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The EU constitutional culture-what is missing?

Abstract

The EU has its own constitutional culture even though it does not have a constitution in the formal sense of the word. The formation of the EU constitutional culture is the result of the joint continuous acceptance of the legal, political, economic and social categories, values, principles, but also acceptance of the specifics that are contained in the constitutional identities of the EU member states. Hence it is said that the constitutional culture of the EU represents a real mosaic, a set of different constitutional identities that the member states of the Union have within the framework of the national systems upgraded with the elements of the supranational system of values that the EU creates and develops as a result of the action of the institutions of the Union, especially the Court of Justice of the EU.

The constitutional culture of the EU develops on the foundations of the rule of law, democracy and respect of the human rights. It takes into account the values related to the rule of law stipulated in national constitutions as basic laws, values and principles as sources of inspiration so-called higher law and the collective identification of European citizens expressed through "the people's law" and networks them in a common axiological system of the Union on which EU policies should be based.

But are EU policies always based on this common axiological set of values? Is there something missing in the constitutional culture of the EU, something crucial that problematizes the essence of the matrix for European unification?

The paper will try to explain the very notion of the EU constitutional culture, and then will be focused on the most relevant segment of that constitutional culture - the constitutional identities of the EU member states and their influence on the philosophy and the essence of the EU constitutional culture. When we are talking about the EU constitutional culture we are actually talking about EU constitutional identity which, from the other side, is a set of national constitutional identities of the member states of the Union. In order to understand the problems that the EU has today regarding its own constitutional culture and its constitutional identity as a part of that constitutional culture, we need to trace back to several national Constitutional Courts' reactions to the Court of Justice of the European Union's doctrine of primacy of the EU Law. Through analyzing these reactions, we will actually discover the key problems related to the formation and development of the constitutional culture of the EU.

Key words: Constitution, Culture, Identity, Constitutional Court, ECJ, Rule of Law

1. What is the essence of the EU constitutional culture?

Constitutional culture is very complex and multidimensional category that always goes beyond the sole constitutional text, if written and formal constitution exists in the system.

Constitutional culture is at the crossroad between constitutional law, social psychology and political sciences. It is related not only to the legal rules and principles but also to other concepts, such as political support, institutional legitimacy and constitutional identity.

For some authors, constitutional culture is actually a box through which the Constitution's words, principles and values are transformed into concrete actions, obligations and consequences. It is seen as an interlocking system of practices, institutional arrangements, norms, and habits of thought that determine what questions we ask, what arguments we credit, how we process and how we resolve disputes.[1]

Talking about the EU constitutional culture we are actually explaining the EU constitutional identity which is defined as a set of national constitutional identities of the member states of the Union describing their historical development of the institutions, practices, policies and habits of thought through which constitutional law is made. This means that the EU constitutional culture is practically a set of national and European institutional arrangements, practices, norms and other miscellaneous features that determine how the national constitution's and EU Treaty's words are transformed into concrete actions and consequences.

The EU constitutional culture is usually seen as a "living category" with its own history and reality which is in the process of constant evolving, and responds directly to various kinds of challenges. Although finding that the EU constitutional culture is a "living" notion and is a kind of a comfortable metaphor, it enables us to understand why the evolving of the EU constitutional law is not a choice but inevitability.

As it is already mentioned, the constitutional culture is not fully and strictly formed from the formal constitutional text, if any, but is formed thanks to a process that filters the text through concrete institutions, policies and practices as "living elements". Those elements are constantly evolving because people and institutions have freedom to formulate and define norms, to choose different opportunities, to follow different approaches.

Prof. Peter Häberle, for instance, in his work "The rationale of constitutions from a cultural science viewpoint" puts the emphasis on the "European legal culture". According to his thoughts, the constitutions are strongly enrooted in people's culture, they practically emerge from it. From this theory we can conclude that we should no longer think about "constitutions and

[1] See: Andrew M. Siegel (2016), "Constitutional Theory, Constitutional Culture", Journal of Constitutional Law, Vol. 18:4, April, p. 1107, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1600&context=jcl.

culture" as separate categories and values, but we should see them as a symbiosis of "constitutions as culture".[2]

Häberle initially draws a distinction between Europe in a wider sense, which includes the Council of Europe and the OSCE, and Europe in the narrow sense of the European Union. In his view, the latter has, through the Treaties of Rome, Maastricht, Amsterdam and Nizza established an "ensemble of partial constitutions".[3]

Each constitutional culture contains constitutional identity which means a constitutionally defined identity. While some authors consider the Constitution to be a reflection of the collective beliefs, positions, attitudes and values formed throughout the history of a nation as a result of the action of its culture and tradition in the country, which means that the Constitution is a recognition of the pre-existence of identities[4], others considered that the Constitution, culture and identities are in correlation with each other, i.e. they influence each other as a result of the direct connection of their different social aspects.

