Constitutional identity in the light of European integration:
EU and non-EU perspective

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Abstract

Chapter 1 of the thesis starts from the doctrinal approaches to the identification of the constitutional identity. It refers to the question of the sources of identity, its nature (stable and dynamic). Then this doctrinal approach is applied to the German, Polish and Ukrainian constitutional identities, in order to identify the common features of those. There are common source of it (eternity clause and the practice of the constitutional courts), and common unstable nature (in all three countries the identity is subject to possible interpretations).

Chapter 2 describes the *Kompetenz-Kompetenz* dilemma in the light of the constitutional identity: what are the views on this of the constitutional pluralist and scholars, which are in the opposition to the constitutional pluralism in order to keep the coherence of the European legal order. There the clash of the concept of the constitutional identity is shown in the light of the supremacy and unity of the EU law. The supremacy of the European legal order is shown through the threat of the undermining of it by the constitutional identity due to the doctrinal features of the last, which is the lack of determinacy which leads to arbitrariness. Then the problem of the unity in the European legal order is discussed: in particular, the prohibition of the undermining of the equality of Member states by the arbitrary usage of the constitutional identity doctrine. Also, the question of the chilling effect on Eurointegration is raised in the light of the ongoing practice of the abusive usage of the identity doctrine.

Chapter 3 elaborates on the possible solutions to the constitutional identity problem. There is the proposition of the judicial dialogue, performed not in the terms of the opposition of the national constitutional identity to the European legal order, as it is shown by the Member states nowadays, but the dialogue in the terms of the common Europan constitutional identity, which is the case for the countries which are only going to integrate. So the possible ways of the different approaches to the constitutional identity are shown: the dominant now national one, which however could be used in the abusive way, and the European one, which shows the friendliness towards the common legal order.

However, if the described dialogue will not succeed, the other way to resolve the problem is described, which is the proportionality test with regard to the national constitutional identities, in order to preserve the common European legal order in the frames of the equality of Member state and due to the obligation of the sincere mutual cooperation.

Table of contents

Introduction

Central problem and background

The central problem in my thesis is the application of the doctrine of constitutional identity in the light of European integration. The question of the constitutional identity, as it will be discussed, comes into place in times of changes of constitutional orders, and Eurointegration is one of the prime examples of such transformations.

According to the different models, chosen by the country (more national constitutional identity or the European one), the concept could be used in the two directions. The first one is the opposition to the Eurointegration, by arguing that the identity is the national unchangeable core, or more flexible model, which comes from the idea, that even though the constitution contains the unchangeable core, it could be interpreted in the way, which is friendly to the chosen Eurointegration track.

It is important to note, that the thesis project operates by the term "Eurointegration" mostly because considers worthy of comparison not only the identity of Member States of the EU but also the identity of the Associate Members. In the strictly legal sense means, that I am going to use not only the compliance with the Lisbon Treaty, but also the compliance with the Copenhagen criteria, and the respectful practice of the constitutional courts, which could be characterized as the “choice of the Eurointegration track”.

Taking into the considerations this, the choice of the countries-comparators is justified: Germany and Poland, as the Members of the EU, and Ukraine, as the Associate to the EU country. This choice has been made consciously, having in mind the factual difference of these countries: it gives the opportunity to look at the Eurointegration process retrospectively, having the examples of the different models of identities from the country-founder of EU (Germany), country, which joined the Union recently (Poland) and country, which is going to join (Ukraine). However, in some of the aspects, these countries are similar: all three of them have the totalitarian or/and communistic experience in the past, which was the historical precondition to the formatting of the very particular constitutional identities, with the strong set of the requirements to the national constitutional identity.

Recently in all of the respectful countries, the identity issue has been raised: in the context of Germany and Poland, it has a negative connotation. It has been associated with the attempts to undermine the supremacy and unity of the EU law, which is opposite to sincere

cooperation if the frames of the European integration, or with the attempts to take over the democratic system of the country; and at the same time the concept intervened Ukrainian constitutional law and supposed to be the doctrinal punching force for Eurointegration. This shows that identity is understood differently in different settings and used opposingly. Therefore, the aim of this research is to raise the problem and weight arguments for and against the doctrinal usage of the identity in the light of the European integration, as the potential threat or supportive tool.

Research questions:

1. Constitutional identity in the doctrinal dimension. What are the core values of the identities of Germany, Poland, and Ukraine, and how those reflect the doctrinal findings of the types and characteristics of constitutional identities?
2. Constitutional identity and the opposition to European integration. What are the doctrinal approaches to the Kompetenz-Kompetenz problem, and whether it could be resolved in the light of the principles of the supremacy and unity of the EU law?
3. The question of the judicial dialogue in the process of the European integration. What are the possible directions of the dialogue in the light of the national and European models of the constitutional identity? How the complications with the European integration could be solved, if the judicial dialogue is not possible?

Type of questions:

With regard to the character of research, it is a *regional* one. It concerns the narrow framework of the EU law and its Member States, and those non-EU states, which are in the process of joining the EU.

With regard to the aim, the first one question is *descriptive*, and the second one is *causal*. Because in the first question I should describe the existing approaches with the aim to identify their scope, and after this, I should figure out the outcome of the different approaches in the practice and their effect on the EU integration.

With regard to the approach, it is *political* and *historical*, because depending on the history of the country the EU integration had a different extend, and thus the identity of the constitutional subject is 'eurointegrated' to a different extend. Political one approach is important, as it is an identification of the readiness to comply the state identity with the EU ethos.

With regard to the focus, it is a *comparative* one, because it elaborates on the German, Polish and Ukrainian approaches.

These countries are one of the most useful for my research, because they more often, then others, use the concept of constitutional identity in their domestic practice.

The second point, why Germany and Poland from the EU perspective, is that the ways of application of concept are contrasted with each other: till the recent times, in Germany CC in most of the cases tried to rich the balance with EU law, and in case of Poland concept is used more controversial. Ukraine, as a non-EU Member State, is an important comparator to share the idea, that concept of identity could be used outside the EU area.

Methodology

Both methods, the *normative* and the *empirical* are applied.

What concerns the normative method, the exploring of Lisbon treaty legal frames in the identity light, and the legal ground (if any) in Constitutions (referral to the integration, and acceptance of integration standard, under Lisbon). By this I, in a normative way, want to explore to which extend the Lisbon allows to countries to keep their identity, and to which extend countries allow integration. I am going to discover the meaning and the scope of the doctrine of 'constitutional identity' in the way of comparing the ways of wording it in the decision in every country.

What makes this research empirical one, is a fact that judicial practice, even if it reflects a normative thing as a Constitution itself, still is in a context with society and its effect on it. Because of different values, which may be leading in societies of these countries, the decision is to be made in a different context. I also think that as far as I zoom the historical background and zoom the EU integration process as a context, it makes it more empirical. This example illustrates how the same doctrine in a quite normative thing as a judicial decision is affected by the context of society and its history.

Chapter 1. The main concepts of constitutional identity, differences in approaches.

1.1 Doctrinal approaches to constitutional identity

The concept of constitutional identity is not stable[1], and the constitutional identity of every state is not stable either[2]. Nevertheless, it has some definitions which are commonly recognized.

As specified by professors Sajo and Uitz, constitutional identity is the determinator of "what is and what is not negotiable in the times of changes". Especially it is important when the states are considering the participation in the international or supranational - as EU - organizations and decide which sovereign rights should be transferred and which should not[3].

In Michel Trooper's interpretation, the concept is understood as a 'core and basic structure of the Constitution'[4], which imposes a special protection of this norms in the prohibition of amending of it, or the situation of changing of the constitution it imposes restrictions with regard to the eternal values from the objectives which established in the Preamble[5]. Not only the amendments, but also the way of its application by interpretation is important: 'these formative elements will ensure constitutional continuity'[6]. Same logic is in the Gary Jacobson view of what identity is for. 'Constitutionalism is about limits and aspirations', he argues. And because of these, 'whether there are implicit substantive constraints on formal constitutional change' is a question, which may be resolved due to the identity[7].

To conclude this issue, I would like to specify which understanding of constitutional identity will be taken for the purpose of this work. I will consider identity as those sovereign rights, which are formulated as general principles in the constitutions and consequent constitutional practice, and enjoy higher or absolute stability and protection during the process of Eurointegration.

[1] See the discussion of Jacobson and Rosenfeld.
[2] "Identity does not have to be rigidly fixed; in fact, it is uncertain and changing". Sajó, A., & Uitz, R. (2019). The Constitution of Freedom. Oxford University Press, P. 66.
[3] Sajó, A., & Uitz, R. (2019). The Constitution of Freedom. Oxford University Press, P. 65.
[4] Sajo, A., Uitz, R., & Troper, M. (2010). Constitutional Topography: Values and Constitutions (Issues in Constitutional Law). Eleven International Publishing, P. 195.
[5] Same as 2.
[6] Same as 3.
[7] Jacobson. Constitutional identity. *The Review of Politics 68 (2006),* 361–397. P. 368.

Sources of identity

Often the sources of the constitutional identity refer to the national identity, which can be described through language, religion, political identity and common history[8]. This approach to national identity as a source in the legal sense finds its application due to the idea of continuity, which a constitution provides: 'Constitutions must be viewed as embodiments of unique histories and circumstances, […], the unity of one continued life'[9].

The most essential points of the will of founding fathers we usually can find not only in the historical context and documents from the period of the drafting a constitution but also in the preambles of the constitutions, which may refer to this tradition of continuity[10]. Preamble, even so often it is not a normative part, it is still one of the most valuable parts: it refers to the principles, which inspired the drafters and to which the nation gave the consent to be loyal, as to the pointer.

