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## PROCEDURES REGARDING NATIONAL IDENTITY CLAUSE IN THE NATIONAL CONSTITUTIONAL COURT'S AND THE CJEU'S CASE-LAW

### **ABSTRACT**

*Besides the evolution of the concept of national identity through the work of scholars, a new era in the conceptualization of this concept came with the Lisbon Treaty and its so-called "national identity clause" or the famous Article 4(2) TEU. Since Article 4(2) TEU does not determine the national identity of Member States, in order to determine it, our starting point should be its constitution, or, more precisely, certain principles of its constitution or a set of core values, principles and rules. A second important phase in this sense is the relevant constitutional court's case law. In this context, particularly important role play decisions regarding the relationship between the law of the European Union and domestic constitutional law. The German Federal Constitutional Court has developed the most elaborate jurisprudence on constitutional identity. This German approach has inspired the positions adopted by some other constitutional courts, and very possible will be also inspiration for future Croatian Constitutional Court position in this context. As it arises from the analysis of the CJEU's case-law, although it seems that Article 4(2) TEU offers a trap door to Member States to escape some of their EU law obligations, the overall picture is far from being so simple.*

**Keywords:** national identity, constitutional identity, constitutional court, Court of Justice of the European Union

### **1. INTRODUCTION**

Although the idea of national identity is far from being new,<sup>1</sup> it is well known that especially in the last few years "national identity" is really *à la mode*.<sup>2</sup> And yet,

<sup>1</sup> Moreover, constitutional theorizing about *identity* has really deep historical roots. As G. J. Jacobsohn emphasises, "In Book III of *The Politics* Aristotle asked, "On what principle ought we to say that a State has retained its identity, or, conversely, that it has lost its identity and become a different State?" His answer requires that we distinguish the physical identity of a state from its real identity. Thus, "The identity of a polis is not constituted by its walls." Instead, it is constituted by its constitution, which for Aristotle refers to the particular distribution of the offices in a polis – what the moderns imply by sovereign authority – as well as the specific end toward which the community aspires." Jacobsohn, G. J., *Constitutional Identity*, Harvard University Press, Cambridge, Massachusetts, London, England, 2010, p. 7.

<sup>2</sup> Claes, M., *National Identity: Trump Card or Up for Negotiation*, in: A. Saiz Arnaiz, C. Alcobarro Llivina

despite its history and significance, there is no agreement what “national identity” means or refers to. As a consequence, many questions still have no clear answers and remain quite unclear, such as: “What exactly is national identity?”, “What does ‘identity’ mean?”, “Who is allowed to identify national identity?”, or “Is there a difference between *national* and *constitutional* identity?”.

Albeit the scope and meaning of the national identity seem quite unclear and undetermined, academic literature has been all over the notion of national identity, especially after the Lisbon Treaty, which entered into force in December 2009, incorporated the so-called “national identity clause” in Article 4(2) TEU and after the famous German Constitutional Court decision on the Lisbon Treaty of 30 June 2009.

According to Rideau, currently only three Member States of the European Union do explicitly endorse *constitutional* identity: Germany, France and Poland, the notion is implied in Spain, Italy, Hungary and the Czech Republic, while this concept is blurred or absent in the remaining Member States.<sup>3</sup> One of this “remaining Member States” is Republic of Croatia.

## 2. WHAT IS ACTUALLY “NATIONAL IDENTITY”?

Starting with the point that national identity is a concept far from being new and yet far from being clear, we may also add that it is a concept far from being simple. We could also say that it is closely linked to terms “*identity*” or “*constitutional identity*”, so close that it is “common to use indiscriminately the terms “national identity” and “constitutional identity”, because both refer to the same thing, constitution or domestic law.”<sup>4</sup>

The concept of *national* or *constitutional* identity has been addressed by many constitutional lawyers, scholars, students. According to Rosenfeld, one of the leading American experts in the field, constitutional identity is “an essentially contested concept as there is no agreement over what it means or refers to. Conceptions of constitutional identity range from focus on the actual features and provisions of a constitution – for example, does it establish a presidential or parliamentary system, a unitary or federal state – to the relation between the constitution and the culture

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(eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge – Antwerp – Portland, 2013, p. 109.

<sup>3</sup> Rideau, J., *The Case-law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the ‘German Model’*, in: A. Saiz Arnaiz, C. Alcobarro Llivina (eds.), *National Constitutional Identity and European Integration* *op.cit.* note 2, p. 243.

<sup>4</sup> Flores Amaique, J. A., *National Constitutional Identity in the European Union and the Principle of Primacy*, LL.M. Final Thesis in Natural Resources and International Environmental Law, 2015, p. 77.

in which it operates, and to the relation between the identity of the constitution and other relevant identities, such as national, religious, or ideological identity.”<sup>5</sup>

In elaborating the idea of constitutional identity, Marti writes about several meanings of the idea of constitutional identity: the identity of a constitutional text, the identity of a constitutional practice and tradition, the identity of the core values and principles of a constitution, the identity of the constitutional subject, the national identity, the (non-necessarily-national) identity of a political community, the religious, ethnic and cultural identity of the whole society or of some subgroups in the society, etc.<sup>6</sup> Marti writes that all this different meanings can be restated to a basic distinction between two different ideas of constitutional identity: the identity of the constitution and the identity of the people.<sup>7</sup> Additionally, Marti points out that “the elements of the constitutional identity of a particular country are so fundamental that they should be specially preserved and protected from change. And that it is why they are often entrenched within the constitution itself.”<sup>8</sup>

Smerdel writes that the core of the concept refers to certain principles of the national constitutions and that it can refer to different notions of “identity”: to what which essentially makes the constitution (and the state it governs) into what it is, and to what in which a constitution (and the states it governs) is different from some other constitutions. It might also mean the limits of the community authority over the legal system of a Member State and in particular its constitution.<sup>9</sup>

Constitutional identity, according to Núñez Poblete, “expresses some sort of meta-constitution, understood as a set of norms or pre-constitutional principles that define the meaning of other constitutional norms, eventually coinciding, at a textual level, with other norms of different political communities.”<sup>10</sup>

Besides the evolution of the concept of national identity through the work of scholars, a new era in the conceptualization of this concept came with the Lisbon Treaty and its so-called “national identity clause” or the famous Article 4(2) TEU.

<sup>5</sup> Rosenfeld, M., *Constitutional Identity*, in: M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, p. 756.

<sup>6</sup> Luis Marti, J., *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, in: A. Saiz Arnaiz, C. Alcobarro Llivina (eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge – Antwerp – Portland, 2013, p. 19.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, p. 20.

<sup>9</sup> Smerdel, B., In *Quest of a Doctrine: Croatian Constitutional Identity in the European Union*, *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 64, No.4, 2014, p. 515.

<sup>10</sup> Quoted from: J. A. Flores Amaiquema *op.cit.* note. 4, p. 27.