This practically means that the Constitution is recognition and a basis for the creation of new identities. The majority of the authors agree that the constitutional identity is, in fact, composed of elements that create the political identity of the community, such as: civic awareness of the need to have a specific identity, a sense of belonging to a specific community, identification with the values of a specific political system, the sense of common interest and well-being of the citizens and so on. Hence, it is said that the constitutional identity can be considered from a formal and informal aspect.[5]

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[2] See: Constitutions as culture: Two insights from Peter Häberle's "The rationale of constitutions from a cultural science viewpoint", (available at: https://ukconstitutionallaw.org/2015/04/07/stefan-theil-constitutions-as-culture-two-insights-from-peter-haberles-the-rationale-of-constitutions-from-a-cultural-science-viewpoint/.

[3] Cited from S. Theil, 'Constitutions as culture: Two insights from Peter Häberle's "The rationale of constitutions from a cultural science viewpoint"' U.K. Const. L. Blog (7th Apr 2015) (available at: http://ukconstitutionallaw.org)).

[4] See: Hegel, G.W. Friedrich, in Arato, Andrew, Civil Society, Constitution and Legitimacy, (Maryland: Rowman and Littlefield Publishers), 2000, (p.169).

[5] See: Gary Jeffrey Jacobsohn, Constitutional Identity, Michel Rosenfeld, *Constitutional Identity*, in The Oxford Handbook of Comparative Constitutional Law, 2010, p.756–76, as well as in: Michel Rosenfeld, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community, 2010 (available at: https://www.routledge.com/The-Identity-of-the-Constitutional-Subject-Selfhood-Citizenship-Culture/Rosenfeld/p/book/9780415949743).

http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2760&content=tlr. Rosenfeld posed simpler questions than those stated above, stating that "constitutional identity must answer the three most important questions: To whom does the Constitution apply, what should the Constitution provide, and finally, how can the Constitution be justified."
The formal aspect is by definition related to the citizens as direct bearers of sovereignty who are at the same time bearers of the constitutional identity. The informal aspect (cognitive and affective) of the constitutional identity is explained through the values and beliefs of the citizens in the specific state, who share the same identity.

National identities include national constitutional identities, since constitutions are the living expression of the very foundational values of a community. Or as Bell has stated, "they express what turns a community into a genuine political community of principle".[6]

In the last three decades, the EU constitutional culture[7] as well as the EU constitutional identity[8] has been going through numerous challenges and are facing with problems due to several national Constitutional Courts' reactions to the Court of Justice of the European Union's doctrine of primacy of the EU Law. These reactions have an impact on the further development of the EU constitutional culture/identity taking into account that it is not only the result of the national constitutional cultures/identities of the EU member states[9] but of the common principles and values as important parts of the EU law.

On the other hand, the Luxembourg Court with its so-called "displacement doctrine" exerted a great influence in the creation of the EU constitutional culture. With its own decisions, the Luxembourg Court removed the national constitutional courts from their place in constitutional law and politics. Unfortunately, in many cases the national ordinary courts, who are acting in cooperation with the ECJ, replace them, especially in the context of the famous "rights revolution" which occurred after the adoption of the EU Charter.[10]

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[6] See: J. Bell (1994), "Comparative Law and Legal Theory," in W. Krawietz et al. (eds.), Prescriptive Formality and Normative Rationality in Modern Legal Systems, Festschrift for Robert S. Summers, Duncker & Humblot, Berlin (1994), 19, at 29, and in: J. Bell (2001), "Judicial Cultures and Judicial Independence", 4 CYELS 47, at 47.

