the Constitution for Europe and in Article 4(2) TEU as amended by the Treaty of Lisbon. It follows from the identical wording of both texts that the Union respects “the national identity [of the Member States], which is inextricably linked to their fundamental political and constitutional structures” [6].

It should be noted that the relationship between Article 4(2) and Article 4(3) of the Treaty on European Union – namely, the principle of sincere cooperation – is also of significant importance [7, p. 6]. The Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. This means that invoking constitutional identity cannot lead to a complete evasion of the application of EU law. As Advocate General Maduro pointed out in the aforementioned opinion, the preservation of the constitutional identity of Member States should not be understood as respect for all national constitutional principles in a unilateral and absolute manner [8]. If the principle deriving from Article 4(2) TEU were applied in such a manner, national constitutions could become an instrument enabling Member States to exempt themselves from EU law in specific areas. However more and more often the concept of constitutional identity is generally understood by Member States as a safeguard protecting the sovereignty of Member States against the transfer of sovereign powers associated with the exercise of public authority to supranational bodies [9].

Case law of national constitutional courts. The concept of constitutional identity has been developed primarily in the case law of national constitutional courts. The most extensive line of case law was developed by the German Federal Constitutional Court. As early as the *Solange I* judgment of 1974 [10], it was stated that the transfer of powers to an international organisation must not lead to a violation of the fundamental structure of the constitution. In subsequent rulings, particularly the *Lisbon* judgment, the Court emphasised the existence of so-called constitutional identity, the violation of which would be unacceptable even within the framework of European integration. At this point, mention should also be made of the ruling of the French Constitutional Council of 27 July 2006. The Council stated: “the implementation of a directive shall not violate a provision or principle that is inherent to France's constitutional identity, unless the *pouvoir constituant* has consented thereto” [1]. The Italian Constitutional Court has indicated that the constitutional identity of the state encompasses, above all, the fundamental principles of the country's constitutional order or inalienable human rights. The Czech Constitutional Court cited the foundations of state sovereignty as exemplary values and described situations where the attributes of democracy and the rule of law are threatened as potentially infringing upon constitutional identity [12, p. 1434–1436].

Of particular significance is the 2010 *Honeywell* judgment [13], in which the German Federal Constitutional Court developed the concept of *ultra vires* review. Under this concept, a constitutional court may examine whether EU institutions have exceeded the powers conferred upon them. At the same time, the Court explicitly stated that such review is of an exceptional and may only be applied where the exceeding of powers is manifest and leads to a significant shift in the balance between the Union and the Member States. It was also emphasised that situations where national courts independently challenge the validity of EU law should be avoided, as this could jeopardise its uniform application [14, p. 8].

The Polish Constitutional Tribunal also addressed this issue in its judgment *K 32/09*. It identified a catalogue of elements constituting Poland's constitutional identity, which included, amongst other things, provisions setting out the fundamental principles of the Constitution and provisions concerning individual rights that define the state's identity, including in particular the requirement to ensure the protection

of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement to ensure better implementation of constitutional values and the prohibition on delegating legislative power to create competences [13].

Case law of Court of Justice of European Union. The case law of the Court of Justice of the European Union also refers to the concept of identity. In the Sayn-Wittgenstein case [16], the Court highlighted the link between the concept of national identity and the constitutional foundations of Austria, which had introduced specific measures to protect fundamental constitutional values. The Court then noted that the status of an EU Member State as a republic forms part of that country's national identity and, consequently, national identity must be regarded as closely linked to fundamental constitutional principles. In this case, the issue concerned the use of a surname incorporating a noble title, which had been prohibited under Austrian constitutional law due to historical circumstances and the associated legal provisions. The Court indicated that there is no obstacle to the authorities of a Member State, in circumstances such as those at issue in the proceedings before the referring court, refusing to recognise in its entirety the surname of a national of that State, which was adopted in a second Member State where that citizen resides following his adoption as an adult by a citizen of that second Member State. This follows from the principle of respect for the national identity of a Member State, and in this judgment the prohibition on the use of noble surnames was recognised as part of that national identity. At the same time, the Court indicated a condition whereby the measures taken by the said authorities in this regard must be justified on grounds of public policy, meaning that they are necessary to protect the interests they are intended to safeguard and proportionate to the legitimate aim pursued [17].