Having in mind that the obligation that exist for the EU to respect national identity of its Member States has its history *before* Article 4(2) TEU – namely, in Article F(1) of the Maastricht Treaty (“The Union shall respect the national identities of its Member States, whose systems of government are founded on the principle of democracy.”<sup>11</sup>), and then in Article 6(3) of the Amsterdam Treaty (“The Union shall respect the national identities of its Member States.”<sup>12</sup>) – we could say that Article 4(2) TEU is quite longer and more descriptive than its predecessors. Namely, Article 4(2) provides: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”<sup>13</sup>

The link between national identity clause and the “fundamental political and constitutional structures”, is the reason why we may say that this distances the notion of national identity in Article 4(2) TEU from cultural, historical or linguistic criteria and turns to the content of national constitutional orders.<sup>14</sup> In our view, this is the reason why we may understand the Article 4(2) TEU as *national – respectively constitutional identity* clause. This corresponds with the understanding of national identity introduced since 1970s by national constitutional courts who use national identity as constitutional, not cultural concept.<sup>15</sup>

Additionally, since earlier versions of the identity clause were not subject to the jurisdiction of the CJEU, this implies a great difference when it comes to comparing it to Lisbon Treaty which “institutionally increases the importance of the identity clause and further develops its content”.<sup>16</sup>

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<sup>11</sup> Treaty on European Union, available on:  
URL=[http://europa.eu/eu-law/decision\\_making/treaties/pdf/treaty\\_on\\_european\\_union/treaty\\_on\\_european\\_union\\_en.pdf](http://europa.eu/eu-law/decision_making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf)

<sup>12</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, URL=<http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>

<sup>13</sup> Consolidated version of the Treaty on European Union,  
URL=<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN>

<sup>14</sup> Von Bogdandy, A., Schill S., *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, Common Market Law Review, Vol. 48, 2011, p. 1427.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 1422.

Since Article 4(2) TEU does not determine the national identity of Member States, there have been some controversies about such questions as to *what* the Union should respect, what this “identity” *precisely* consist of, and *who* decides on the identity of Member States. However, Von Bogdandy and Schill write that although Article 4(2) TEU does not determine the national identity of Member States, “it establishes, by referring to ‘fundamental political and constitutional structures, including regional and local self-government’, criteria for the elements and self-understandings that may be protected under Article 4(2) TEU. EU law therefore sets up criteria that can be of relevance for the notion of national identity under Article 4(2) TEU. Thus, only elements somehow enshrined in national constitutions or in domestic constitutional processes can be relevant for Article 4(2) TEU.”<sup>17</sup>

Without any doubt, this revised identity clause could be seen through the prism of a new era in the conceptualisation of the relationship between EU law and national law.<sup>18</sup> According to Von Bogdandy and Schill, it can help to reconceptualize the relationship between EU law and national constitutional law and “guide the way to a more nuanced understanding beyond the categorical position of the ECJ on the one side, which supports the doctrine of absolute primacy of EU law even over the constitutional law of Member States, and that of most domestic constitutional courts on the other, which largely follow a doctrine of relative primacy in accepting the primacy of EU law subject to certain constitutional limits.”<sup>19</sup>

### 3. DETERMINATION OF THE NATIONAL, RESPECTIVELY CONSTITUTIONAL IDENTITY

Since Article 4(2) TEU does not determine the national, respectively constitutional identity of Member States, we could say that there is no specific rule to follow to determine it. Accordingly, we could also say that of particular importance for determining the content of national constitutional identity are (relevant) constitutional provisions, (relevant) national constitutional court’s case law and (relevant) CJEU’s case law.

#### 3.1.1 Relevant constitutional provisions

In order to determine the content of constitutional identity of some Member State, our starting point should be its constitution, or, more precisely, certain

<sup>17</sup> *Ibid.*, p. 1430.

<sup>18</sup> Claes, M., *op.cit* note 2, p. 121.

<sup>19</sup> Von Bogdandy, A., Schild, S., *op. cit.* note 14, p. 1418.

principles of its constitution or a set of core values, principles and rules. Almost all Member States of the EU enjoy a written Constitution, with the exception of the UK. Of course, not every constitutional element can be considered as part of the constitutional identity within the meaning of Article 4(2) TEU. This is why it is important to pay attention on constitutional provisions that prevent the legislature from making certain constitutional changes or that subject constitutional amendments to a specifically difficult procedure.<sup>20</sup>

In its writing on methods of identification of national constitutional identity, Grewe writes that there are principally three conceptions of constitutional amendments in European countries: (1) the substantial or material conception of the revision, that establishes a true hierarchy within the Constitution and that means that some provisions are excluded from any possibility of amendment (such as Article 79 paragraph 3 of the German Basic Law<sup>21</sup> or Article 288 of the Portuguese Constitution<sup>22</sup>); (2) the procedural conception, that refers to a differentiation within the Constitution of two ways to amend the constitution, the total and the partial revision (such as the case with the three Baltic States, where the areas subjected to a total revision comprehend the first Chapter of the Constitution, in addition to the amendment provisions), and (3) the formal conception, that ignores any differentiation within the Constitution, so there is only one procedure for constitutional amendments and no provision is excluded from possible modification, and this is why in the framework of this conception is not possible to

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<sup>20</sup> *Ibid.*, p. 1432.

<sup>21</sup> Article 79 paragraph 3 of the German Basic Law: "Amendment to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Article 1 and 20 shall be inadmissible."

<sup>22</sup> Article 288 of the Portuguese Constitution: "Constitutional revision laws shall respect: a. National independence and the unity of the state; b. The republican form of government; c. The separation between church and state; d. Citizens' rights, freedoms and guarantees; e. The rights of workers, workers' committees and trade unions; f. The coexistence of the public, private and cooperative and social sectors in relation to the ownership of the means of production; g. The requirement for economic plans, which shall exist within the framework of a mixed economy; h. The elected appointment of the officeholders of the bodies that exercise sovereign power, of the bodies of the autonomous regions and of local government bodies by universal, direct, secret and periodic suffrage; and the proportional representation system; i. Plural expression and political organisation, including political parties, and the right to democratic opposition; j. The separation and interdependence of the bodies that exercise sovereign power; l. The subjection of legal rules to a review of their positive constitutionality and of their unconstitutionality by omission; m. The independence of the courts; n. The autonomy of local authorities; o. The political and administrative autonomy of the Azores and Madeira archipelagos.

<sup>23</sup> Beside Germany and Portugal, six other Member States of the EU prohibit certain amendments: Cyprus, the Czech Republic, France, Greece, Italy and Romania.

draw any conclusion relating to the core of the Constitution (such as the case of Croatia<sup>24</sup>).<sup>25</sup>

In general, we may say that the principles that are constitutionally protected belong to the following categories: the protection of basic principles of State organization, State sovereignty and the principle of democracy, State symbols, State aims, the protection of human dignity, fundamental rights and the principle of law.<sup>26</sup>

Additionally, in order to define constitutional core, it is important to examine the introductory provisions of Member States' constitutions. Although the length and the style of preambles are quite varied, we may say that preambles have two principal functions. While the first one consists of situating the Constitution in its time, the second one is interesting for the determination of constitutional identity because it consists of evoking the essence or the core of the Constitution.<sup>27</sup> The content of the "introductory part" of the Constitution – whether or not have been provided with a special title such as Preamble, General Principles, Fundamental Principles, or Historical Foundations in Croatian case – contains two different provisions: the first refer to the constitutive elements of the State in a large sense (institutional or "sovereignist" content) and the second address the constitutionalism (constitutionalist or substantive content).<sup>28</sup>

If we choose to analyze the Constitution of the Republic of Croatia,<sup>29</sup> which was adopted on 21 December 1990 and it has been repeatedly amended and adapted to the exigencies of the time (in 1997, 2000, 2001, 2010 and 2013), we may firstly say that, of course, not every constitutional element can be considered as part of the constitutional identity within the meaning of Article 4(2) TEU. This is why it is important to pay attention on constitutional provisions that prevent the legislature from making certain constitutional changes or that subject constitutional amendments to a specifically difficult procedure. In this sense, it is important to note that Croatian Constitution is not one of those which contain prohibition of changing some of the constitutional norms. Consequently, this is why in the

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<sup>24</sup> Beside Croatia, ten other Member States of the EU are implicated: Belgium, the Netherlands, Luxembourg, Denmark, Finland, Sweden, Ireland, Hungary, Slovakia and Slovenia.