[7] The EU constitutional culture is a relevant topic which emerges in contemporary constitutional practice. It contains different elements including principles of primacy, uniformity, and effectiveness of EU law and other principles and features allowing the EU legal order to assert its autonomy and persist over time. Constitutional culture is also shaped by the constitutional identity which has become a central feature of the EU as a form of transnational law. See: Massimo Fichera and Oreste Pollicino (2019), The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?, Published online by Cambridge University Press: 02 December, https://www.cambridge.org/core/journals/german-law-journal/article/dialectics-between-constitutional-identity-and-common-constitutional-traditions-which-language-for-cooperative-constitutionalism-in-europe/E8D1FE181EB6A389ED739155A8F3BB80.

[8] The term constitutional identity becomes very important part of the constitutional law. Many scholars, Besselink (2010), Burgorgue-Larsen (ed) (2011), Saiz Arnaiz and Alcoberro Llivina (eds) (2013), Faraguna (2017) etc, analyze it in detail in the context of the conflicts that exist between national constitutional courts and the ECJ.

[9] Professor Lex Garlickii (Лех Гарлицкий) has stated that every national constitution proclaims specific collection of values that determine the meaning and the value of its constitutional articles. Since no clear distinction between values, principles and norms exists, all constitutions contain a number of fairly general notions, which may serve as a basis in the process of interpreting its provisions.
See: Лех Гарлицкий (2009), „Конституционие ценности" и Страсбургский суд, A collection of communications "Конституциониъе цениости в теории и судебноий практике"-М, p.221. http://lawreview.pf.ukim.edu.mk/wp-content/uploads/2020/08/7.-Tanja-Karakamisheva-Jovanovska-Aleksandar-Spasenovski.pdf.

[10] See: Jan Komárek, National constitutional courts in the European constitutional democracy, *International Journal of Constitutional Law*, Volume 12, Issue 3, July 2014, p. 525–544, (available at: https://doi.org/10.1093/icon/mou048. "The ECJ's recent jurisprudence further undermines the position of national constitutional courts. In *Åkerberg Fransson*, the ECJ interpreted the scope of EU fundamental rights rather widely. In *Melloni*, on a reference from the Spanish Constitutional Tribunal, the ECJ forcefully asserted that article

EU constitutional culture contains a "legal tradition, which is not consisted only of rules and processes, but also of the people's practice who operate and perpetuate the tradition. A legal tradition is a set of practices among a caste of lawyers." This *mentalité*, according to Zweigert and Kötz as well as to Samuel and Legrand, is a defining feature of the legal/constitutional culture and legal tradition.[11]

For Legrand a legal (constitutional) system is not just a set of rules and principles but a set of traditions and practices which shape and sustain an attitude to law and constitution and its role in society. He has also stated: "The notion of 'legal tradition' implies, among other features, an idiosyncratic cognitive approach to law".[12]

It seems that constitutional identity is a reformulation of constitutional culture or traditions, which is a well-established concept in constitutional law. For instance, the eternity clauses or certain judicial constructions are very similar in substance to the present construction of constitutional identity.[13]

The essence of the constitutional identity is usually found in the preamble of the constitutions where information on the values that the constitutional framers have given priority to is provided. These values are the core principles of the constitutions as elements of constitutional identity, such as, constitutional provisions related to national language, culture, historical specificities, separation of power, tradition, freedoms and liberties, the republican form of state, public law autonomies, parliamentary democracy, the recognition of the judiciary, protection of nationalities etc.[14]

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53 of the EU Charter cannot threaten the supremacy of EU law in any event. The German BVerfG thus adopted an opposite approach to that assumed by its Austrian counterpart and warned the ECJ that too expansive an application of EU fundamental rights can be found to be *ultra vires*." See: Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court (FCC)], Apr. 24, 2013, 1 BvR 1215/07, 91, (available at: www.bundesverfassungsgericht.de/entscheidungen/rs20130424_1bvr121507.html, quoted from the FCC's English press release available at: http://www.bundesverfassungsgericht.de/en/press/bvg13-031en.html.

[11] See: G. Samuel (1995), The Foundations of Legal Reasoning, Maklu, Antwerp, at 28; P. Legrand (1996), "The European Legal Systems are not Converging" (1996) 45 ICLQ 52.

[12] See: Tatham, A. F. (2011), Central European Constitutional Courts in the face of EU membership: the influence of the German model of integration in Hungary and Poland. Retrieved from https://hdl.handle.net/1887/18011 as well as at: https://scholarlypublications.universiteitleiden.nl/access/item%3A2859084/view.

[13] See: James T. McHugh (ed.) (2002), Comparative Constitutional Traditions, Peter Lang.