What concerns legal side of sources, Andras Sajo and Renata Uitz find constitutional identity originates in two ways: as is reflected in the content of the constitution, and either wat it 'may be expressed in legal and cultural assumptions in the text, or underlying it, or may be associated with the practices that constitute the constitution or expressed as a consideration of interpretation of the arguments in constitution-making'[11].

The dispute about sources of the constitutional identity is known primarily due to the discussion between Michel Rosenfeld and Gary Jacobson. In Rosenfeld's version, the identity reflects 3 meanings, which at the same time we can consider as sources: the fact of having a constitution, the content of the constitution and the context on which it operates. In the Jacobson version, the source of the identity is experience, because it is 'neither a discrete object of the invention nor as a heavily encrusted essence embedded in a society's culture'[12]. He argues, that just constitution is not enough to determine the constitutional identity: 'this is necessary, but not sufficient, for establishing a viable basis for a genuine identity'. As he argued on the example of the Soviet constitution, that just the continuity of it (reference rather to the document, as a text) do not mean that it is the real mirror of what

[8] Sajó, A., & Uitz, R. (2019). The Constitution of Freedom. Oxford University Press, P. 63-64.
[9] Jacobson. Constitutional identity. *The Review of Politics 68 (2006),* 361–397. P. 372.
[10] Sajo, A., Uitz, R., & Troper, M. (2010). Constitutional Topography: Values and Constitutions (Issues in Constitutional Law). Eleven International Publishing, P. 198.
[11] Same as 3.
[12] Jacobson. Constitutional identity. *The Review of Politics 68 (2006),* 361–397., P. 363.

is the real identity and its application[13]. And by specifying what is the dialogical process, he refers to the real sources of the identity, arguing that 'evolution of the identity through interpretive and political activity occurring in courts, legislatures, and other public and private domains'[14].

But then the question is whether any identity is possible in the situation when the constitutional text was duplicated. "Constitutional borrowing can still be a moment of creation for luck of a better option"[15], as it was argued. Indeed, it was the practice of the constitutions which arose from the ashes of post-totalitarian regimes and lost their own democratic and liberal traditions for a decades. And what is not acceptable for some[16], is the start point for others as long, as it helps to 'establish a secure basis for national unity, identity, and membership'.

Nature: stable and dynamic

Describing constitutional identity as a collective identity, Rosenfeld pointed out about its nature, which at the same time associated either with sameness, either with selfhood. He pointed out, that sameness of the constitution – textual, structural – may be changed, but the spirit of the Constitution remains, as its selfhood. Or I can presume, this is possible the other way round: the textual sameness of the constitution may remain, but through the interpretation the selfhood of the constitution changes. This means, as the author concludes, that textual sameness of the constitution may have an evolving sense of selfhood which originates through the trends in constitutional interpretation[17]. In such a way, constitutional identity in Rosenfeld's vision always represents stable structure: it may come from the sameness, either from selfhood. Also, the fact of what Rosenfeld considers as sources – permanent social constructions, as fact of having constitution, constitution itself, its context - altogether contribute to the more stable model of understanding what is constitutional identity.

Gary Jacobson, in opposite to the general point of Rosenfeld about the 3 permanent meanings of identity which are quite stable sources, shows its own vision, which based on

[13] Jacobson. Constitutional identity. *The Review of Politics 68 (2006),* 361–397. P. 371.
[14] Jacobson. Constitutional identity. *The Review of Politics 68 (2006),* 361–397. P. 370.
[15] Same as 3.
[16] Analysis of Justice Scalia speech, Jacobson, Constitutional identity. *The Review of Politics 68 (2006),* 361–397, P. 368.
[17] Rosenfeld, M., & Sajo, A. (2013). The Oxford Handbook of Comparative Constitutional Law (Oxford Handbooks) (Reprint ed.). Oxford University Press, P. 757.

the dynamic basis. He pointed out that identity is a result of a dialogue[18] - mix of political aspirations laid down in the frame of nation's past. The activity, which in the case of a constitution, points to a correspondence between the words of a document and the behavior of those who fall under its jurisdiction[19].

For Jacobson identity better visible in the case of the constitutional conflict, he pointed out about the controversial features of identity, which in fact makes it dynamic: first, in the very text of the constitution which may include 'alternative visions and aspirations', as a result of different standards in the common history, and second is the potential conflict between the constitution and the society in which it operates[20].

Therefore, the Rosenfeld's approach is more textual, it is based on what is written in the constitution and operates by the status originated from the structure and content. In the Jacobson's approach the status itself is not significant, but the dialogue within the structure of constitution, and the constitutional conflicts which originate because of this dialogue is what really matters.

For the purpose of this study both approaches are applicable: constitutional identity of selected countries may be found either in the constitutional text and context, either in the constitutional conflict (namely, the clashes between the constitutional courts and CJEU).

1.2 Core values of German constitutional identity under the constitutional text and case law.

German constitutional model of identity based on the key provision of article 79 (3), which is also well-known as an "eternity clause". It restricts the amendments of the Basic Law in the cases of changes with regard to 'division of the Federation into Länder, their participation on principle in the legislative process', and *values* laid down in articles 1 and 20: human dignity, human rights, the democratic and social character of the federal state, and the right to resist in a case of threat to democratic order[21]. The last one was in the constitution not from the very beginning but was added in 1968 and as well as the state obligations about the environment

[18] Jacobson. Constitutional identity. *The Review of Politics 68 (2006)*, 361–397, P. 363.
[19] Jacobson. Constitutional identity. *The Review of Politics 68 (2006)*, 361–397, P. 365.
[20] Jacobsohn, G. J. (2010). Constitutional Identity (0 ed.). Harvard University, P. 133.
[21] Constitute project. (n.d.) Constitution of Germany.
https://constituteproject.org/constitution/German_Federal_Republic_2014?lang=en

in 1994[22]. As pointed by the Federal Constitutional Court, identity also refers to what is the sphere of the sovereignty for the state: 'so-called eternity guarantee even prevents a constitution-amending legislature from disposing of the identity of the free constitutional order. The Basic Law thus not only presumes sovereign statehood for Germany but guarantees it"[23].

What concerns amendments and the very essence of the Constitution, as pointed by Grimm, even so the Constitution was amended quite a lot[24], he argued that "if identity refers to the core of the Constitution as secured by Art. 79 III, we still live under the same Basic Law although much has changed in the penumbra"[25]. To sum up, the unamendable *principles* which constitute the German constitutional identity, are commonly recognized the democracy, the social and federal state, rule of law and republicanism.

All these provisions and its principles come from the historical background: as argued, the Basic law was a way to escape the totalitarian horrors of 1933 and 1945[26]. Even continuing the tradition of the democratic Weimar Constitution[27], the new Basic Law tried to get away from the mistake due to which the Weimar constitution never had these 'safety measures' in the constitutional meaning. Even democratic and liberal constitution without the security provisions failed: as argued by Wernen Heun, "constitutional amendments were no real obstacle for transforming democracy into dictatorship; where no explicit substantive limits to the extent to which constitution could be amended, the abolition of the democracy and rule of law by a two-thirds majority in Parliament were considered constitutional"[28]. Exactly because of this, a new constitution – even as it supposed to be a temporal document – Basic Law, tried to protect itself at least at the level of restrictions to amend the certain articles.

But German constitutional identity reflected not only in the text of the constitution and its context, as it would prove the Rosenfeld's approach only, but also derived from the constitutional conflict, as it was predicted by Jacobson's perspective. First, it appeared in the

[22] Grimm, D. (2010). The Basic Law at 60 – Identity and Change. German Law Journal, 11(1), 33–46. https://doi.org/10.1017/s2071832200018411, P. 34.
[23] Lisbon decision, Federal Constitutional Court, 2009. P. 216 URL: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html
[24] As pointed out by the Ministry, it was amended more than 60 times. Constitution of the Federal Republic of Germany. (n.d.). Federal Ministry of the Interior, Building and Community. Retrieved February 15, 2021, from https://www.bmi.bund.de/EN/topics/constitution/constitutional-issues/constitutional-issues.html
[25] Same as 22.
[26] Grimm, D. (2019). European Constitutionalism and the German Basic Law. Constitutional Amendments Regarding EU Membership. Springer link. https://link.springer.com/chapter/10.1007/978-94-6265-273-6_10
[27] Same as 26.
[28] Heun, W. (2010). The Constitution of Germany: A Contextual Analysis (Constitutional Systems of the World). Hart Publishing, P. 19.

Solange I and Solange II cases, where the Court introduced its attitude to the human rights, as a part of the constitutional identity. Due to these cases the first judicial test was invented, which is "judicial reservations in the field of fundamental rights review", and later on the Court will invent ultra vires review and identity review[29]; the last one for the purpose of this study will be examined in detail.

But if the previous cases concerned the topic of human rights, identity as an instrument firstly was introduced in the Lisbon decision. The Court ruled, that "treaty provisions can still be interpreted in a manner that respects the national responsibility for integration, to establish, at any rate, suitable *national safeguards* for the effective exercise of such responsibility: it must be capable of permitting European integration continuing to take place according to the principle of conferral without the possibility for the European Union of taking possession of Kompetenz-Kompetenz or to violate the Member States' constitutional identity, which is not open to integration"[30].

The Court remains of the position, that it can strike down EU law in the case, when the identity of the Basic law is violated by the provisions of this supranational law. The Court elaborated about what is called as a 'identity test', and needless to say that it is a dangerous tool for a whole supremacy, stability and unity of EU law.