<sup>25</sup> Grewe, C., *Methods of Identifications of National Constitutional Identity*, in: A. Saiz Arnaiz, C. Alcobero Llivina (eds.), *National Constitutional Identity and European Integration*, *op.cit.* note 2, pp. 40-44.

<sup>26</sup> Von Bogdany, A., Schild S., *op. cit.* note 14, p. 1432.

<sup>27</sup> Grewe, C., *op.cit.* note 25, p. 44.

<sup>28</sup> *Ibid.*, p. 45.

<sup>29</sup> The Constitution of the Republic of Croatia - Ustav Republike Hrvatske, Official Gazette nos. 56/90, 135/97, 113/00, 28/01, 76/10, 85/10 – consolidated text, 5/14 – Decision by the Constitutional Court of the Republic of Croatia



framework of this formal conception is not possible to draw any conclusion relating to the core of the Constitution. However, we agree with Kostadinov who strongly believe that nothing prevents us from finding this “eternal clause” in the text of the Constitution. Here we share the opinion of Prof. Constance Grewe who stressed that “nothing prevents us from finding the boundaries in the text, even if they are not explicitly deemed inviolable, and nothing prevents constitutional judges to change their jurisprudence and to declare themselves entitled to protecting constitutional identity, even in the case of constitutional changes. Even if some legal system does not go as far as to determine the inviolable core of its Constitution, it will try to protect it because it represents its identity.”<sup>30</sup>

In this sense, we believe that constitutional identity of Croatia is determined in the constitutional text, more precisely – in three constitutional provisions and in Historical Foundations of the Constitution.

Firstly, at the beginning of constitutional text, Article 1 defines the Republic of Croatia as a unitary and indivisible democratic and social state, while Article 3 establishes the highest values of the constitutional order of the Republic of Croatia, as the grounds for the interpretation of the entire constitutional text as well as its institutional provisions. The list of eleven highest values – freedom, equal rights, national equality, equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and democratic multiparty system – certainly represents the list of fundamental constitutional principles which have priority over all other constitutional norms.<sup>31</sup>

Secondly, we stress Article 17 paragraphs 3 of the Constitution which stipulates that “*Not even in the case of an immediate threat to the existence of the State may restrictions be imposed on the application of the provisions of this Constitution concerning the right to life, prohibition of torture, cruel or degrading treatment or punishment, on the legal definitions of punishable offences and punishments, or on freedom of thought, conscience and religion.*” According to Kostadinov, exactly this compliance with the prohibition to limit the application of law, even in the cases of immediate threat to the existence of the State from Article 17, paragraph 3 of the Constitution, logically and theologically necessarily involves the inviolable

<sup>30</sup> Constance Grewe, lecture on 22eme Cours Internationale de Justice Constitutionnelle Hiérarchie entre droits fondamentaux, Université Paul-Cézanne Aix-Marseille III, 8 and 9 September 2010, quoted from: Kostadinov, B., *Constitutional Identity*, Iustinianus Primus Law Review, Vol. 3:1, 2012, p. 16, URL=<http://law-review.mk/pdf/04/biljana%20kostadinov.pdf>

<sup>31</sup> Smerdel, B., *Ustavnost izmjena Ustavnog zakona o pravima manjina (NN 80/2010) i Zakona o izboru zastupnika (NN 145/2010)*, Političke analize, No. 8, 2011, p. 68.

constitutional ban to annual those rights, and therefore the constitutional identity of the Republic of Croatia. This prohibition to limit the application and thus the annulment of the obligation to respect human dignity, the essence of the rule of law's principles and the free democratic order is unalterable as a norm of Croatian Constitution.<sup>32</sup> Since human rights can be limited by law in ordinary conditions (according to Article 16 of the Constitution<sup>33</sup>) and in extraordinary conditions (according to Article 17 paragraphs 1 and 2<sup>34</sup>), this constitutional exemption via Article 17 paragraph 3 could be seen as the *inviolable essence* of the Constitution, or the *material core* of the Constitution, which is directed towards the protection of constitutional identity.

And finally, we stress the importance of the Historical Foundations of the Constitution, or its preamble, which has great (primarily) historical, but also symbolic and political, significance. In the context of constitutional identity, we point out that its part on national sovereignty which states that “...*the Republic of Croatia is hereby founded and shall develop as a sovereign and democratic state in which equality, freedoms and human rights are guaranteed and ensured, and their economic and cultural progress and social welfare promoted.*” This provision has served out as one of the most important grounds and guidelines for the interpretation of individual constitutional provisions and the Constitution as a whole.<sup>35</sup>

### 3.2. Relevant national constitutional courts' case law

As a starting point in determination of the content of constitutional identity, the constitutional provisions only give a first indications. A second important phase in this sense is the relevant constitutional court's case law. In this context, particularly

<sup>32</sup> Kostadinov, B., *op.cit.* note 30, p 17.

<sup>33</sup> According to Article 16 of the Constitution, freedoms and rights may only be restricted by law in order to protect freedoms and rights of others, public order, public morality and health. Any restriction of freedoms and rights shall be proportional to the nature of the necessity for restriction in each individual case.

<sup>34</sup> Article 17 paragraph 1 of the Constitution stipulates that individual constitutionally-guaranteed freedoms and rights may be restricted during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia or in the event of any natural disaster. Such curtailment shall be decided upon by the Croatian Parliament by a two-thirds majority of all representatives or, if the Croatian Parliament is unable to convene, by the President of the Republic, at the proposal of the Government and upon the counter-signature of the Prime Minister. According to Article 17 paragraph 2, the extent of such restrictions must be adequate to the nature of the threat, and may not result in the inequality of citizens with respect to race, colour, gender, language, religion, national or social origin.

<sup>35</sup> Smerdel, B., *The constitutional order of the Republic of Croatia on the twentieth anniversary of the 'Christmas Constitution'*. *The Constitution as a political and legal act*, in: *The Constitution of the Republic of Croatia*, Novi informator, Zagreb, 2010, p. 95.

important role play decisions regarding the relationship between the law of the European Union and domestic constitutional law.<sup>36</sup>

According to Rideau, currently only three Member States of the European Union do explicitly endorse constitutional identity: Germany, France and Poland, the notion is implied in Spain, Italy, Hungary and the Czech Republic, while this concept is blurred or absent in the remaining Member States.<sup>37</sup>

The beginnings of the development of the notion of constitutional identity in the constitutional courts' case-law of respective Member States can be traced back to 1970s. The German Federal Constitutional Court has developed the most elaborate jurisprudence on constitutional identity. It referred to the concept of constitutional identity for the first time in its 1974 *Solange I*<sup>38</sup> decision and then later in a follow up judgment *Solange II* (1986). Whereas in the two *Solange* judgments the German Federal Constitutional Court had concentrated on the guarantees for the protection of fundamental rights in the European (Economic) Community, in its 1993 *Maastricht* judgment it shifted its attention to institutional guarantees regarding the conferral of sovereign competences and the democratic legitimacy of EU action.<sup>39</sup> The famous *Lisbon* judgement on the compatibility of the Treaty of Lisbon with the German Basic Law of 30 June 2009 "proceeded with great impetus to the concretisation of the Constitution's identity on which some positions adopted by the Court have relied until now".<sup>40</sup> The Federal Constitutional Court reviewed whether the inviolable core content of the constitutional identity of the Basic Law (pursuant to Article 23.1 third sentence) in conjunction with Article 79.3 of the Basic Law is respected. In this context, the Court held the following: "The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area. The identity review makes it possible to examine whether due to the action of European institutions, the principles under Article 1 and Article 20

<sup>36</sup> Von Bogdany, A., Schild S., *op. cit.* note 14, p. 1433.