[14] See: Zoltán Szente (2022), Constitutional identity as a normative constitutional concept, Hungarian Journal of Legal Studies 63, 1 3–20, DOI: 10.1556/2052.2022.00390, https://akjournals.com/view/journals/2052/63/1/article-p3.xml.

2. How the national Constitutional Court's[15] influence the EU constitutional culture?

Let's begin this "explanatory journey" with the Italian Constitutional Court and with the *Frontini judgment* from 1974 with which it started developing its own *controlimiti* doctrine.[16]

The Italian Court's judgment essentially found that "fundamental rights and other basic values of the constitutional system" can "neither be modified, nor amended, nor even derogated from in a single case because they are vested with a crucial importance for the polity as a whole."

Accordingly, the Court reserved for itself the power to review EU law for compliance with *controlimiti doctrine*. Even though the judgment does not use the term "constitutional identity" as such, the idea of constitutional identity nonetheless seems to be at the core of the doctrine. This position was latter reaffirmed in cases of the Constitutional Court, *S.p.A. Industria Dolciaria Giampaoli v. Ufficio del Registro di Ancona*[17] *and Zerini*[18], dealing with the direct effect of the EU directives.

The German Federal Constitutional Court has generally accepted the primacy of EU law. However, it has carved out three exceptions: the *Solange* reservation for fundamental rights, the *constitutional identity* reservation, and *the ultra vires doctrine*[19]. In *Solange I*, the *Bundesverfassungsgericht* first addressed the nature of the EU legal system:

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[15] The long list of Court's decisions includes, among others, decisions by the Danish Højesteret, the Estonian Riigikohus, the French Conseil Constititionnel and Council d'Ètat, the Irish Supreme Court, the Italian Corte Costituzionale, the Polish Trybunal Constytucyjny, the Czech Ústavni Soud, the Spanish Tribunal Constitucional, the Latvian Satversmes tiesa, the High Court and the Supreme Court from the United Kingdom. Court's different decisions have expressed limitations based on Member States' sovereignty, constitutional identity, and the supremacy of the constitution.
See: https://akjournals.com/view/journals/2052/63/2/article-p79.xml#fn80.

[16] See: Mart Cartabia (1990), The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community, 12 MICH. J. INT'L L. 173, https://repository.law.umich.edu/mjil/vol12/iss1/7.
The version of a controlimiti doctrine is current up to now. The Italian Constitutional Court reasoned that Italy's participation in European integration brought about certain limitations of Italian sovereignty. According to the Court, these limitations must find their borders within core principles of the Italian constitution. The transfer of sovereignty to the then European Community does not "give the organs of the EEC an unacceptable power to violate the fundamental principles of the Italian constitutional order", as stated in this judgment.

See: https://learninglink.oup.com/static/5c0e79ef50eddf00160f35ad/casebook_99.htm.

[17] See: Corte cost. 8 aprile 1991, n. 168: Giur. cost. 1991, 327: P.F. Lotito, "Comunità europee: Corte costituzionale e direttive 'self-executing'" Quad. cost. 1991, 613.

[18] See: Corte cost. 23 marzo 1994, n. 117: Giur. cost. 1994, 785. A. Adinolfi, "The Judicial Application of Community Law in Italy (1981-1997)" (1998) 35 CML Rev. 1313 at 1322.

[19] In its Honeywell decision, the Federal Constitutional Court ceased the opportunity to specify the *ultra vires* doctrine. It held that an EU legal act could only be classified as ultra vires under three conditions: First, if there was a doubt about the interpretation of EU competences and their interpretation by the Court of Justice, the question had

"Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source."[20]

With other words, based on *Grundgesetz,* on its eternity clauses, the Court stated that Community law (and consequently the common constitutional traditions protected by the ECJ, do not have priority over the protection granted by the Constitution and guaranteed by German courts. This means that the *Solange I case* was an attempt to defy the international common traditions by highlighting the role of national constitutions. The quiet battle went on for decades with *Solange II*, *Solange III* and many other cases.[21]

In Solange II the German Constitutional court more closely resembles the *controlimiti* doctrine of the Italian Constitutional Court, rather than its own position in Solange I. In its decision the Court more generally follows the framework of constitutional pluralism. The Italian and German Constitutional courts preferred to give expression to constitutional limits to European integration also through other mechanism, such as democracy, sovereignty, fundamental rights.