As a further example of the intersection between the concept of constitutional identity and individual rights, the case of Runevič-Vardyn and Wardyn [18] (C-391/09) is worth mentioning. The case concerned national minorities and the spelling of surnames. A Lithuanian citizen of Polish origin wished to have her surname written in the Polish form, i.e. with the letter 'w', which does not exist in the Lithuanian alphabet. In this case, there was a clash between the right to privacy and freedom of movement and the protection of the state language as an element of Lithuania's constitutional identity. The Court held that the state may impose the spelling of a surname in accordance with the rules of the national language if this is necessary for the protection of national identity, provided that this does not cause serious inconvenience to the citizen in administrative, professional or private matters, a matter to be determined by the national court. If that is found to be the case, the court must also examine whether the refusal to make the change is necessary to safeguard the interests which the national legislation is intended to protect and whether it is proportionate to the objective pursued. The objective pursued by such national legislation, namely the protection of the official language through the introduction of a requirement to apply the spelling rules laid down in that language, constitutes, in principle, a legitimate objective which may justify restrictions on the rights to freedom of movement and residence provided for in Article 21 TFEU and may be taken into account when balancing legitimate interests against those rights conferred by EU law [19].

The Digibet case (C-156/13) is also worthy of note. The dispute concerned whether Germany could have different gambling regulations in different Länder, given that Schleswig-Holstein had different rules from the rest of the country. The subject of the conflict in this case was the freedom to provide services versus the federal structure of the state as an element of national identity. In its judgment, the CJEU confirmed that the federal structure of a Member State is part of its national identity, which the European Union must respect. This means that citizens of different parts of the same country may be subject to different regulations in the name of preserving that structure. On the other hand, however, the legislation of a federal entity maintaining more lenient provisions in force for a specified period should meet the requirements of proportionality established by the Court's case-law, which is subject to review by the referring court [20].

A key example illustrating the conflict between the protection of constitutional identity and individual rights is Case C-490/20, *Stolichna obshtina, rayon "Pancharevo"*. The case concerned a situation in which a Bulgarian citizen, married to a UK citizen (the mother of their daughter, who was born in Spain), applied to the Bulgarian authorities for a birth certificate for the child, so that she could subsequently apply for a Bulgarian identity document for her daughter. The application was rejected. In Bulgaria, birth forms require the parents to be identified as the mother and the father. The refusal was appealed

to the administrative court. The court referred the matter to the CJEU. The court considered whether a potential obligation on the part of the national authority to issue a birth certificate listing two mothers as parents would pose a threat to public order and the national identity of Bulgaria. The reference for a preliminary ruling raised the question of whether the fact that one of the parents is a national of a country that has left the EU is relevant to the outcome of the case. The Court emphasised that the minor girl—by virtue of her birth—holds Bulgarian nationality and, consequently, also EU citizenship. She may therefore enjoy the freedom of movement and residence within the Union, subject to certain applicable restrictions. The minor should be able to obtain documents confirming her citizenship. The Bulgarian authorities are obliged to issue her with an identity card or passport, and these documents should bear the surname given in the Spanish birth certificate. Addressing the issue of public order, the Court noted that the concept of public order as a justification for derogating from a fundamental freedom should be interpreted narrowly, so that its scope is not determined unilaterally by each Member State without scrutiny by the institutions of the Union. It follows that public order may only be invoked in the event of a genuine and sufficiently serious threat to one of the fundamental interests of society. The requirement to issue an identity document to a child does not, in the Court's view, infringe upon a Member State's national identity. It cannot be considered to threaten public order in a state where, amongst other things, same-sex marriages are not permitted. In the Court's view, the best interests of the child must be taken into account when interpreting the provisions. A child must not be discriminated against on the grounds that their parents are of the same sex [21].