<sup>37</sup> See note 3.

<sup>38</sup> BverfGE, Judgement of 29 May 1974

<sup>39</sup> Kiiver, P., *The Lisbon Judgement of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU*, European Law Journal, Vol. 16, No. 5, 2010, p. 580.

<sup>40</sup> Rideau, J., *op.cit.* note 3, p. 246.

of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated. This ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect.”<sup>41</sup> In this case the German Federal Constitutional Court explicitly made reference to Article 4(2) TEU and considered that Germany’s constitutional identity “was defined by the so-called ‘eternity clause’ in Article 79(3) of the German Constitution”,<sup>42</sup> which, as mentioned previously, prevents the legislature from making certain changes to the German Basic Law. Additionally, it is important to note that besides the principles laid down in Articles 1 and 20 of the German Basic Law (in particular human dignity, democracy, rule of law, federalism), the Court mentioned eight further fields that are particularly relevant to constitutional identity: (1) citizenship, (2) the civil and the military monopoly on the use of force, (3) revenue and expenditure including external financing, (4) deprivation of liberty in the administration of criminal law or placement in an institution, (5) cultural issues, (6) the shaping circumstances concerning family and education, (7) the ordering of the freedom of opinion, press and of association, and (8) the dealing with the profession of faith or ideology.<sup>43</sup>

This German approach has inspired the positions adopted by some other constitutional courts. The French Constitutional Council, for example, started to use the concept of constitutional identity in its decision of 27 July 2006,<sup>44</sup> when it reviewed the constitutionality of the Act pertaining to copyright and related rights in the information society and decided that “the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the onstituting power consents thereto.”

With decision 1146/1988,<sup>45</sup> the Italian Constitutional Court explicitly dealt with the problem of the existence of some supreme principles excluded from constitutional revision. It explicitly determined that “the Italian Constitution contains some supreme principles that cannot be subverted or changed in their essential content neither by constitutional laws of revision nor by constitutional laws. These

<sup>41</sup> BverfGE, Judgement of 30 June 2009, 2 BvE 2/08, at 240, URL=[http://www.bverfg.de/e/es20090630\\_2bve.00008en.html](http://www.bverfg.de/e/es20090630_2bve.00008en.html)

<sup>42</sup> Von Bogdany, A., Schild S., *op. cit.* note 14, p. 1438.

<sup>43</sup> López Bofill, H. *What is not Constitutional Pluralism in the EU*, in: A. Saiz Arnaiz, C. Alcobero Llivina (eds.), *National Constitutional Identity and European Integration*, *op.cit.* note 2, p. 229.

<sup>44</sup> Decision No. 2006-540 DC of 27 July 2006, URL=[http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2006540DCen2006\\_540dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2006540DCen2006_540dc.pdf)

<sup>45</sup> Decision of Italian Constitutional Court No. 2006-540 DC dated July 27th 2006, URL=[http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2006540D-Cen2006\\_540dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2006540D-Cen2006_540dc.pdf)

principles are explicitly provided by the Constitution as absolute limits to power of constitutional revision, as the republican form of government (Art 139 of the Constitution) as well as the principles which, although not expressly mentioned among those not subject to the constitutional revision process, belong to the values upon which the Italian Constitution is founded.”

The Spanish Constitutional Court in its Declaration 1/2004<sup>46</sup> addresses the issue of the compatibility of the Spanish Constitution of 1978 and the Treaty of the European Union. The limits to the integration process were summarised as follows: “These material limits, which are not expressly included in the constitutional provision (Article 93), but which implicitly derive from the Constitution and from the essential meaning of the precept itself, are understood as respect for the sovereignty of the State, our basic constitutional structures and the system of fundamental principles and values established in our Constitution, in which fundamental rights acquire their own substantive nature”. According to P. Pérez Tremps, this brief formula provides the basis for ascertaining the content and scope of constitutional identity as defined by the Constitutional Court.<sup>47</sup> In this sense, writes Pérez Tremps, constitutional identity includes a safeguard for the State itself, which encompasses two formally different contents: the essential elements of the State and the essential elements of the Constitution.<sup>48</sup>

The Polish Constitutional Court in its 24 November 2010 decision on the constitutionality of the Lisbon Treaty,<sup>49</sup> “manifestly inspired by the German model to which it moreover openly refers”,<sup>50</sup> manifested its will to defend constitutional identity. The Constitutional Court shared the view expressed in the doctrine that the competences, under the prohibition of conferral, manifest about a constitutional identity, and thus they reflect the values the Constitution is based on. Therefore, “constitutional identity is a concept which determines the scope of “excluding – from the competence to confer competences – the matters which constitute (...) ‘the heart of the matter’, i.e. are fundamental to the basis of the political system of a given state” , the conferral of which would not be possible pursuant to Article

<sup>46</sup> Tribunal Constitucional 13.12.2004, Declaration 1/2004, available in English on URL=<http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/DTC122004en.aspx>

<sup>47</sup> Pérez Tremps, P., *National Identity in Spanish Constitutional Court Case-law*, in: A. Saiz Arnaiz, C. Alcobero Llivina (eds.), *National Constitutional Identity and European Integration*, *op.cit.* note 4, p. 270.

<sup>48</sup> *Ibid.*

<sup>49</sup> Constitutional Court, Judgement of 24 November 2010 – Ref. No. K 32/09 (Constitutionality of the Lisbon Treaty), available on: URL=[http://www.tribunal.gov.pl/eng/summaries/documents/K\\_32\\_09\\_EN.pdf](http://www.tribunal.gov.pl/eng/summaries/documents/K_32_09_EN.pdf)

<sup>50</sup> Rideau, J., *op.cit.* note 3, p. 252.

90 of the Constitution. Regardless of the difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle 203 of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences.” Thus, “the guarantee of preserving the constitutional identity of the Republic of Poland has been Article 90 of the Constitution and the limits of conferral of competences specified therein.”

The Hungarian Constitutional Court in its 20 July 2010 decision on the constitutionality of the Act of promulgation of the Lisbon Treaty,<sup>51</sup> interpreted the relevant articles of the Constitution on sovereignty, democracy, rule of law and European cooperation. According to the Court, the so-called European clause cannot be interpreted in a way that would deprive the clauses on sovereignty and rule of law of their substance. The Court referred however to its former jurisprudence on the free limitation of the exercise of attributes of sovereignty by the holder of the sovereignty, i.e. in fact by the legislator. The Constitutional Court emphasized that material and procedural rules were duly observed during the adoption of the Act of promulgation and the Parliament gave its consent to the content of the Lisbon Treaty on its free will. To summarize, “the Constitutional Court came to the conclusion that even if the reforms of the Lisbon Treaty were of paramount importance, they did not change the situation that Hungary maintains and enjoys her independence, her rule of law character and her sovereignty. Consequently, the application was rejected in all its elements.”