The Maastricht judgment[22] of the German Constitutional Court, through the *Kompetenz-Kompetenz doctrine,* is example of such mechanism. This doctrine framed national limitations to the reach of EU law as a matter of sovereignty (the capacity to decide who is and who is not

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to be referred to the Court of Justice in the context of the preliminary reference procedure. Without a decision of the Court of Justice, the GFCC may not set aside an EU legal act under the ultra vires doctrine. Second, the violation of EU competences has to be manifest. With this requirement, the Federal Constitutional Court acknowledged that there may be reasonable disagreement about the interpretation of legal norms, and the ultra vires reservation should only be used when a legal interpretation leaves the realm of the reasonable. Finally, the violation of competences has to be "highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law." In the concrete case, the GFCC ruled that the Court of Justice had still acted within its competences in Mangold, acknowledging that the latter had the power to interpret the EU treaties dynamically. See more details in: Study, Primacy's Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 692.276 - April 2021, p. 17.
https://www.europarl.europa.eu/RegData/etudes/STUD/2021/692276/IPOL_STU(2021)692276_EN.pdf.

[20] The Bundesverfassungsgericht addresses the situation of a possible conflict in the spirit of constitutional pluralism: "This does not lead to any difficulties as long as the two systems of law do not come into conflict with one another in their substance. There therefore grows forth from the special relationship which has arisen between the Community and its members by the establishment of the Community first and foremost the duty for the competent organs, in particular for the two courts charged with reviewing law—the European Court of Justice and the Bundesverfassungsgericht— to concern themselves in their decisions with the concordance of the two systems of law". See: BVerfG, Internationale Handelsgesellschaft (Solange I), judgment of May 29, 1974, 37 BVerfGE 271, 2 C.M.L.R. 540 (1974).

[21] See: Andras ZS. Varga, Constitutional Courts: The Guardians of Identity, Prawo Międzynarodowe i unia Europejska W Konstytucji, Wydawnictwo Naukowe UKSW, Warszawa 2020, p. 198-199. https://wydawnictwo.uksw.edu.pl/ksiegarnia/647-prawo-miedzynarodowe-i-unia-europejska-w-konstytucji.html.

[22] See: https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf.

competent in the particular case). The Court held that generally the European treaties could be ratified if they complied with certain core principles of the German Constitution. These principles are derived from the so-called eternity guarantee enshrined in Art. 79, para. 3 of the Constitution. Art. 79 provides that specific constitutional provisions could not be changed through a constitutional amendment.[23]

The German Constitutional Court has also invoked constitutional identity in its European Central Bank's Monetary Transactions Programme, as well as in the context of the *European Arrest Warrant I and II*. In the preliminary reference decision of 2014 related to *Outright Monetary Transactions ("OMT")*, the German Constitutional Court confirmed that despite the need for its compliance with EU law, the Court has the right to assess it from aspect of respecting the identity of the Constitution.

According to the Court, democracy as a constituent element of the identity of the Constitution and the national identity of Germany would be violated if Parliament renounced budgetary autonomy. The Constitutional Court recalled that the EU Court of Justice is obliged to ensure proportionate protection of national identity.[24]

This approach has recently been extended in a decision on Right to erasure or "the right to be forgotten (I and II)"[25] related to the implementation of the General Data Protection Regulation (GDPR).[26]

On the line of GFCC's decisions in *Solange II* and *Maastricht* is the Czech Constitutional Court which stated that it "generally recognizes the functioning of this institutional framework for ensuring a review of the scope of exercise of conferred competences, although [the Court's] position may change in the future, should it appear that this framework is demonstrably non-functional".[27]

It is familiar that the Czech Constitutional Court went down a similar route like German Constitutional court, using the eternity clause in Article 9 of the Czech Constitution as the starting point for staking out a "material core" of the Constitution. In the case of a conflict

[23] See: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/692276/IPOL_STU(2021)692276_EN.pdf.

[24] See: https://www.cambridge.org/core/journals/german-law-journal/article/constitutional-identity-in-europe-the-identity-of-the-constitution-a-regional-approach/83D8D1737788756FEF098CF9485D7B1C%20-%20fn26.
In the Lisbon judgment issued in 2009 the Court had to review a change of the founding treaties of the EU and this time, however, it did not limit itself to the examination of the principle of democracy. Instead, it developed the concept of constitutional identity and identified certain core competences of the state which could not be transferred to the EU level even through a change of the founding treaties.
A detailed analysis of the importance of the "identity of the German Constitution" was made by the Constitutional Court in 2016 when it examined whether the constitutional principles contained in Article 79 (3), together with those of Articles 1 and 20 of the German Constitution could be violated by the transfer of the sovereign power of the German parliament in the EU institutions.