From the perspective of the national constitutional law, however, debates still remain, and the arguments are not less convenient: 'since every time the EU usurps a competence, national constitutions become less significant, the Member States must prevent the EU from "deciding on its own competence (Kompetenz-Kompetenz)" or from violating the "constitutional identity" of the Member States". And institutionally this is performed through the constitutional practice "since the CJEU itself has been a driving force behind the gradual erosion of the Member States' competences, only the domestic constitutional courts remain to act as a counterbalance. The Federal Constitutional Court has held that it must therefore retain the ability to safeguard the national constitutional identity and the order of competences set out in the Treaties"[31]. So, in that way the domestic German constitutional identity is inevitably connected to the process of European integration, in some way it determines each other limits.

[29] Same as 26.
[30] Lisbon decision, Federal Constitutional Court, 2009. P. 239 URL: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html
[31] Grimm, D. (2020). A Long Time Coming. German Law Journal, 21(5), 944–949. https://doi.org/10.1017/glj.2020.55, P. 946.

But then the question of the dangerous approach, which the Court takes, remains: how we should deal with the identity test and whether it is possible for the Court to deal with EU law like this.

A lot of scholars, and I share the same opinion, are of view that the identity review test is not possible and should not be managed[32]. They argued that 'no Member State is more equal than others'[33], but what is also important, no Member State is identical to each other. And in this slippery slope between the illiberal leaders who may use it to "expand the borders of sovereignty" (as we will see it later on the example of Poland), and scientists who argued about the opposite, I would like to explore the German constitutional identity in the EU frames. And the way to explore what is the constitutional identity of Germany, surprisingly, lay through EU law - exactly because the identity review is a litmus test to what is the constitutional conflict, and in Jacobson's understanding it is what constructs the dynamic tension to identify the identity.

The core of the problem is well identified as following: "while in the context of European integration the term 'national constitutional limits' can simply refer to the requirement to amend the Constitution before ratification (which is the approach of the EU-related jurisprudence of the French Conseil constitutionnel), the constitutional limits derived from Art. 79(3) are red lines framing the inalienable substantive core of the German constitutional order"[34]. It refers us to the Article 4 (2) of TEU[35], which promised the respect to the constitutional identities of the Member states. But then the question is about the identity, which was at stake – identity in the understanding of Rosenfeld, as a text and stable construction, or the respect to the identity in Jacobson version, as a dynamic due to the constitutional conflict – and then the question whether the EU should respect the dynamic identity as well, as it is produced in the courts' dialogue due to the identity review.

[32] Kelemen, D. R., Eeckhout, P., Fabbrini, F., Pech, L., Uitz, R., Kelemen, D. R., Eeckhout, P., Fabbrini, F., Pech, L., & Uitz, R. (2020, May 26). National Courts Cannot Override CJEU Judgments. Verfassungsblog. https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/

[33] Lenaerts, K., & Lenaerts, K. (2020). No Member State is More Equal than Others. Verfassungsblog. https://verfassungsblog.de/no-member-state-is-more-equal-than-others/

[34] Grimm, D. (2019b). European Constitutionalism and the German Basic Law. SpringerLink. https://link.springer.com/chapter/10.1007/978-94-6265-273-6_10?error=cookies_not_supported&code=db0dc7c3-7a77-4234-a0a8-0fe40cf03034

[35] EUR-Lex - 12012M/TXT - EN - EUR-Lex. (n.d.). Consolidated Version of the Treaty on European Union. Retrieved June 30, 2021, from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT

1.3 Core values of Polish constitutional identity under the constitutional text and case law.

Polish constitution does not establish the eternity clause or any constitutional identity concern explicitly in the text of the Constitution. However, it does not mean that Polish constitutional order is silent about the potential threats, from which the very identity of the constitutions are designed to protect[36].

Constitutional identity appeared not in the constitutional text, but in the Lisbon Treaty decision, and as mentioned, it is a part of the "Polish Constitutional Tribunal rhetoric"[37]. As claimed by the Sledzinska-Simon and Ziolkowski, constitutional identity never has been used for the other international agreements as well, and "Polish Constitutional Tribunal developed the concept of constitutional identity to establish the relationship between Poland and the European Union and determine the scope of competence to confer competences to European institutions"[38].

Incomparable to the German case, where the Federal Constitutional Court has said, that constitutional identity is identified by the textually present in the Basic Law eternity clause, in Polish case, it was the task of the Tribunal to determine the unwritten essence of the Polish constitution, which constitutes the constitutional identity because of the lack of the written part. So, if in the German case the way of identity was historically evolutionary and in the Lisbon decision was just confirmed, then in the Polish case we can say that Lisbon decision was a trigger to establish it, to express the identity concern in the first place in the kind of revolutionary-constitutional way, by invoking in the decision the unwritten part of what identity is. Same is confirmed by the views of scholars: arguing, that constitutional identity never appeared in the practice of the Tribunal before, it is highlighted that it was invented in the decision to "establish relationship between Poland and EU"[39]. So the analysis of the source

[36] As mentioned above, "constitutional identity determines what is and what is not negotiable in the times of change, e.g. when the state determines which aspect of its sovereignty can be given up", Sajó, A., & Uitz, R. (2019). The Constitution of Freedom. Oxford University Press. P. 65.

[37] Sledzinska-Simon, A. (n.d.). Constitutional Identity of Poland: Is the Emperor Putting On the Old Clothes of Sovereignty. Constitutional Identity of Poland: Is the Emperor Putting On the Old Clothes of Sovereignty. Retrieved June 30, 2021, from https://www.academia.edu/37769122/Constitutional_Identity_of_Poland_Is_the_Emperor_Putting_On_the_Old_Clothes_of_Sovereignty

[38] Anna Śledzińska-Simon, Michał Ziółkowski. Constitutional identity in Poland. Calliess, C., & der Schyff, V. G. (2019). Constitutional Identity in a Europe of Multilevel Constitutionalism. Cambridge University Press.

[39] Sledzinska-Simon, A. (n.d.). Constitutional Identity of Poland: Is the Emperor Putting On the Old Clothes of Sovereignty. Constitutional Identity of Poland: Is the Emperor Putting On the Old Clothes of Sovereignty. Retrieved June 30, 2021, from

of Polish identity gives us the picture about the nature of this identity: it's a dynamic identity, which arises from the dialogue of the constitutional norms and European treaties. So this model of identity refers more to the Jacobson model, because it is neither still determined in the constitution textually, non the exhaustive description of the identity was given by the Tribunal.

The Constitutional Tribunal in the judgment says, that the Treaty of Lisbon should be in compliance not only with constitutional values and principles, but also this compliance concerns "the sovereignty of the state and its constitutional identity"[40].

In the Tribunal's view, sovereignty and identity are mutually dependent concepts in the Polish context, which will be explained by Wojcech Sadurski below. And the Tribunal itself is saying, that the scope of the constitutional identity is in the scope of the sovereignty of Poland under the Polish constitution, which depends on the primacy of decisions of the Polish nation, and normatively is fixed like this: "in particular the provisions of the Preamble, Article 2, Article 4, Article 5, Article 8, Article 90, Article 104(2) and Article 126(1), in the light of which the sovereignty of the Republic of Poland is expressed in the inalienable competences of the organs of the state, constituting the constitutional identity of the state"[41]. These provisions concerned the execution of power by the polish people, and the possibility of the transfer of sovereign rights to the international institutions, etc.

This definition of identity through the sovereignty is important, as the Tribunal notes, it the context of integration, because of the "surrendering sovereignty to the European Union", in particular how it defined in the preamble"[42]. And as the Court notes, in the process of Eurointegration in particular, it is important as "regaining sovereignty understood as a possibility of determining the fate of Poland"[43].

Wojciech Sadurski explains this phenomenon of the sovereignty for the countries with the post-communistic trauma[44]: shortly after the 'limited sovereignty', which was the case of

https://www.academia.edu/37769122/Constitutional_Identity_of_Poland_Is_the_Emperor_Putting_On_the_Old_Clothes_of_Sovereignty, p. 4-5.

[40] Lisbon decision, Polish Constitutional tribunal, 2010. P. 16. URL: https://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf

[41] Lisbon decision, Polish Constitutional tribunal, 2010. P. 22. URL: https://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf

[43] Lisbon decision, Polish Constitutional tribunal, 2010. P. 25. URL: https://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf

[44] Sadurski, W. (n.d.). Return of the Solange Ghost: the Supremacy of EU Law and the Democracy Paradox. Oxford Scholarship Online. Retrieved June 30, 2021, from https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199696789.001.0001/acprof-9780199696789-chapter-4?rskey=VvFi6w&result=6&q=constitutional%20court

all countries under the forced Warsaw agreement, these countries integrated to EU, where the concept of sovereignty de-facto is already transformed to needs of supranational organization. Thus, states moved from limited sovereignty right to the transferred sovereignty, what for sure raise the issue of constitutional identity acutely. It affects to the policy of Constitutional courts on the European integration matter, and at the institutional level strikes the ECJ jurisdiction. It explains the real reason for purring the sovereignty into the level of the identity of the Polish Constitution.

However, it does not end up with the strict division of sovereign rights between actors, which would close the issue of the scope of Polish constitutional identity: constitutional pluralism[45], which is the outcome of usage of constitutional identity doctrine, nowadays is a dangerous for coherence and unity of EU. So-called competitive authoritarian countries or in other words illiberal democracies may use the tool of pluralism as an excuse for the selective jurisprudence in European legal order. There are examples of non-compliance with the judicial independence[46], asylum and migration law[47], reaction to which is expressed by usually calm ECJ.