The position of the Czech Constitutional Court on the constitutional identity is present in its decisions *Lisbon I* and *Lisbon II*. In its 2008 *Lisbon I* decision,<sup>52</sup> the Constitutional Court examined a petition from the Senate of the Parliament of the Czech Republic, seeking review of whether the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community is consistent with the constitutional order of the Czech Republic. As regards the

<sup>51</sup> Constitutional Court, 20 July 2010, Decision 143/2010. (VII. 14.) AB of the Constitutional Court of the Republic of Hungary on the constitutionality of the Act on promulgation of the Lisbon Treaty, Press release in English, available on URL=[http://www.mkab.hu/admin/data/file/797\\_143\\_2010.pdf](http://www.mkab.hu/admin/data/file/797_143_2010.pdf)

<sup>52</sup> Constitutional Court, 2008/11/26 – Pl. US 19/08: Treaty of Lisbon, available on URL=<http://www.usoud.cz/en/decisions/20081126-pl-us-1908-treaty-of-lisbon-i-i>

sixth group of the Senate's objections (the Senate questioned whether Art. 2 of the TEU is consistent with Art. 1 par. 1 and Art. 2 par. 1 of the Constitution (the principle of the sovereignty of the people), "the Constitutional Court stated that the values mentioned in Art. 2 and 7 of the TEU are fundamentally consistent with the values on which the material core of the Czech constitution rests (cf. Art. 1 par. 1, Art. 5, Art. 6 of the Constitution, Art. 1, Art. 2 par. 1, Art. 3, Chapter Four of the CFRF). Therefore, in this regard as well the Treaty of Lisbon is consistent with the untouchable principles protected by the Czech constitutional order. Insofar as the Senate relies on state sovereignty in this regard, the Constitutional Court stated that in a modern, democratic state, governed by the rule of law, state sovereignty is not an aim in and of itself, in isolation, but is a means for fulfilling the fundamental values on which the construction of a constitutional state governed by the rule of law, stands. Therefore, the Constitutional Court summarized that the Treaty of Lisbon changes nothing on the fundamental concept of current European integration, and that, even after the entry into force of the Treaty of Lisbon, the Union would remain a unique organization of an international law character." Accordingly, we may say that the Czech Constitutional Court considered the rule of law (Article 1(1) of the Constitution, free competition among political parties (Article 5 of the Constitution), the principle of non-discrimination (and protection of national minorities (Art 2 and 3 of the Charter of Fundamental Rights and Basic Freedoms) as part of the constitutional core. A year later, in its 3 November 2009 *Lisbon II* decision,<sup>53</sup> the Constitutional Court examined a petition from a group of senators of the Senate of the Parliament of the Czech Republic for review of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community for conformity with the constitutional order. The Constitutional Court did not consider itself authorised to establish material limits to the transfer of competences: "However, the Constitutional Court does not consider it possible, in view of the position that it holds in the constitutional system of the Czech Republic, to create such a catalogue of non-transferrable powers and authoritatively determine "substantive limits to the transfer of powers", as the petitioners request. It points out that it already stated, in judgment Pl. ÚS 19/08, that "These limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion." Responsibility for these political decisions cannot be transferred to the Constitutional Court; it can review them only at the point when they have actually been made on the political level. For the same reasons, the Constitutional Court does not feel authorised to formulate in advance, in an abstract

<sup>53</sup> Constitutional Court, 2009/11/03 – Pl. US 29/09: Treaty of Lisbon II, available on URL=<http://www.usoud.cz/en/decision/20091103-pl-us-2909-treaty-of-lisbon-ii-1>.

context, what is the precise content of Article 1(1) of the Constitution, as requested by the petitioners, supported by the president, who welcomes the attempt “in a final list to define the elements of the ‘material core’ of the constitutional order, or more precisely, of a sovereign democratic state governed by the rule of law”, and states (in agreement with the petitioners) that this could “limit future self-serving definition of these elements based on cases being adjudicated at the time.”

This brief overview of national constitutional courts case-law demonstrates following: first, the German Federal Constitutional Court has developed the most elaborate jurisprudence on the constitutional identity and the judgements of this Court seem to serve as a reference point for other constitutional courts in Europe; second, this is the reason why – despite some differences in the jurisprudence of national constitutional courts – we may see a ‘remarkable overall convergence’,<sup>54</sup> and third, most of these constitutional courts have developed certain constitutional limits with regard to the protection of the statehood, the protection of the form of government and of the central principles of State organization, the protection of democracy, of the rule of law and, of course, of fundamental rights.<sup>55</sup>

With regard to the Republic of Croatia, in the case law of the Constitutional Court of the Republic of Croatia reference to constitutional identity has appeared and discussed only recently. First reference of the Croatian Constitutional Court to constitutional identity can be found in its Decision U-I-3597/2010 et al., from July 2011,<sup>56</sup> where the Court states that the constitutional identity of the Republic of Croatia is determined in paragraph 2 of the Historical Foundations of the Constitution: “...*the Republic of Croatia is established as the national state of the Croatian people and the state of the members of national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrian, Ukrainians, Ruthenians, Bosniaks, Slovenians, Montenegrins, Turks, Vlachs, Albanians and others, who are its citizens, who are guaranteed equality with citizens of the Croatian nationality and the realisation of national rights in accordance with the democratic norms of the UN and the lands of the free world.*” This principle of equality of members of national minorities with citizens of the Croatian nationality as a part of Croatian constitutional

<sup>54</sup> Von Bogdany, A., Schild S., *op. cit.* note 14, p. 1433.

<sup>55</sup> *Ibid.*, p. 1440.

<sup>56</sup> Decision of the Constitutional Court of the Republic of Croatia, Nos. U-I-3597/2010, U-I-3847/2010, U-I-692/2011, U-I-898/2011, U-I-994/2011, Zagreb, 29 July 2011, point 30.1, available on: URL=[http://http://sljeme.usud.hr/usud/praksWen.nsf/e540ceb6cd1e4ec-0c1257de1004aa1f3/477e6dbf66aeaa69c1257e5f003d81f8/\\$FILE/U-I-3597-2010.pdf](http://http://sljeme.usud.hr/usud/praksWen.nsf/e540ceb6cd1e4ec-0c1257de1004aa1f3/477e6dbf66aeaa69c1257e5f003d81f8/$FILE/U-I-3597-2010.pdf). In this case proceedings have been instituted to review conformity with the Constitution and Article 1 of the Constitutional Act on Amendments to the Constitutional Act on the Rights of National Minorities.



identity was certainly a first step towards the Croatian theory of constitutional identity.