[25] See: BVerfG, 6 Nov. 2019, 1 BvR 16/13 – Right to be forgotten I.

[26] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of data and on the free movement of such data.

[27] See: Decision of 26 November 2008, case No. Pl. ÚS 19/08, para 139, Lisbon Treaty I, as transl. Briza, supra note 146, at p. 153

between EU Law and the Czech Constitution, the Court upheld that "the constitutional order of the Czech Republic, in particular its material core, must take precedence."[28]

The Danish Supreme Court held that EU law had no primacy over the Danish Constitution, and that it is a precondition for a transfer of powers that Denmark remains an independent state. According to the Maastricht and Lisbon Supreme court decisions, "it is for the Danish courts to decide whether EU acts exceed the limits for the surrender of sovereignty which has taken place by the Accession Act".

While the Danish Supreme Court recognized the competences of the Court of Justice and the need for judicial dialogue, it also reserved itself the right to conduct an *ultra vires review*, based on the constitutional requirement of specificity in the conferral of powers.[29]

Consequently, national courts would have to rule an EU act inapplicable as an *ultima ratio* if this Act "is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Accession Act", even if the act was upheld by the Court of Justice.[30]

The French *Conseil Constitutionnel* in 2006 went further in practically developing its own constitutional identity doctrine. It found that the transposition of European directives must not run counter to principles of French constitutional identity "unless the constituent power has agreed to this." Actually, the Conseil effectively developed a doctrine of constitutional identity that must prevail over community law.[31]

The French Court approach to constitutional identity review seems very similar to the "identity review" practiced by German Constitutional Court with one difference. While in Germany the constitutional identity is predefined and is immune to constitutional amendment, in France is different. In France, the constitutional identity concern can be accommodated by the

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[28] See: https://www.usoud.cz/en/decisions/2008-11-26-pl-us-19-08-treaty-of-lisbon

[29] In 2015, the Supreme Court of Denmark requested a preliminary ruling in the case of Dansk Industry, acting on behalf of *Ajos A/S v. Estate of Karsten Eigil Rasmussen* concerning the interpretation of the principles of non-discrimination on grounds of age, legal certainty and the protection of legitimate expectations. The dispute concerned Ajos' refusal to pay Mr. Rasmussen a severance allowance. In December 2016, the Supreme Court of Denmark, in its decision in the *Ajos case* disregarded the guidelines of the Court of Justice of the European Union. It used the occasion to set new boundaries to the applicability of the ECJ's rulings in Denmark. It did so in two steps: first, the highest Danish court delimited the competences of the EU through the lens of its interpretation of the Danish Accession Act. Second, the Supreme Court delimited its own power within the Danish Constitution.
See: See M. R. Madsen, H. P. Olsen and U. Sadl (2017), Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation, iCourts Working Paper Series, No. 85.

[30] Danish Supreme Court, Case No. 199/2012, U 2013.1451H, 20 Feb 2013, pp. 12–13 as it is explained in Study: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/692276/IPOL_STU(2021)692276_EN.pdf.
In the Lisbon judgment the Supreme Court stated that the interpretation of EU law by the Court of Justice "must not result in widening of the scope of Union powers". This reasoning was also extended to EU acts and judgments by the Court of Justice that refers to the Charter of Fundamental rights. It is on the Danish authorities to ensure "that there is no creeping transference of powers".

[31] See: https://www.cambridge.org/core/journals/german-law-journal/article/abusing-constitutional-identity/65ABF04377192ADF0BFB445C53FC002F

constituent power.[32] For instance, legislative acts that implement EU acts and fall into the scope of the constitutional provisions of Article 88-2 regarding the European Arrest Warrant or Article 88-3 referring to the municipal voting rights for EU citizens are covered by the constituent power could not be a subject to identity review.

Hungary[33] and Belgium have also adopted their own forms of constitutional identity discourse to protect from European encroachment. With some variation, constitutional identity now is a common standard for national constitutional review of EU law, sort of a red line. Constitutional identity has remained relevant as a limit to EU law, as an actual standard of review. But how exactly we can understand the EU constitutional identity and the EU constitutional culture when national constitutional courts have started converging on similar jurisprudence on the limits of the EU legal order?