Just to highlight the importance of this historical background as such for a definition of identity, it is important to compare it with the German case. So to compare German and Polish contexts, the history of Germany formulated some values and rights, which are absolute in the matter of Constitutional identity and cannot be derogated from by any type of transferring those into the competence of EU, and also it's separately defined what is the scope of the sovereign rights which could be transferred to the EU (in fact, it is confirmed by the two types of tests, which Federal Constitutional Court could apply: ultra vires test and identity test). In the case of Poland, and because of its historical background, the identity and the scope of the sovereign

[45] Kelemen, D. R. (n.d.). The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland | Cambridge Yearbook of European Legal Studies. Cambridge Core. Retrieved June 30, 2021, from https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/abs/uses-and-abuses-of-constitutional-pluralism-undermining-the-rule-of-law-in-the-name-of-constitutional-identity-in-hungary-and-poland/3DCC6C466E4E3B97448337C0F701CA56

[46] Pech, L., Sadurski, W., Scheppele, K. L., Pech, L., Sadurski, W., & Scheppele, K. L. (n.d.). Open Letter to the President of the European Commission regarding Poland's "Muzzle Law." Verfassungsblog. Retrieved June 30, 2021, from https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission-regarding-polands-muzzle-law/

[47] EU Court of Justice on. (2020, July 25). [Post]. Twitter. https://twitter.com/EUCourtPress/status/1276068781505368064?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1276068781505368064%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.infomigrants.net%2Fen%2Fpost%2F25641%2Fhungary-s-asylum-policy-violates-eu-law-advocate-general https://twitter.com/EUCourtPress/status/1334799608095023107

rights which can't be transferred to the EU merged. By saying that sovereignty rights are a matter of identity, Polish Constitutional Tribunal in fact merged two possible tests into one.

The question about the scope of the values, which are sensitive for the amendments in Polish context, as an analogy with the German eternity clause, were raised in the context of the discussion about the amendments to constitution or new constitution. Following the logic of the German eternity clause, scholars tried to determine what is the essence of the Polish constitution which could not be changed – what is, as a matter of fact, is a question of the constitutional identity. So the conclusions of it were the following: first of all, the Polish constitution does not explicitly establishes an eternity clause (or non-changeability clause)[48], and, as a consequence, secondly it leads only to debates about what may be unamendable in a way of "concepts which are referred to as implied, implicit, or intrinsic limitations"[49]. So, it leaves the space for political narrative in the strictly legal room, as the debates about what are those unamendable values which at the very end constitute a constitutional identity of the Polish constitution. It shows that the process of finding the identity or establishing of this identity in the constitution in the explicit manner) is still going on, and the dynamic nature of this process will leave the question of sources and scope of the identity open.

1.4 Core values of Ukrainian constitutional identity under the constitutional text and case law.

Ukrainian Constitution just introduced the amendment to the preamble, the text of which is the following: "affirming the European identity of the Ukrainian people and the irreversibility of Ukraine's European and Euro-Atlantic course […]"[50]. This amendment introduced the word "identity" into the constitutional text for a first time, and at the same time raised the discussion about what is the constitutional identity of Ukrainian constitution in particular.

These amendments directly refer to the participation of Ukraine in the EU and NATO, which is clear from the context of the process of amending the constitution: it adds not only

[48] Kustra, A. (n.d.). CONSTITUTIONAL IDENTITY AS IMPLIED LIMITS OF CONSTITUTIONAL AMENDMENT POWERS. THE CASE OF POLAND. Academia. Retrieved June 30, 2021, from https://www.academia.edu/43097260/CONSTITUTIONAL_IDENTITY_AS_IMPLIED_LIMITS_OF_CONSTITUTIONAL_AMENDMENT_POWERS_THE_CASE_OF_POLAND?email_work_card=view-paper P. 41

[49] Same as 48.

[50] Конституція України. (1996). Офіційний вебпортал парламенту України. https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

the new provision into preamble, but also gives the new powers to the Parliament (Article 85), declares the President as a guarantor of the strategic direction to EU and NATO (Article 102), and gives to the Cabinet of Ministers the power to the realization of the strategy of the integration (Article 116)[51]. Even though most of the judges criticized how the amendments were introduced procedurally[52], the majority ruled about the amending the preamble[53]. Regarding the preamble in the concurring opinion of judge Pervomaysky, it is mentioned, that the "preamble of the Basic Law of Ukraine has a character of value and orientation for a Constitution, and due to this its provisions are used to understanding the essence and scope of the Constitution"[54].

This model already was described in the context of the Polish experience, because Constitutional Tribunal directly touched upon this question: "the provisions of the Preamble of the Constitution are also, at the same time, a premise of formulating the principle of favorable predisposition towards the process of European integration and the cooperation between States. From that perspective, the interpretation of constitutional provisions concerning membership in the EU should be carried out"[55]. So the doctrinal approaches to the understanding of the Preamble as a source of the interpretation for the Eurointegration matter is evident and could be applicable to the construction of the Ukrainian legal order in the Eurointegration frames.

At the same time, Ukrainian Constitution contains the analogy of the German eternity clause: article 157 is a provision about unamendable provisions and prohibits "the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine", and also a procedural part of it which prohibits any changes in the time of martial law or a state of

[51] Про внесення змін до Конституції України (щодо стратегічного курсу держави на набуття повноправного членства України в Європейському Союзі та в Організації Північноатлантичного договору). (n.d.). Офіційний вебпортал парламенту України. Retrieved June 30, 2021, from https://zakon.rada.gov.ua/laws/show/2680-19#Text

[52] Judges Melnyk (URL: https://ccu.gov.ua/sites/default/files/docs/3_v_2018_2.pdf), Kasminin (URL: https://ccu.gov.ua/sites/default/files/docs/3_v_2018_3.pdf), Litvynov (URL: https://ccu.gov.ua/sites/default/files/docs/3_v_2018_4.pdf), pointed out about the number of procedural inconveniences, such as in-fact armed conflict, which if would be recognised de-jure would block the possibility to amend the Constitution at all, about the absence of the national referendum, because in nature the essence of the preamble changes the fundament of the constitutional order.

[53] Conclusion №3-в, 2018 about compatibility of the Law about changes to the preamble with the Constitution of Ukraine, URL: https://ccu.gov.ua/sites/default/files/docs/3_v_2018.pdf

[54] URL: The concurring opinion of judge Pervomaysky, URL: https://zakon.rada.gov.ua/laws/show/ng03d710-18#n2

[55] P. Judgment of 24 November №32/09, Constitutional Tribunal, 2010. URL: https://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf

emergency[56]. As we can see from the content of this Article, it is close to the Polish experience of what is an identity of the constitution: the ethos of sovereignty and independence. In that sense, the Ukrainian eternity clause is the mix of experiences: by legal technique close to the German model (explicit constitutional text known as an eternity clause), and by the content closer to the Polish model (the content directed towards the most vulnerable in the historical sense aspects – sovereignty and its possible limitations).

The law which amended the Constitution was reviewed by the Constitutional Court in the light of the mentioned Article 157 in particular[57]. As we can see from the German and Polish example, Constitutional Courts are the main actors in the enhancing of the role of the identity doctrine in the national constitutional discourse. Exactly because of the fact, that the very existence of the Ukrainian constitutional identity was triggered, in fact, by the EU integration, this judgment is comparable to both of the Lisbon decisions in the beginning stage: as Germany and Poland checked the compatibility of constitutions to Lisbon treaties in the context of the Eurointegration, same way Ukraine checked whether the way of Eurointegration (and by the Eurointegration in the preamble in the strictly legal sense constitutes the Agreement about the association between Ukraine and European Union)[58] is in compliance with the explicit constitutional text. By pointing that it is in harmony with the Constitution, Constitutional Court added to the constitutional text Euro-Atlantic direction, which was not in the identity of the Ukrainian constitution initially, but now is an inherent and integral part of the constitutional identity of the state. By correcting the constitutional direction through the preamble, it leads the whole Constitution into the integrating process[59].

So the paradox is, that in a way of assuring that the law about the changes to the constitution does not contain the incompatibility with the eternity clause, which was about the

[56] Ukraine 1996 (rev. 2016) Constitution - Constitute. (1996). Constitute Project. https://constituteproject.org/constitution/Ukraine_2016?lang=en, Article 157.
[57] Conclusion №3-в, Constitutional Court of Ukraine, 2018, URL: https://ccu.gov.ua/sites/default/files/docs/3_v_2018.pdf
[58] Угода про асоціацію між Україною, з однієї сторони, та Європейським Союзом, Європейським співтовариством з атомної енергії і їхніми державами-членами, з іншої сторони. (n.d.). Офіційний вебпортал парламенту України. Retrieved June 30, 2021, from https://zakon.rada.gov.ua/laws/show/984_011#Text
[59] Висновок Конституційного Суду України у справі за конституційним зверненням Верховної Ради України про надання висновку щодо відповідності законопроекту про внесення змін до Конституції України (щодо стратегічного курсу держави на набуття повноправного членства України в Європейському Союзі та в Організації Північноатлантичного договору) (реєстр. № 9037) вимогам статей 157 і 158 Конституції України. (n.d.). Офіційний вебпортал парламенту України. Retrieved June 30, 2021, from https://zakon.rada.gov.ua/laws/show/v003v710-18#Text

unchangeable heart of the constitution, so in other words its identity, the amendment itself introduced the new part of what is Ukrainian constitutional identity. As mentioned by the judge Melnyk, "the scope of this law is to establish a new strategic course of the state and in fact to establish a new ideology of the development of the society"[60]. And if in the German and Polish case the concept of identity was used to draw a line between the national constitutional law and European law, then in the Ukrainian case the very identity of the constitution lays in its Eurointegration aspiration. So, by saying that its constitutional identity is a European one, not a national one, it establishes a principally new vision of what the constitutional identity is and serves for. In previous cases, it was a safeguard from the very intensive Europeanisation of constitutional law of member states, and in the Ukrainian case instead of it the identity is used to the more proactive Europeanisation of the constitutional order.