A second important step has been made two years later in the framework of Constitutional Court Communication on the citizen's constitutional referendum on the definition of marriage.<sup>57</sup> This Communication was issued on the occasion of the citizens' initiative "In the Name of the Family" (*U ime obitelji*) of mid 2013 requesting the calling of a national referendum to amend the Constitution of the Republic of Croatia whereby the definition of marriage as a living union between a man and a woman would be introduced into the Constitution.<sup>58</sup> In the case of the referendum on the definition of marriage, voting was conducted and a decision rendered in the Croatian Parliament to dismiss the proposal for the Croatian Parliament to act on Article 95 of the Constitutional Act on the Constitutional Court of the Republic of Croatia<sup>59</sup> (according to which at the request of the Croatian Parliament, the Constitutional Court shall, in the case when ten percent of the total number of voters in the Republic of Croatia request calling a referendum, establish whether the question of the referendum is in accordance with the Constitution and whether the requirements in Article 8 paragraphs 1-3 of the Constitution of the Republic of Croatia for calling a referendum have been met) and file a request with the Constitutional Court on those two questions. By rendering a decision to dismiss the proposal for the Croatian Parliament to act on Article 95 of the Constitutional Act, the Croatian Parliament expressed its legal will that it deemed the content of the referendum question on the definition of marriage to be in conformity with the Constitution and confirmed that the constitutional requirements had been met to call a referendum on that question. However, pursuant to Article 125.9 of the Constitution and Article 2.1 in conjunction with Article 87.2 of the Constitutional Act, the Constitutional Court has the general constitutional task to guarantee respect of the Constitution and to oversee the conformity of a national referendum with the Constitution, right up to the formal conclusion of the referendum procedure. Accordingly, after the Croatian Parliament had rendered a decision to call a national referendum on the basis of a citizens' constitutional initiative, and it had not prior to that acted

<sup>57</sup> Constitutional Court, Communication on the citizens's constitutional referendum on the definition of marriage, No. SuS-1/2013, Zagreb, 14 November 2013, available on: URL=[http://sljeme.usud.hr/usud/prakswen.nsf/.../\\$FILE/SuS-1-2013.doc](http://sljeme.usud.hr/usud/prakswen.nsf/.../$FILE/SuS-1-2013.doc).

<sup>58</sup> The national referendum was requested by 683,948 voters, that is more than 10 percent of the total number of voters in the Republic of Croatia, At its session held on 8 November 2013, the Croatian Parliament adopted the Decision to call a national referendum, which was published in the Official Gazette no. 134 of 9 November 2013, and came into force on the day it was adopted.

<sup>59</sup> Constitutional Act on the Constitutional Court of the Republic of Croatia, consolidated text, Official Gazette No. 49/02.

on Article 95.1 of the Constitutional Act, the Constitutional Court's general supervisory authority over the conformity with the Constitution of a referendum called in this way does not ceased. However, out of respect for the constitutional role of the Croatian Parliament as the highest legislative and representative body in the state, the Constitutional Court believed that it is only permissible to make use of its general supervisory authorities in that situation as an exception, when it establishes the formal and/or substantive unconstitutionality of a referendum question, or a procedural error of such severity that it threatens to destroy the structural characteristics of the Croatian constitutional state, that is, its *constitutional identity*, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution). The primary protection of those values does not exclude the authority of the framer of the Constitution to expressly exclude some other question from the circle of permitted referendum questions (point 5 of the Communication).

It is interesting that other Constitutional Courts' reflections on constitutional identity can be found in some other cases connected with the citizen-initiated referendum.

In this context, also in 2013 the citizens' initiative "Headquarters for the Defence of Croatian Vukovar" (*Stožer za obranu hrvatskog Vukovara*) succeeded in collecting the necessary number of signatures for the referendum to amend the Constitutional Act on the Right of National Minorities.<sup>60</sup> More precisely, the aim was to change minority language rights in the sense that existed provision (Article 12 of the Constitutional Act) "equal official use of the language and script used by members of a national minority shall be realised in the area of a unit of local self-government when members of an individual national minority comprise *at least one third* of the population of such unit" change to "*at least one half*" of the population of such unit. At the request of the Croatian Parliament, the Constitutional Court decided in its Decision U-VIIR-4640/2014<sup>61</sup> that the referendum question was constitutionally inadmissible. For us is interesting point 13.1 of the respective Decision, which states that "Article 12.2 of the Constitution should be understood as a public law expression of the particular importance which the Constitution gives to the language and script of national minorities, these universal and permanent values which define the identity of the Croatian constitutional state." Exactly this declaration - that the respect for minority languages makes part

<sup>60</sup> Constitutional Act on the Rights of National Minorities, Official Gazette nos. 155/02, 47/10 – decision by the Constitutional Court of the Republic of Croatia, 80/10 and 93/11 - decision by the Constitutional Court of the Republic of Croatia

<sup>61</sup> Decision of the Constitutional Court, No U-VIIR-4640/2014, Zagreb, 12 August 2014

of the Croatian constitutional identity – was one of the most prominent features of this case.

In 2014, two more citizens' initiative by several trade unions (the first one demanded a referendum on preventing the outsourcing of non-core services in the public sector, while the second one demanded a referendum against the monetisation of the Croatian motorways) also succeeded in collecting the necessary number of signatures, but the Constitutional Court decided that respective referendums questions were (also) constitutionally inadmissible. In first case concerning the outsourcing,<sup>62</sup> the Court has repeated its statement from point 5 of the Communication on the citizen's constitutional referendum on the definition of marriage and stated that which regard to the revision of the Constitution, it is the obligation of the Constitutional Court to permit referendum "*when it establishes the formal and/or substantive unconstitutionality of a referendum question, or a procedural error of such severity that it threatens to destroy the structural characteristics of the Croatian constitutional state, that is, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution)*" (point 34.4.). In second case concerning the monetisation of Croatian motorways,<sup>63</sup> the Court declared that constitutional principle from Article 49 paragraph 1 of the Constitution, which states that entrepreneurial and market freedom shall be the basis of the economic system of the Republic of Croatia, and which must be seen together with the Article 3 of the Constitution, is especially linked to the conception of constitutionally guaranteed fundamental rights which builds *the identity of Croatian constitutional state* (poin 43.1.).

To sum up: in the case law of the Constitutional Court of the Republic of Croatia reference to constitutional identity has appeared and discussed only recently and the Court has defined following parts of the Croatian constitutional identity: first, Article 1 and Article 3 of the Constitution (the highest values of the constitutional order of the Republic of Croatia); second, constitutionally guaranteed fundamental rights, including respect for minority languages and entrepreneurial and market freedom, and third, the Historical Foundation of the Constitution, especially its paragraph 2 on equality of national minorities with citizens of the Croatian nationality.

On the other hand, as to the identity clause and as to the subsidiarity of the EU law in Croatian legal order in general, there is still no relevant case-law of the Croatian Constitutional Court. However, according to the former President of

<sup>62</sup> Decision of the Constitutional Court, No. U-VIIR-1159/2015, Zagreb, 8 April 2015

<sup>63</sup> Decision of the Constitutional Court, No. U-VIIR-1158/2015, Zagreb, 21 April 2015

the Croatian Constitutional Court Jasna Omejec, it is reasonable to presume that the relevant legal standpoints of the German Federal Constitutional Court will be carefully considered by the Croatian Constitutional Court in the coming period. This is primarily related to the “standpoints of the German BVerfG that is obliged to intervene if a measure under EU law were to represent a clear or structurally significant *ultra vires* act, or if it were detrimental to Germany’s constitutional identity as protected under Article 79.3 of the Basic Law, including the minimum standard of protection of fundamental rights demanded by the Basic Law.”<sup>64</sup>