Principle of primacy. The principle of primacy of European Union law constitutes one of the foundational doctrines of the EU legal order, ensuring the uniform and effective application of EU rules across all Member States. Developed through the jurisprudence of the Court of Justice of the European Union, primacy establishes that, in cases of conflict, EU law takes precedence over national law, including constitutional provisions. This principle has been essential for safeguarding the autonomy and coherence of the EU legal system, preventing fragmentation and reinforcing integration. However, its expansive interpretation has increasingly encountered resistance from national constitutional courts, which invoke constitutional identity as a counter-limit to unconditional supremacy. As a result, the relationship between EU primacy and constitutional identity has emerged as a central tension in contemporary European constitutionalism, raising fundamental questions about sovereignty, legitimacy, and the ultimate authority within the EU legal order.

Against this background, however, a significant problem arises concerning threats to the uniformity of European Union law. There is a risk that Member States will invoke constitutional identity to challenge acts of EU law, particularly secondary legislation. This could lead to a weakening of the principle of the primacy of EU law and its uniform application. In order to avoid conflicts arising from the interpretation of EU law with regard to respect for the national identity of Member States, both parties to a potential conflict – national constitutional courts and the Court of Justice – must make mutual concessions. For its part, the Court of Justice should ensure an effective procedure for the national court for a preliminary ruling in order to clarify doubts [22, p. 10]. The Court of Justice points to this approach in its most recent case law. In its judgment of 18 December 2025 in Case C-448/23, *European Commission v. Republic of Poland*, the Court explains that if a national court, within the scope of its jurisdiction, the scope of the Union's competence in a given area or has doubts as to the validity of a Union legal act on the grounds that it exceeds the scope of the Union's competence or infringes the requirement under Article 4(2) TEU that the Union respect the national identities of the Member States, which is inextricably linked to their fundamental political and constitutional structures, it is exclusively the Court of Justice, in preliminary ruling proceedings under Article 267 TFEU, which is competent to provide a definitive and binding interpretation of the relevant provisions of Union law and, where necessary, to declare that act invalid [23]. National constitutional courts should not unconditionally exercise their power to challenge the validity and application of EU acts and should take the principle of sincere cooperation seriously. This requires national courts not only to interpret constitutional limitations narrowly, but more broadly—a case law guided by principles such as the concept of 'favourable interpretation of EU law', which the German Federal Constitutional Court formulated in its Lisbon judgment. Similar considerations should also apply to the national constitutional review test. This would help to limit conflicts between the CJEU and national constitutional courts and strengthen the spirit of mutual cooperation within the

European system of complex constitutional adjudication. Consequently, the CJEU's interpretation must be coordinated with the interpretations made by national constitutional courts and their constitutional constraints designed to protect national identity. At the same time, national constitutional courts should exercise these powers whilst taking into account their European responsibilities.

Summary. Constitutional courts and ECJ define the concept of national identity on a case-by-case basis. As a result, the concept remains dynamic, with its content shaped by the circumstances of individual cases as well as by evolving political, social, and historical contexts. Although certain principles, such as national sovereignty and the protection of fundamental rights, recur in legal scholarship and case law, their interpretation is not always consistent. Constitutional norms are interpreted differently by legal scholars and by the Constitutional Tribunals. Furthermore, the Tribunal itself has adopted varying positions in its rulings [24, p. 108]. The conclusions presented in the publication "The notion of constitutional identity and its role in European integration" [25, p. 68–72] are well-founded. It is widely accepted that the identity clause should be interpreted in a pluralist manner, allowing it to address both domestic constitutional concerns and the principle of primacy of EU law. The interpretation and application of Article 4(2) TEU is, in principle, reserved for the Court of Justice of the European Union (CJEU). In contrast, national institutions are responsible for determining which aspects of a national constitutional order constitute a Member State's constitutional identity. The CJEU will accommodate identity-based claims provided they do not undermine the uniformity achieved through legislative harmonization or restrict free movement or fundamental rights protected under the Charter of Fundamental Rights. In areas where the European Union lacks competence, national claims for the accommodation of constitutional identity are likely to have greater weight.