However, needed to be pointed out, that even though the identity is established in the constitution and seems to be stable, it is still subject to interpretations by the Constitutional court. It can clarify the borders of the Article 157, as the interpretation of the eternity clause, and the very fact of putting the identity into preamble gives to the Court the possibility to find new dimensions of Eurointegration (and logically – its borders) by interpreting the rest of the constitution into the light of the preamble. Considering that, it is important to note, that even though the identity seems to be Euro-friendly and stable in that sense, there is still a possibility and all preconditions to the be dynamic to this identity.

[60] Окрема думка судді Конституційного Суду України Мельника М.І. стосовно Висновку Конституційного Суду України у справі за конституційним зверненням Верховної Ради України про надання висновку щодо відповідності законопроекту про внесення змін до Конституції України (щодо стратегічного курсу держави на набуття повноправного членства України в Європейському Союзі та в Організації Північноатлантичного договору) (реєстр. № 9037) вимогам статей 157 і 158 Конституції України. (n.d.). Офіційний вебпортал парламенту України. Retrieved June 30, 2021, from https://zakon.rada.gov.ua/laws/show/nd03d710-18#n2

Chapter 2. The clash of identities and the European integration.

2.1 The danger of the usage of identity in the EU: Kompetenz-Kompetenz dilemma.

Article 4(2) of TEU expresses respect to the constitutional identities, by this allowing to the concept of identity intervene into the EU legal order. Even though article 4 (2) shows the importance of the national constitutional identities, this concept raises the problem of the so-called *Kompetenz-Kompetenz* issue. The vague interpretation of which results in two main concerns in the relationship between the identities and EU law. Those are the supremacy of EU law and the unity of EU law.

Considering this concerns, some scholars are coming with the idea, that Article 4 (2) should be read with an accent not at the identity, but as the Primacy clause: "since there is an unbreakable link between the equality of the Member States before the Treaties, the uniform interpretation of EU law and the primacy of that law, it is now safe to say that the principle of primacy has found its way into the Treaties"[61]. Altogether with the respect to the constitutional identity expressed in the Article 4 (2) of TEU, the respect to the equality to the Member States should be assumed and expressed as well.

Kelemen and Pech suggested to read Article 4 (2) only in the casual link with Article 4 (3) for the coherent interpretation: "Article 4(2) TEU can only be considered legitimate and reasonable only if the Member State […] behaves in full compliance with the principle of sincere cooperation laid down in Article 4(3) TEU"[62]. And Taborowski in fact exemplified it on the ground of the Polish experience: Polish case is discussed precisely in relation to Article 4 (3) TEU, as sincere cooperation[63].

However, despite these interpretations and because the practice of some Member states Article 4 (2) surrounded by some troubling legal practice – in particular, the attempts to destabilize the common legal order. Germany and Poland in this discourse of the undermining of the supremacy of EU law are the main targets. This tendency emerged because of the recent judgments of the Constitutional courts of these countries. The reaction of the German PSPP

[61] Lenaerts, K., & Lenaerts, K. (n.d.). No Member State is More Equal than Others. Verfassungsblog. Retrieved June 30, 2021, from https://verfassungsblog.de/no-member-state-is-more-equal-than-others/

[62] Why autocrats love constitutional identity and constitutional pluralism: lessons from Hungary and Poland, 2018. URL: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf P. 21

[63] Polska tożsamość konstytucyjna a prymat prawa UE. (2014, July 7). Obserwator Konstytucyjny. http://niezniknelo.pl/OK2/artykul/polska-tozsamosc-konstytucyjna-a-prymat-prawa-ue/index.html

judgment[64] was immediate: scientists started to claim "the hegemony of the German constitutional law"[65]. Regarding Poland, the problem has been deeper, so it has been formulated in terms of the question "Why autocrats love constitutional identity and constitutional pluralism?". As claimed by Kelemen and Pech, "local autocrats operating within unions that guarantee the protection of fundamental rights and core democratic principles are naturally attracted to legal doctrines like constitutional pluralism that would provide them with a justification to ignore the union's common norms"[66]. And the constitutional pluralism in that regard clearly constitutes the consequence of the constitutional identity doctrine: pluralism, as a space to step-out from the common legal order, is possible for the exceptional circumstances only – as the exception based on the identity.

The main common denominator between this Polish and German approaches is an issue whether the national constitutional courts indeed can and should compete with the jurisdiction of EU law based on the identity claim. The questions to be answered are: whether they indeed have the capacity to compete with CJEU for the jurisdiction over cases and how they can do that; and then – if they can, whether they should do that, because the Eurointegration process is at stake. Mainly, the problem is in the very issue "who has the last word". The constitutional identity doctrine in fact says, that EU law (and consequently – to decrease the integration capacity) possibly could be overcome by the core identity of the constitution – and constitutional courts use this loophole (or the position of the constitutional pluralists, that if the problem will arise, it will be resolved through the judicial dialogue). In opposite, the scientific community has a strong voice in these debates, saying that "the law as it stands today is clear: no national court can overrule a CJEU judgment […]. it is unacceptable for a national court to declare that a CJEU ruling is not binding in its jurisdiction"[67].

Whether the national constitutional court could compete with CJEU for a jurisdiction? As described, this is how the constitutional pluralism was born: in the *Kompetenz-Kompetenz* approach between the two competing jurisdictions, none of them should prevail, in the opinion of constitutional pluralists. So, answering the question whether the Constitutional Court can

[64] Even though some call it the case of the identity review, the test is rather ultra virus review. But the example is made to show the situation, in which Constitutional Court undermines the primacy of EU law.
[65] The reference made to the number of articles in the Verfassunblog.
[66] Why autocrats love constitutional identity and constitutional pluralism: lessons from Hungary and Poland, 2018. URL: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf P. 10
[67] Kelemen, D. R., Eeckhout, P., Fabbrini, F., Pech, L., Uitz, R., Kelemen, D. R., Eeckhout, P., Fabbrini, F., Pech, L., & Uitz, R. (n.d.). National Courts Cannot Override CJEU Judgments. Verfassungsblog. Retrieved June 30, 2021, from https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/

compete with CJEU under the *Kompetenz-Kompetenz* dilemma, the answer is "depending on which side the question is asked". As pointed out, CJEU and national constitutional courts in this dilemma have different premises: "According to the ECJ, national courts do not have power to determine the validity of EU law"[68], and but national courts are coming from the idea that the membership is clearly drawn in the frames of the treaties due to which the part of the sovereign constitutional rights is transferred and part is not, so "to establish therefore if the exercise of EU competence exceeds the powers surrendered to the EU, one has to look at the national constitution of which the national supreme judiciary is the only rightful exponent"[69]. In this approach the supremacy of EU law formally is not even at stake, because it is only an issue of the boundaries of the national constitutional law to be answered. However, that is not true: what is following from this approach is the possibility to change or interpret the national constitutional law, and the risk to exercise the power arbitrary is given to the constitutional courts (arbitrariness in the cherry-picking of what is in consistency with EU law and what is not), what will be discussed below.

The identity is a core of Constitution, and in such a way the question of the prevailing jurisdiction is never going to be solved: the EU cannot take away the possibility to decide for Member States what their identity is (and consequently – what the boundaries for the EU are), but at the same time it is obvious that the EU law has the supremacy. For a long time, this paradox was not bothering. As pointed out, "ECJ and the national judiciaries tend to differ on the first commandment, namely, what is the source of authority, rather than substantive rules of conduct"[70]. This means, that even though the question of the last word never has been resolved, it neither was a problem – because of the mutual integration aspirations.

Some scholars, however, pointing out that the *Kompetenz-Kompetenz* dilemma could be answered, but only in the case, if all Member states will transfer their sovereignty to EU fully, by discarding their constitutions in a favor of the Constitution of the EU, where is the CJEU is on the top of this legal system[71]. However, I don't necessary considering this as a valid

[68] Tridimas, T. (2015, July 23). The ECJ and the National Courts. Oxford Handbooks Online. https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199672646.001.0001/oxfordhb-9780199672646-e-12?rskey=Dc9bkR&result=6#oxfordhb-9780199672646-e-12-div1-4 P. 417.
[69] Tridimas, T. (2015, July 23). The ECJ and the National Courts. Oxford Handbooks Online. https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199672646.001.0001/oxfordhb-9780199672646-e-12?rskey=Dc9bkR&result=6#oxfordhb-9780199672646-e-12-div1-4 P. 418
[70] Same as 69.
[71] Beck, G. (2011, July 1). The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenzâ□□Kompetenz: A Conflict between Right and Right in Which There is No Praetor1. Wiley Online Library. https://onlinelibrary.wiley.com/doi/full/10.1111/j.1468-0386.2011.00559.x

argument, because the author suggested this solution on the basis of the lack of the legitimacy in the EU legal order, which I nevertheless see as a legitimate enough, because it is gained by the fact of joining EU and being loyal and committed to the new legal order.

So far, the question "whether one can take over the jurisdiction of another?" could not be clearly answered, as summed up by Pierdominici: "here the fact is that the recognition of the legitimacy of the EU constitutional claim, and the idea that competing constitutional claims such as the supranational and the national ones are of equal legitimacy or, at least, cannot be balanced against each other once and for all"[72]. But the question "whether they should do this?" gives no room for doubts – as long as countries are stood on Eurointegration position, such a *Kompetenz-Kompetenz* dilemma should be solved in a favor of EU. So even if due to the *Kompetenz-Kompetenz* issue in the theory the national constitutional court can overrule CJEU based on the identity claim, they should not do that because of the chosen Eurointegration track.