Consequently, the Croatian Constitutional Court will, in the coming period, have to define the fundamental meaning of the subsidiarity of the EU law in the Croatian constitutional order and also clearly define its constitutional identity. This has not been done to date. Concerning the constitutional basis of Croatian Constitutions’ supremacy over EU law, it would not be hard to construe it by an objective interpretation – there is Article 2 of the Constitution (“The sovereignty of the Republic of Croatia is inalienable, indivisible and non-transferable”), Article 3 of the Constitution (the highest values of the constitutional order) and Article 5 of the Constitution (“In the Republic of Croatia laws shall conform to the Constitution, and other rules and regulations shall conform to the Constitution and law”). The EU derives its democratic legitimacy in Croatia within the meaning of Articles 143-146 of the Constitution (“European Union Law”) in connection with Article 1 of the Constitution (“The Republic of Croatia is a unitary and indivisible democratic and social state. Power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens. The people shall exercise this power through the election of representatives and through direct decision making”). Therefore, according to Omejec, “the Constitutional Court could see itself as being obliged to monitor at least those actions that arbitrarily exceed the limits of the EU programme of integration, that is, the constitutional powers transferred to the EU, and, if necessary, to find such legal acts to be inapplicable in Croatia.”<sup>65</sup> Until now the Constitutional Court has issued only one general legal standpoint concerning EU law. Namely, in the mentioned 2015 Decision on the monetization of Croatia motorways, the Court first established that a proposed Act on Amendments to the Roads Act was not in conformity with the Constitution and subsequently concluded that it was necessary to further review the conformity of referendum question with EU law in substance “because the Constitution by its own legal force has supremacy over EU law” (point 60.).

<sup>64</sup> Omejec, J., *Study on European Constitutional Courts as the Courts of Human Rights. Assessment, challenges, perspectives*, Zagreb, 2016, p. 26, URL=[http:// bib.irb.hr/datoteka/796420.OMEJEC\\_-\\_ European\\_Constitutional\\_Courts\\_as\\_the\\_Courts\\_of\\_Human\\_Rights.pdf](http://bib.irb.hr/datoteka/796420.OMEJEC_-_European_Constitutional_Courts_as_the_Courts_of_Human_Rights.pdf)

<sup>65</sup> *Ibid.*, p. 27.

Having all this in mind, we strongly hope that Croatian Constitutional Court will actively participate in European constitutional pluralism exactly via constitutional protection of Croatian constitutional identity.

### 3.3. Relevant case-law of the Court of Justice of the European Union

Although the CJEU made a reference to the notion of national identity even *before* the Lisbon Treaty (for example, the notion of national identity was mentioned in several opinions of advocates general,<sup>66</sup> but in all of these cases “reference was to the protection of the national *cultural* identity of the relevant States rather than to the more political form of it”<sup>67</sup>), the case *Sayn-Wittgenstein*<sup>68</sup> was the first that cited Article 4(2) TEU in relationship with primary law (in this case Article 21 TFEU) and national law (in this case Law on the Abolition of the Nobility). The case concerned the question whether the decision of Austrian authorities to change the surname of Austrian citizen residing in Germany (on the ground of the Law on the Abolition of the Nobility) from “Fürstin von Sayn-Wittgenstein” (“Princess of Sayn-Wittgenstein) into “Sayn-Wittgenstein” was in breach of Article 21 TFEU. While the Austrian Government has pointed out that “the provisions at issue in the main proceedings are intended to protect the constitutional identity of the Republic of Austria. The Law on the abolition of the nobility, even if it is not an element of the republican principle which underlies the Federal Constitutional Law, constitutes a fundamental decision in favour of the formal equality of treatment of all citizens before the law”, the ECJ found that “the refusal, by the

<sup>66</sup> For example, Advocate General Maduro was one of the first to remark pre-Lisbon in *Spain v. Eurojust* (2005) and later in *Michinaki* case (2008). In *Spain v. Eurojust*, Maduro informs that “In a Union intended to be an area of freedom, security and justice, in which it is sought to establish a society characterised by pluralism, respect for linguistic diversity is of fundamental importance. That is an aspect of the respect which the Union owes, in the terms of Article 6(3) EU, to the national identities of the Member States” and that “language is not merely a functional means of social communication. It is an essential attribute of personal identity and, at the same time, a fundamental component of national identity.” (Opinion of Advocate General Poiares Maduro delivered on 16 December 2004, available on: URL=<http://curia.europa.eu/juris/showPdf.jsf?docid=49769&doclang=EN>). In *Michinaki* case, Advocate General Maduro points that “even in cases that fall within their scope, the provisions on freedom of movement do not replace domestic law as the relevant normative framework for the assessment of conflicts between private actors. Instead, Member States are free to regulate private conduct as long as they respect the boundaries set by Community law.” (Opinion of Advocate General Poiares Maduro delivered on 23 May 2007, available on: URL=<http://curia.europa.eu/juris/showPdf.jsf?docid=62533&doclang=en>). We may see that in the first mentioned case it is stated that respect to national identity can be employed on grounds on nationality, while in the second as a means of derogating from EU free movement provisions.

<sup>67</sup> Claes, M., *op.cit.* note 2, p. 130.

<sup>68</sup> Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806, available on: URL=<http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0208&clang1=en&type=TEXT&cancre=>

authorities of a Member State, to recognise all the elements of the surname of a national of that State, as determined in another Member State – in which that national resides – at the time of his or her adoption as an adult by a national of that other Member State, where that surname includes a title of nobility which is not permitted in the first Member State under its constitutional law cannot be regarded as a measure unjustifiably undermining the freedom to move and reside enjoyed by citizens of the Union.” The ECJ held that measures which restrict a fundamental freedom may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures. The ECJ also accepted that, in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under European Union law. In this context, the Court has interpreted the constitutional background of the Law in questions as an element of Austria’s public policy and stressed that “the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions”. Finally, in order to clarify the concept of public policy as a justification for restrictions of fundamental freedoms guaranteed in the EU law, the ECJ also pointed out that “in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.” As emphasized by Von Bogdany and Schill, this case helps to clarify the understanding of Article 4(2) TEU in following ways: “First, the ECJ noted the connection between the concept of national identity and the constitutional background of the interests that Austria’s measures protected. Second, the ECJ held that the status of the State as a republic formed part of national identity, thus intensifying the nexus between national identity and fundamental constitutional principles. Finally, the Court embedded the respect for national identity in the present proceedings into its general jurisprudence on the relationship between fundamental freedoms and fundamental rights.”<sup>69</sup>

Explicit mention of Article 4(2) TEU has been also made in case *Malgożata Runevič-Vardyn*,<sup>70</sup> that concerned a Lithuanian national (first applicant), member of the Polish minority (with Polish forename “Małgorzata” and surname “Runiewicz”),

<sup>69</sup> Von Bogdany, A., Schild S., *op. cit.* note 14, p. 1425.

<sup>70</sup> Case C-391/09, *Malgożata Runevič-Vardy* [2011] ECLI:EU:C:2011:291, available on: URL=<http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0391&lang1=en&ctype=TX-T&ancre=>

married to a Polish national (second applicant) who complained, after the refusal of the Vilnius Civil Registry Division to change her forename and surname, as they appear on her birth certificate, namely “Malgožata Runevič”, to be changed to “Małgorzata Runiewicz”, that there had been discrimination on the grounds of race and invoked the enforcement of Article 21 TFEU and the Directive 2000/43. According to the Lithuanian Law, entries on certificates of civil status must be made in Lithuanian. Forenames, surnames and place names must be written in accordance with the rules of the Lithuanian language. ( Article 3.282 of the Civil Code) and this rule has been confirmed by the Lithuanian Constitutional Court – this Court declared that a person’s forename and surname had to be entered on a passport in accordance with the rules governing the spelling of the official national language in order not to undermine the constitutional status of that language. In this case the ECJ states that “it is legitimate for a Member State to ensure that the official national language is protected in order to safeguard national unity and preserve social cohesion. The Lithuanian Government stresses, in particular, that the Lithuanian language constitutes a constitutional asset which preserves the nation’s identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities.” We may see that the Court has expressly relied on Article 4(2) TEU and affirmed that the EU should respect national identity of its Member States, which includes protection of a State’s official national language. The Court also stressed that this objective pursued by national rules constitutes, in principle, “a legitimate objective capable of justifying restrictions on the rights of freedom of movement and residence provided for in Article 21 TFEU and may be taken into account when legitimate interests are weighed against the rights conferred by European Union law. Measures which restrict a fundamental freedom, such as that provided for in Article 21 TFEU, may, however, be justified by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures.”