In summary, constitutional identity acts as a balancing mechanism in the process of European integration. On the one hand, it allows for the protection of the fundamental values of Member States; on the other, however, it must not be used in a manner that undermines the uniformity of European Union law. Its significance therefore lies in maintaining a balance between integration and the preservation of the constitutional distinctiveness of states. It shows that constitutional identity functions as a legal instrument that channels constitutional conflicts and promotes constitutional dialogue, turning it into an important reference point for a shared normativity between European and national legal orders. It analyses the different national and EU actors involved in interpreting constitutional identity and assesses the various possibilities for enforcing and accommodating constitutional identity in the EU.

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Strasburher O., Śniadach O. Constitutional Identity and the Primacy of EU Law: Conflict, Balance, and Limits

This article explores the relationship between constitutional identity and the principle of the primacy of European Union law, focusing on the tensions, limits, and mechanisms of balance between national and EU legal orders. Through an analysis of key judgments of national constitutional courts and the CJEU, the article shows how constitutional identity is invoked to protect core elements of state sovereignty and constitutional structures, while remaining subject to limitations derived from EU law. Ultimately, the article concludes that maintaining a balance between constitutional identity and EU primacy requires mutual accommodation: the CJEU must respect national constitutional specificities, while national courts must exercise restraint and uphold their obligations under EU law.

Keywords: constitutional identity, national identity, Constitutional Court, European Union, principle of primacy.

Страсбургер О., Снядач О. Конституційна ідентичність і примат права ЄС: конфлікт, баланс і межі

Ця стаття досліджує взаємозв'язок між конституційною ідентичністю та принципом примату права Європейського Союзу, зосереджуючись на напруженості, межах і механізмах балансування між національними правовими системами та правопорядком ЄС. На основі аналізу ключових рішень національних конституційних судів і Суду Європейського Союзу (СЄУ) у статті показано, як конституційна ідентичність використовується для захисту базових елементів державного суверенітету та конституційних структур, водночас залишаючись обмеженою вимогами права ЄС.

Обґрунтовано, що конституційна ідентичність виступає механізмом балансування у процесі європейської інтеграції. З одного боку, вона забезпечує захист фундаментальних цінностей держав-членів; з іншого – не повинна застосовуватися таким чином, щоб підірвати єдність права Європейського Союзу. Її значення полягає у збереженні балансу між інтеграцією та збереженням конституційної самобутності держав. Це свідчить про те, що конституційна ідентичність функціонує як правовий інструмент, який каналізує конституційні конфлікти та сприяє конституційному діалогу, перетворюючи її на важливу точку відліку для формування спільної нормативності між європейським і національними правопорядками. У статті також аналізуються різні національні та європейські актори, залучені до тлумачення конституційної ідентичності, а також оцінюються можливості її забезпечення та врахування в ЄС.

Підкреслено, що конституційні суди та Суд Європейського Союзу визначають зміст національної ідентичності в кожному конкретному випадку. У результаті це поняття залишається динамічним, а його зміст формується як обставинами окремих справ, так і змінними політичними, соціальними та історичними контекстами. Хоча такі принципи, як державний суверенітет і захист основоположних прав, регулярно зустрічаються в наукових дослідженнях і судовій практиці, їх тлумачення не завжди є послідовним. Конституційні норми по-різному інтерпретуються як науковцями, так і конституційними судами. Конституційна ідентичність держави враховується Судом Європейського Союзу за умови, що відповідні вимоги не підривають єдності, досягнутої шляхом гармонізації законодавства, і не обмежують свободу пересування або основоположні права, гарантовані Хартією основоположних прав ЄС. У сферах, де Європейський Союз не має компетенції, національні вимоги щодо врахування конституційної ідентичності, як правило, мають більшу вагу.

Отже, конституційна ідентичність виступає механізмом балансування в процесі європейської інтеграції: вона одночасно забезпечує захист фундаментальних цінностей держав-членів і не повинна підривати єдність права ЄС. Її значення полягає у підтриманні рівноваги між інтеграцією та збереженням конституційної самобутності держав, виконуючи функцію правового інструменту, що сприяє врегулюванню конституційних конфліктів і розвитку конституційного діалогу між національними та європейськими правопорядками.

Ключові слова: конституційна ідентичність, національна ідентичність, конституційний суд, Європейський Союз, принцип примату.

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