The voluntary choice of the Eurointegration way is one of the arguments why national constitutional courts should not – even if in the *Kompetenz-Kompetenz* theory they can, - use the constitutional identity to compete with CJEU by challenging the supremacy of EU law. This will be discussed in the details in the Chapter 3, while arguing about the primacy of the European constitutional identity over the national constitutional identity. The other argument regarding the that is the lack of determinacy of the concept to identity, to make it possible to use it – which will lead to the arbitrariness. Both of these effects – lack of legal certainty of the legal definition to be used and arbitrariness – are against the rule of law, on which the Union is founded.

2.2 The danger of the usage of identity in the EU: supremacy concern.

The questions to be discussed in this part, are the question of the supremacy of the EU law (and Eurointegration track), which could be undermined by the identity claim because of the two main factors: lack of legal certainty which leads to the arbitrariness of the usage of the concept.

As described in the Chapter 1, all of the identities which have been revied are not stable, but dynamic. And their sources are mostly laid down not in the constitutional text only, but in the judgments of the constitutional courts. Even the fact that in Germany and Ukraine the

[72] Leonardo Pierdominici, The Theory of EU Constitutional Pluralism: A Crisis in a Crisis? Perspectives on Federalism, ISSN-e 2036-5438, Vol. 9, Nº. 2, 2017. URL: http://www.on-federalism.eu/attachments/262_download.pdf P, 127.

identity is textually explicit, principles which are placed in this eternity clause are not hostile and unfamiliar to EU law as well: democracy, dignity and human rights, territorial integrity, and sovereignty, etc. The problem then is not that identity and EU legal order are founded on the different values, which are contradictory and prevent each other from legal application, but the interpretation of these principles by Courts. And if the definition is constantly dependent on the national court interpretation, it is not stable per se – so, lacks legal certainty. Polish identity was the product of the Tribunal from the very beginning, and this only adds to the expressed concern.

As Halmai adds to these concerns, not constitutional courts only could be the actors of producing the unstable identity: "constitutional populists rely on Carl Schmitt's understanding of constitutional identity, which posits that it holds a position above the written constitution and based on the will of the people as a constituent power. This concept of constitutional identity means also that it can change from moment to moment as the will of the people changes"[73]. Obviously, this is not in consistency with what was seen in a Chapter 1 as a sameness and selfhood: even if the constitution is unique in some approaches, it should be continuing enough to determine it. By this the identity can be transformed from the legal definition into the political tool.

As pointed out by Sajo and Fabbrini, "the concept suffers from a chronic lack of determinacy, which results in the arbitrariness of its use, which actually and potentially serves nationalism and contributes to European disintegration"[74]. Therefore, the first problem raised, as indeterminacy, is completely applicable to Germany, Poland, and Ukraine. If we will look at the issue of what is identity in Germany, we will find an eternity clause. However, "even a textually identifiable constitutional identity component is subject to creative interpretive extensions that are not obvious"[75]. With regard to Poland, which constitution lacks the eternity clause, the problem is obvious: "where there is no eternity clause, there is no obvious source for the identification of identity at all; depending on where a court will look, including its own case law, different identities may emerge"[76]. Ukraine is in the middle of both of these problems: having an eternity clause, but putting the identity into the preamble as well, we can find

[73] Gabor Halmai. https://me.eui.eu/wp-content/uploads/sites/385/2018/05/IJPL_Special_Issue_Concluding_remarks_Halmai_final.pdf P. 6.
[74] Fabbrini, F., & Sajó, A. (2019). The dangers of constitutional identity. European Law Journal. Published. https://doi.org/10.1111/eulj.12332 P. 458.
[75] Same as 74, P. 467.
[76] Same as 74. P. 468.

ourselves into the trap of the judicial interpretations, because the preamble itself is the source for interpretations: "identity building can rely on vague ideological positions, preambles in particular. It is here that historical identity references mushroom. Here an official version of national history will become a legal source of national constitutional identity"[77].

But the question of the vagueness of the term of the identity in the any of the particular states is not the problem itself. The application of it is the real problem because the Court could not construe on the ground of identity if the identity is not determined (not stable). If the Court does so, it inevitably leads to the arbitrariness. In particular, the German problem was discussed as the matter of the borders of identity: eternity clause contains principles which were interpreted by the Federal Constitutional Court in different matters, so the rhetoric question is whether all this burden of interpretations should be taken as an inevitable part of this identity[78]. Same is applicable to Ukraine, as far as the eternity clause contains principles which Constitutional Court freely can interpret. As Wojciech Sadurski pointed out about the Polish identity, which was concentrated around the judicial interpretation of sovereignty, "there are clear limits to the transfer of legal powers to the EU level […], these limits are defined by the standards set by the Polish Constitution (in particular its requirements concerning democracy and human rights) and the Court will be the guardian charged with assessing whether these limits have been breached"[79]. As Taborowski concludes, then "the consequence is that the supremacy, and in a broader sense the EU law itself will have no legal consequences: Constitutional Tribunal, which protects constitutional identity from the position of the supremacy of the Polish constitution, leads to the one-side exception, which allows to refuse the application of the EU law in certain cases"[80].

So there the problem of the arbitrariness potentially lies in the broadness of the interpretation of the Constitutional Tribunal of Poland, which is the same problem as identified in German and Ukrainian examples. And if in the situation of German and Poland CJEU could be an actor who can compete about the identity application by constitutional courts with regard

[77] Same as 76.
[78] Fabbrini, F., & Sajó, A. (2019). The dangers of constitutional identity. European Law Journal. Published. https://doi.org/10.1111/eulj.12332 P. 469.
[79] Sadurski, W. (n.d.). Return of the Solange Ghost: the Supremacy of EU Law and the Democracy Paradox. Oxford Scholarship Online. Retrieved June 30, 2021, from https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199696789.001.0001/acprof-9780199696789-chapter-4 P. 126.
[80] Taborowski, M. (2014, July 7). Polska tożsamość konstytucyjna a prymat prawa UE. Obserwator Konstytucyjny. http://niezniknelo.pl/OK2/artykul/polska-tozsamosc-konstytucyjna-a-prymat-prawa-ue/index.html

to the efforts to Eurointegration, then in Ukraine potentially the whole Eurointegration process could be stopped (or forced) by the interpretation of what is identity by Constitutional Court only.

As Fabbrini suggests, the question of the arbitrariness will lead to the abuse of the definition of identity which does not have the scope: "the supremacy of EU law is the only guarantee that states will abide by the same rules, mutually depriving themselves of the power to discretionally pick and choose the rules of EU law they like or not"[81].

2.3 The danger of the usage of identity in the EU: the unity concern.

As described, it raises questions with regard to the supremacy of the Eurointegration choice of countries allied with EU. However, the unity concern is of big importance as well: the identity question raises the problem of the equality of states within the EU and those obligations to Eurointegrate which have been taken. This is to be discussed in this part: whether the unity of Member states could be affected by the identity claim, and what is the role of the discrimination and mutual obligations in that.

One of the main problems of the constitutional pluralism, as discussed, is the instability of the content of the identity. As argued by Kelemen and Pech, if it would be in the competence of the national authorities to define what is and what is not identity, the national constitutional courts will gain the discretion for a cherry-picking by identifying or reidentifying it, answering to a certain agenda between *particular* Member States and EU. In this way it ruins the unity of EU law – because of the lack of equality of all Member states in the EU legal order[82]. The idea of constitutional pluralists that the identity could be used to undermine EU law in the cases where the exceptional constitutional circumstances are at stake, ruins from the very beginning: if all 27 member states will use its identity to do that, the unity of the EU law will be lost - EU law most probably will remind of Swiss cheese full of gaps, than the new legal order.

One can claim that the situation when all 27 of member states will claim their requests with regard to identity is impossible, and the rare exceptions to some members should be

[81] Fabbrini, F. (2015). After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States. German Law Journal, 16(4), 1003–1023. https://doi.org/10.1017/s2071832200019970 P. 1016.
[82] Why autocrats love constitutional identity and constitutional pluralism: lessons from Hungary and Poland, 2018. URL: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf P. 7-8.

allowed because of the selfhood of their constitutions. Preventing from this misleading suggestion, Kelemen, touches upon this question through the prism of the discrimination based on the Courts' practice: "if Community law were allowed to be overridden by domestic law, this would give rise to discrimination on the basis of nationality and would lead to Community law being 'deprived of its character as Community law"[83]. This approach prevents the "hegemony of the law" of the certain state, where exceptions are not incompatible with the equality of the rest of the Member States.

Fabbrini looks at this situation of unity in equality in the light of the obligations taken by Member States. These obligations are not only of the Eurointegration character for the state, but also about the integration with other members: "A member state's highest court should not be allowed to invalidate an EU law within its territory, because this would call into question the equality of all the states before the law, and thus the reciprocal nature of the commitments undertaken by them when signing the EU Treaties"[84]. Same conclusion is expressed by Lenaerts, who is saying that there is a "tension between reciprocal commitments and unilateral action", also referring in that way to the obligation to remain equal.

On the view of Lenaerts, this equality which comes from the mutual obligations could be achieved under three following conditions: equality could be gained by the uniform interpretation and application of EU law only, then second aspect is that this uniformity could be achieved if not all the domestic courts will intervene, but if the CJEU would be the only one actor for such an interpretation and application, and the last but not least third is that equality of all people in the union should be attained if the EU law will have an undoubtful primacy before the national law – so all Member States are under the same equal legal protection without exceptions[85]. Likewise, the resolution of the unity concern refers to the supremacy concern, described in the first part of this Chapter, saying that without the supremacy the unity is not possible either. Also, this point will be raised in Chapter 3, in the context of the judicial dialogue: whether the identity claim is consistent with obligations taken, and consequently whether it could be used as an argument in the dialogue between courts.