Another interesting case concerning Article 4(2) TEU is case *O’Brien*,<sup>71</sup> concerning the refusal of the Ministry of Justice to pay Mr. O’Brien (Queen’s Council and former Crown Court recorder) a retirement pension calculated pro rata temporis on the retirement pension payable to a full-time judge taking retirement at age 65 which has performed the same work. In this case some important questions were raised: first, who define the concept of workers who have on employment contract

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<sup>71</sup> Case C-393/10, *O’Brien* [2012] ECLI:EU:C:2012:110, available on: URL=<http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0393&lang1=en&type=TX-T&ancre=>

or an employment relationship and who determine whether judges fall within that concept – and here the ECJ emphasized that “ it is for the Member States to define the concept of ‘workers who have an employment contract or an employment relationship’ in Clause 2.1 of the Framework Agreement on part-time work and, in particular, to determine whether judges fall within that concept, subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81 and that framework agreement. An exclusion from that protection may be permitted only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, within the category of workers”, and second, if according to national law, judges fall within the concept of “workers who have an employment contract or an employment relationship” in Clause 2.1 of the Framework Agreement on part-time work, whether the latter must be interpreted as meaning that it precludes, for the purpose of access to the retirement pension scheme, national law from discriminating between full- and part-time judges, or between different kinds of part-time judges - the ECJ answered that the Framework Agreement on part-time work must be interpreted as meaning that it precludes, for the purpose of access to the retirement pension scheme, national law from establishing a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, unless such a difference in treatment is justified by objective reasons, which is a matter for the referring court to determine. The ECJ also argued on the argument of Latvian Government (intervening in the case) that the application of European Union law to the judiciary has the result that the national identities of the Member States are not respected, contrary to Article 4(2) TEU. The Court held that the application, with respect to part-time judges remunerated on a daily fee-paid basis, of Directive 97/81 and the Framework Agreement on part-time work cannot have any effect on national identity, but merely aims to extend to those judges the scope of the principle of equal treatment, which constitutes one of the objectives of those acts, and to protect them against discrimination as compared with full-time workers. Accordingly, in this case we have seen that Article 4(2) TEU can be used by by various actors, not only by the parties in the proceeding, but also by the intervening parties.

As it arises from the above analysis of the CJEU’s case-law, although it seems that Article 4(2) TEU offers a trap door to Member States to escape some of their EU law obligations, the overall picture is far from being so simple. It is obvious that Member States should be allowed some kind of discretion to develop the concept of constitutional identity, especially because, as it was stressed in *Sayn-Wittgenstein*, “the specific circumstances which may justify recourse to the concept of public



policy may vary from one Member State to another and from one era to another”. However, the Court has repeatedly noted that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions.

#### 4. CONCLUSION

Besides the evolution of the concept of national identity through the work of scholars, a new era in the conceptualization of this concept came with the Lisbon Treaty and its so-called “national identity clause” or the famous Article 4(2) TEU. Having in mind that the obligation that exist for the EU to respect national identity of its Member States have its history *before* Article 4(2) TEU, we could say that Article 4(2) TEU is quite longer and more descriptive than its predecessors. Namely, Article 4(2) provides: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

Since Article 4(2) TEU does not determine the national identity of Member States, we could say that there is no specific rule to follow to determine it. Accordingly, we could also say that of particular importance for determining the content of constitutional identity are (relevant) constitutional provisions, (relevant) national constitutional court’s case law and (relevant) ECJ’s case law.

In order to determine the content of constitutional identity of some Member State, our starting point should be its constitution, or, more precisely, certain principles of its constitution or a set of core values, principles and rules. In general, we may say that the principles that are constitutionally protected belong to the following categories: the protection of basic principles of State organization, State sovereignty and the principle of democracy, State symbols, State aims, the protection of human dignity, fundamental rights and the principle of law.

As a starting point in determination of the content of constitutional identity, the constitutional provisions only give a first indications. A second important phase in this sense is the relevant constitutional court’s case law. In this context, particularly important role play decisions regarding the relationship between the law of the European Union and domestic constitutional law. The German Federal Consti-

tutional Court has developed the most elaborate jurisprudence on constitutional identity. This German approach has inspired the positions adopted by some other constitutional courts, and very possible will be also inspiration for future Croatian Constitutional Court position in this context.

As it arises from the analysis of the CJEU's case-law, although it seems that Article 4(2) TEU offers a trap door to Member States to escape some of their EU law obligations, the overall picture is far from being so simple. It is obvious that Member States should be allowed some kind of discretion to develop the concept of constitutional identity, especially because, as it was stressed in *Sayn-Wittgenstein*, "the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another". However, the Court has repeatedly noted that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions.

In order to determine Croatian constitutional identity, our starting point was the Constitution of the Republic of Croatia. Having in mind that Croatian Constitution is not one of those which contain prohibition of changing some of the constitutional norms, and this is why in the framework of this formal conception is not possible to draw any conclusion relating to the core of the Constitution, we stress that constitutional identity of Croatia is determined in the constitutional text, more precisely – in three constitutional provisions and in Historical Foundations of the Constitution. Firstly, we stress Article 17 paragraph 3 of the Constitution which stipulates that *"Not even in the case of an immediate threat to the existence of the State may restrictions be imposed on the application of the provisions of this Constitution concerning the right to life, prohibition of torture, cruel or degrading treatment or punishment, on the legal definitions of punishable offences and punishments, or on freedom of thought, conscience and religion."* Secondly, at the beginning of constitutional text, Article 3 establishes the highest values of the constitutional order of the Republic of Croatia, as the grounds for the interpretation of the entire constitutional text as well as its institutional provisions. And finally, we stress the importance of the Historical Foundations of the Constitution, or its preamble, which has great (primarily) historical, but also symbolic and political, significance.

On the other hand, in the case law of the Constitutional Court of the Republic of Croatia reference to constitutional identity has appeared and discussed only recently. The Court has defined following parts of the Croatian constitutional identity: first, Article 1 and Article 3 of the Constitution (the highest values of the constitutional order of the Republic of Croatia); second, constitutionally guaranteed

fundamental rights, including respect for minority languages and entrepreneurial and market freedom, and third, the Historical Foundation of the Constitution, especially its paragraph 2 on equality of national minorities with citizens of the Croatian nationality.

As to the identity clause and as to the subsidiarity of the EU law in Croatian legal order in general, there is still no relevant case-law of the Croatian Constitutional Court. However, according to the former President of the Croatian Constitutional Court Jasna Omejec, it is reasonable to presume that the relevant legal standpoints of the German Federal Constitutional Court, including on constitutional identity issue, will be carefully considered by the Croatian Constitutional Court in the coming period.

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