[83] Kelemen, R. D. (2016). On the Unsustainability of Constitutional Pluralism. Maastricht Journal of European and Comparative Law, 23(1), 136–150. https://doi.org/10.1177/1023263x1602300108 P. 142.
[84] Fabbrini, F. (2015). After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States. German Law Journal, 16(4), 1003–1023. https://doi.org/10.1017/s2071832200019970 P. 1016.
[85] Lenaerts, K., & Lenaerts, K. (n.d.-b). No Member State is More Equal than Others. Verfassungsblog. Retrieved June 30, 2021, from https://verfassungsblog.de/no-member-state-is-more-equal-than-others/

The effect of the violation of the unity commitment is the other important issue to be discussed here. The negative impact which will be gained by the usage of the identity claim by only one of the states by the larger extend affects all Member States: EU law not only in its application, but even more – at the stage of the forming and making of EU law, the chilling effect is going to pressure the legislation. Because of the variety of exceptions and the attempts to please all of them in the process of law-making, it will lead to the acceptance of the most generalized, commonly accepted models. Doubtfully, that such broad law prescriptions will lead to the unification of legal orders to achieve the honest unity of the EU legal orders among them. So, it will have a chilling effect on the EU law lawmaking process as well as the process of application of the law.

Laurent Pech defined the chilling effect in the legal sense as the "negative effect which any of the state action has on natural and/or legal persons, and which results in pre-emptively dissuading them from exercising their rights or fulfilling their professional obligations, for fear of being subject to formal state proceedings which could lead to sanctions or informal consequences such as threats, attacks or smear campaigns". He describes state action as all actions of the state which are of the discouraging character for those, who should have enjoyed their rights or prevent actors from the accomplishment of their obligations under the respectful legal regulation (he exemplifies it on judges, prosecutors, lawyers etc.)[86].

Pech refers to the same problem, but from the different angle: if earlier he showed, that autocrats may use the concept of the constitutional identity as a tool for the backsliding of the democracy, then now he is describing the consequences of it: "in a context of increasing democratic and rule of law backsliding, where legal autocrats do not necessarily aim to enforce new restrictive measures but rather aim to dissuade individual critics, civil society groups or judges from exercising their constitutional and/or European rights which amount at times, as for instance in the case of judges, to exercising their obligations in EU law, the European Commission has finally and positively relied on the concept of chilling effect". Because the usage of the concept which aims to contrapose EU law and national law, resulted in the chilling effect for the first.

And EU institutions indeed noticed that effect as well: the example of the Poland is a case which shows how the constitutional identity with the national incline could be dangerous.

[86] Laurent Pech, The concept of chilling effect: its untapped potential to better democracy, the rule of law and fundamental rights in the EU. Open society foundation, 2021. P. 4.

By pointing out that the national judiciary system is a sphere, which never has been transferred to the EU area competence, and so far is a part of Polish sovereign rights – so, under the Polish discourse – the part of the Polish constitutional identity, authorities took over the judiciary by the reforms, incompatible with the rule of law requirements. As Commission reports, "measures, including disciplinary ones, have also been taken affecting the freedom of judges to submit preliminary references to the Court of Justice of the European Union. Such attacks and measures can have a chilling effect and a negative impact on public trust in the judiciary, affecting its independence".

Chapter 3: The judicial dialogue – directions of this dialogue and possible limitations of the constitutional identity.

This chapter will elaborate on the judicial dialogue, as a possible way of the resolution of the identity problem in the Eurointegration track. The issues to be discussed are the following. First, the resolution of the Kompetenz-Kompetenz problem on the basis of the European model of constitutional identity. Second, the question of the proportional limit of the identity of the Member state in the category of cases, where the dialogue is not possible.

The idea to have a dialogue between jurisdictions, which aims the avoidance of the conflict mostly associated with constitutional pluralists[87]. However, the proposition is that the conflict could be avoided by the dialogue in all of the cases because it is quite a rare dilemma, and also based on the thesis of equal voices of the courts in this dialogue. Nevertheless, there are arguments against of equal weight of opinions in this dialogue, to preserve the supremacy of EU law – which also means the stability for the rest of member states, not engaging into the identity discussion.

As it already was mentioned, Article 4 (2) expressed the respect to the national constitutional identities, under the condition of the equality of all Member States. That means, that is the equality is endangered, the constitutional identity should try to find the most possible common denominator under the Eurointegration settings: so-called European constitutional identity.

National constitutional identity could be used for the domestic jurisprudence of Constitutional Courts, to preserve the stability of the national constitutional order – this is not dangerous for the EU legal order, nor risky for the Eurointegration. But when identity meets the Eurointegration matter – and consequently touches upon the equality obligation – it should distinguish the domestic content in favor of European choice. In such a situation the European constitutional identity plays a role of common constitutional traditions, on which the Union has been established and by which CJEU has been inspired. So all of these traditions altogether, as the one constitutes the European constitutional identity.

As it has been elaborated by Wojciech Sadurski, “we contrast the European Constitutional Identity with different identities. It is only when we are satisfied that, in

[87] Why autocrats love constitutional identity and constitutional pluralism: lessons from Hungary and Poland, 2018. URL: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf P.6

confrontation with other constitutional identities, there is more commonality within the European Constitutional Identity than between some ingredients of European Constitutional Identity and other constitutional identities, only then can we meaningfully talk about European Constitutional Identity as a "bloc de constitutionalité" of certain inner coherence"[88].

However, he concludes, that "there is simply no connection between ascertaining the dominant identity at a particular level and the implications for the division of authority between the European and national levels within the EU[89]". At such a way he points out on the *Kompetenz-Kompetenz* problem. But being aware of the problems, to which it leads, such as the issues of the supremacy of EU law and unity of EU law, I can conclude in opposite, that this connection exists, and the solution could be found in the usage of the European constitutional identity instead of the national constitutional identity in the category of cases, which touches upon the EU law.

Therefore, the importance of the judicial dialogue comes into place: it is needed for the absorption of different constitutional traditions, even recent ones, to form the common European constitutional identity. So, the dialogue between courts should be based not on the terms of the absolute supremacy of the national constitutional identities, but to adapt as much as possible the national legal system to the European one, and at the same time influence and form the European constitutional identity.

As revealed, "the judiciaries of the Member States have embraced the primacy of EU law as espoused by the CJEU, they have done so on the basis that primacy derives from the dispositions of national law on the incorporation of EU law into domestic legal systems, and not from EU law itself"[90]. And by national law the constitutional provisions about the accession to EU (if any) and judgments of the Constitutional Courts (in Germany and Poland, as descried, there were Lisbon treaties, and in Ukraine it was the judgment about the membership in EU and NATO[91]) on this favor, every of which confirmed the combability of the constitutions with EU values and standards and the intent to be or to became a member of the European Union.

[88] Sadurski, W. (2006). European Constitutional Identity? SSRN Electronic Journal. Published. https://doi.org/10.2139/ssrn.939674 P. 7.
[89] Sadurski, W. (2006). European Constitutional Identity? SSRN Electronic Journal. Published. https://doi.org/10.2139/ssrn.939674 P. 21.
[90] Tridimas, T. (2015, July 23). The ECJ and the National Courts. Oxford Handbooks Online. https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199672646.001.0001/oxfordhb-9780199672646-e-12?rskey=Dc9bkR&result=6#oxfordhb-9780199672646-e-12-div1-4 P. 419.
[91] The judgment of the Constitutional court of Ukraine about the membership of Ukraine in EU and NATO. Надано Висновок Конституційного Суду України у справі щодо членства України в ЄС та НАТО |

Despite this, the Polish and German models of identities remain to be mostly the national ones, and Ukrainian serves as the national one and European constitutional identity as well. This claim refers back to the idea that constitutional identity could be not only the national one, but could be formulated as the European model as well: if Germany and Poland refer to the identity only, Ukraine is an example of the country which also refers to the eternity clause and to the European aspiration at the same time. So this means, that Constitution contains the mechanism of self-protection, its unchangeable core, but at the same time the country underlines, that the Eurointegration way and identity are not contradictory, and because of this will interpret all the principles of the core in the most of the possible integration-friendly ways. It could be the best solution to the *Kompetenz-Kompetenz* problem: acknowledge its existence, but at the same time the national constitutional court should be bound by the voluntary agreement of the country to be part of the EU – a sincere mutual cooperation under the Article 4(3) of the Lisbon treaty or to be bound by signing the Agreement about the association with EU. Same was observed by Pierdominici, who mentioned one of the conceptual approaches: "a strand of Weiler's substantive pluralism, more interested in defining a balance between the two confronting constitutional identities, the nation-state and the European one, and the substantive content of it"[92]. And under the sincere mutual cooperation, the constitutional identity of Member states under the *Kompetenz-Kompetenz* then should be seen and construed as the European one, rather then nationalistic. To reaffirm the Euro-friendly usage of the identity, courts could point out about this: as Federal Constitutional Court presented in a Honeywell case, "ultra vires review may only be exercised in a manner which is friendly towards European law"[93]. Same should be true to the identity review, because if countries allowed the integration, this means that their national constitutional identities are compatible with European one, so nothing precludes from the friendly interpretation.

Same is proven, if we will look at the problem from the more doctrinal point of view: as was explained in the Chapter 1, identity could be viewed as the sameness or selfhood of the constitution. In that respect then every Member of the EU and those countries, which

Конституційний Суд України. (n.d.). Висновок. Retrieved June 30, 2021, from https://ccu.gov.ua/novyna/nadano-vysnovok-konstytuciynogo-sudu-ukrayiny-u-spravi-shchodo-chlenstva-ukrayiny-v-yes-ta

[92] Pierdominici, L. (2017). The Theory of EU Constitutional Pluralism: A Crisis in a Crisis? Perspectives on Federalism, 9(2), E-119. https://doi.org/10.1515/pof-2017-0012 P. 126.

[93] Bundesverfassungsgericht. (n.d.). Bundesverfassungsgericht - Decisions - The Mangold judgment of the European Court of Justice does not transgress Community competence in a constitutionally objectionable manner. . Retrieved June 30, 2021, from https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html P. 58.

committed themselves to the Eurointegration as well, constitute the sameness of the national and European identities. As it was explained by Śledzińska-Simon and Ziółkowski on the example of Poland, "constitutional identity assumes the axiological sameness of the Republic of Poland with the European Union as a community of values"[94]. So if the values on the ground of which countries united around the EU are the same, then the national only interpretation of these values inevitably is in conflict with either supremacy, either unity of the community legal order. As Kelemen reminds, "the EU is a voluntary association and, as was made explicit in the Lisbon Treaty, any Member State remains free to leave the Union at any time, 'in accordance with its own constitutional requirements'"[95].

The same thesis, but just not in the terms "national – European", has been addressed by Taborowski: "there are two approaches *(to the character of the Article 4 (2)*: hard and soft. The hard one refers to the idea, that constitutional identity is an exception, which steps out from the obligations under the EU law, […]. So, the "blocking mechanism" is in the national constitutional law. The soft one conception refers to the idea that Article 4 (2) is of the subsidiary character, and constitutes the concrete interpretation of the already existing precedent exceptions or treaties […]"[96]. In fact, this refers to the European model of the constitutional identity: with the primacy of the EU law and with the respect to the national constitutional identity, where it is as consistent with EU law, as possible.

It is important to notice, that the dialogue between courts, as constitutional pluralists are suggesting, is important in terms of the gaining the idea of what could be considered as the essence of the identity of the Member State. However, it should be restricted to the extend, where the CJEU is taking an inspiration from the constitutional traditions (identities) of Member State.

Some scholars, however, point out – and this supports the claim about the universal character of the European constitutional identity – that the Court could find an aspirations not only in the constitutional traditions and identities of Member states. Thus, it could be helpful

[94] Śledzińska-Simon, A. (n.d.). Constitutional Identity in Poland (Chapter 12) - Constitutional Identity in a Europe of Multilevel Constitutionalism. Cambridge Core. Retrieved June 30, 2021, from https://www.cambridge.org/core/books/constitutional-identity-in-a-europe-of-multilevel-constitutionalism/constitutional-identity-in-poland/E30C407687A9B33843F859FD0FD2A0CA

[95] Kelemen, R. D. (2016). On the Unsustainability of Constitutional Pluralism. Maastricht Journal of European and Comparative Law, 23(1), 136–150. https://doi.org/10.1177/1023263x1602300108 , P. 140.

[96] Taborowski, M. (2014, July 7). Polska tożsamość konstytucyjna a prymat prawa UE. Obserwator Konstytucyjny. http://niezniknelo.pl/OK2/artykul/polska-tozsamosc-konstytucyjna-a-prymat-prawa-ue/index.html

to search outside EU, especially in the context of the countries which expressed the intention of association: "we may wish to say something about the legal phenomena which (as we may claim) pertain also to the Swiss, or Norwegian, or Ukrainian, or Croatian, etc. law. We want therefore a concept which has not acquired any canonical meaning, as a technical legal notion, as the European legal traditions have definitely become"[97]. This approach is first of all important to gain the point of view primarily for the countries which are going to integrate with the EU.

If we will translate it into the discussion raised in this thesis project, we can say that Germany and Poland may take into account the new vision of the constitutional identity, namely Ukrainian model, which gravitates to the model of the European constitutional identity.

However, it is important to note, that the European constitutional identity is not a concept of absolute terms. It should be as legitimate, as it is indeed derived from the national constitutional traditions because European one in that sense is a legitimate common denominator. Especially it is vital during the integration process: Member states should feel the legitimacy of the EU authority and of the judgments of the CJEU, which is achieved through the respect to the constitutional identity of Member states. But the respect to the identities does not mean its primacy: as pointed out by Kelemen, "period of constitutional pluralism may have served as a useful developmental stage for the EU legal order, but it is time for the EU to mature beyond it and to establish definitively the supremacy of EU law"[98].

The question which remains is what could be a solution for the situation, where no productive dialogue between the national and European identities is not possible. One solution is the usage of the proportionality test, to restrict the usage of the identity of some Member States in the name of the equality. As claimed, "In EU law a proportionality test is applied both to EU acts and to acts of the Member States. In both cases the consistency with EU law is reviewed"[99].

There are 4 steps to be addressed on the matter of the proportionality with regard to the possible restriction of the identity:

[97] Sadurski, W. (2006). European Constitutional Identity? SSRN Electronic Journal. Published. https://doi.org/10.2139/ssrn.939674 P. 6.
[98] Kelemen, R. D. (2016). On the Unsustainability of Constitutional Pluralism. Maastricht Journal of European and Comparative Law, 23(1), 136–150. https://doi.org/10.1177/1023263x1602300108 , P. 139.
[99] Sauter, W. (2013). Proportionality in EU Law: A Balancing Act? Cambridge Yearbook of European Legal Studies, 15, 439–466. https://doi.org/10.1017/s1528887000003128 P. 445.

1) an appropriate (or suitable) measure,

2) in pursuit of a legitimate objective (legality—this is sometimes not counted as a separate step in the test),

3) among the appropriate measures that measure which constitutes the LRM.

4) not manifestly disproportionate in terms of a costs versus benefits balance[100].

The answer to these questions in the context of the national identity could be the following: first, the measure is appropriate because exactly the identity issue could be an obstacle in the Eurointegration process. Second, the legitimate aim to be perceived is the equality of the Member States in the process of the European integration, in the cases where this equality could not be achieved because of the too contradictory interpretation of the particular Member state. Third, this one measure is the only possible appropriate measure, otherwise every constitutional court would claim the power till the allowance of the arbitrariness in the EU legal order. And the last but not least, this restriction is proportional if take into account all the obligations of the member states given at the moment of the consent to Eurointegration track.

One can claim, that not all Member States would agree with the restriction of their constitutional identity. But the result is clear: if the Member State could not comply in its national constitutional identity with the European one, this clearly means that this country's legal order does not allow it to be a part of the EU.

Otherwise the steps taken could be crucial for both of the parties, and this extreme scenario was described by Kelemen: "while it is unsustainable for national constitutional courts to pick and choose which aspects of EU law should apply in their countries, they should by all means retain the authority to review whether the EU's competences have grown beyond what is acceptable under the terms of their constitution, and, if they determine this to be the case, to remedy the situation by compelling their government either to amend their constitution, to seek to change the EU legal norm involved by working through the EU political process, or, if necessary, to withdraw from the Union altogether"[101]. As we can see, because the identity of

[100] Sauter, W. (2013). Proportionality in EU Law: A Balancing Act? Cambridge Yearbook of European Legal Studies, 15, 439–466. https://doi.org/10.1017/s1528887000003128 P. 448.
[101] Kelemen, R. D. (2016). On the Unsustainability of Constitutional Pluralism. Maastricht Journal of European and Comparative Law, 23(1), 136–150. https://doi.org/10.1177/1023263x1602300108 P. 140.

the constitution is its unchangeable core, the process of the changing or amending of the constitution as one of the possible options is not an option.

To sum it up, only three steps could be taken. First, it is possible to achieve the unity on the national level by the interpretation of the national identity in the way which complies with EU requirements. The other option, if such an interpretation have not happened, is to restrict the identity under the proportionality test by the CJEU judgment. And the last one crucial alternative is to leave the Union to the Member State, which is not going to conform with the settings established by the European integration obligations.

Conclusion

The concept of constitutional identity is still highly controversial due to the described dynamic nature, which leads to the indeterminacy and the possible arbitrariness of its usage. However, this critique is addressed to the version of the identity, which constitutes the national model of the constitutional identity. And the profit from the concept of the European constitutional identity, which can lead to the opposite results, like the more intense integration, is not discovered yet. This is the result of the justified skepticism, expressed by the opponents of the identity theory, which is based on the present autocratic practice.

The challenge of the European legal order in the light of the identity problem is the actual inequality and the lack of dialogue to resolve this problem. The dialogue between constitutional courts of Member states and CJEU could lead to a positive result if the narrative of this dialogue would be constructed in the light of the common European constitutional identity.

To the countries, which are not part of the European Union yet, but nevertheless are going to join it, the European constitutional identity doctrine also could be helpful. In the monologue of the Constitutional Court or the Supreme Court, the Constitution and the law of this country could be interpreted in the light of the friendliness to the EU law, which will lead to the more intense integration process of this country.

But also the negative consequences of the lack of dialogue are foreseen and the proposal on how to deal with it is carried: if the voluntary compliance with the European constitutional identity is not achieved, to preserve the unity in the European legal order and the supremacy of the EU law, the national constitutional identity could be restricted under the proportionality test.

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Висновок Конституційного Суду України у справі за конституційним зверненням Верховної Ради України про надання висновку щодо відповідності законопроекту про внесення змін до Конституції України (щодо стратегічного курсу держави на набуття повноправного членства України в Європейському Союзі та в Організації Північноатлантичного договору) (реєстр. № 9037) вимогам статей 157 і 158 Конституції України. (n.d.). Офіційний вебпортал парламенту України. Retrieved June 30, 2021, from https://zakon.rada.gov.ua/laws/show/v003v710-18#Text

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