It is tempting for courts and also for scholars to try to fully subsume the EU constitutional identity and constitutional culture concept under the doctrinal umbrella of EU law, and thus, to understand national reservations to the primacy of EU law as a matter of EU law itself. The German Constitutional Court, for instance, claimed in its Lisbon judgment that the institution of identity review was the only way to ensure compliance of EU institutions with Article 4(2) of the TEU. The Polish Constitutional Tribunal similarly argued that constitutional identity was the equivalent to the concept of national identity in Article 4(2) of the TEU.

Scholars have also tried to subsume constitutional identity defenses under the categories of EU law, for instance, by tying them to Article 4(2) TEU as a formula that qualifies the primacy of EU law.

3. What is the reaction of the CJEU?

It seems that the Luxembourg Court accept the view that the constitutional identity is part of the test for the principle of subsidiarity and proportionality, whereat the closer the question is to the essence of the constitutional identity of the member states, the greater the margin of discretion is.

The CJEU's practice take into account the views of the constitutional courts of the member states as crucial for understanding the relationship between the constitutional and the national identity of the EU member states.

It should be emphasized that both terms "constitutional identity" and "national identity" refer to the same obligation for the EU institutions, the obligation to respect the core constitutional values of each member state separately.

[32] The constituent power which representing the people determine the ingredients of the constitutional identity. This approach was probably followed by the French Constitutional Council when it declared a ban on the wearing of the veil, deriving the banning from the constitutional identity of the French people as a community of free and equal citizens. See: Conseil constitutionelle, Décision n° 2010-613 DC du 7 octobre 2010.

[33] After a failed referendum and constitutional amendment, in December 2016, in a judgment on the immigrants' quota system, the Hungarian Constitutional Court endorsed in the abstract the possibility to refuse compliance with EU law in the name of a Member State's sovereignty and constitutional identity, based on the historical constitution of the country.

The CJEU itself has acknowledged that the preservation of the member states national identities is a legitimate aim respected by the EU legal order and that the EU Court recognizes the right of each member state to protect and nurture its constitutional identity as a national principle and value.

On the other hand, the Luxembourg Court practice has different and sometimes controversial approach in implementation of the Article 4 of the EU Treaty. The EU law and the EU Court of Justice could not demand primacy and supremacy if the measure is not covered by the competencies that have been explicitly transferred to the EU by the member states with the founding treaties.

Several General Advocates[34] of the EU Court of Justice have applied the concept of constitutional identity in order to draw on what is protected by Article 4 (2) of the EU Treaty, although to be precise, that article refers to the national identity of the EU member states, inherent in their fundamental structures. Although the identification, the connection between these two concepts is not based on any theory of legal interpretation, it should be noted that the obligation arising from the EU Treaty to respect the national identities of the Member States is based on certain normative assumptions.

As it is already mentioned, there are the claims of several national constitutional courts that EU law must be in accordance with the constitutional identity of the member state in order to be applied in the domestic legal order.

The EU's obligation to pay attention to national identity is based on the Union's concern for the dignified treatment of member states in the multinational political community, while the preoccupation of national constitutional courts with constitutional identity is based on the specific concept of sovereignty protection. In other words, the demands for simultaneous respect for the national and constitutional identity of the EU member states stem from different theoretical narratives.

The drafters of the Treaty are considered to have had better reasons for stating the demand for respect for the national identities of the member states than for the sovereignty of the states or their constitutional identities. The Treaty focuses on national identity. In the absence of a theory of sovereignty with which both the EU and the member states could agree, it is quite safe to expect that any reference in the Treaty to sovereignty would be a new source of tension or conflict within the Union.[35]

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[34] For example, Miguel Maduro. http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/12/Maduro-JUDICIAL-ADJUDICATION-IN-A-CONTEXT-of-constitutional-Pluralism.pdf

[35] See: Tanja Karakamisheva – Jovanovska, Aleksandar Spasenovski, EUROPEAN UNION AND IDENTITIES (CONSTITUTIONAL/ NATIONAL VS EUROPEAN DIMENSION), POLITICAL THOUGHT YEAR 20, NUMBER 63, JANUARY, SKOPJE 2022, p. 13, https://idscs.org.mk/wp-content/uploads/2022/02/Political-Thought-63.pdf.

Having all this in mind one of the possible answers to our question contained in the title of the paper, what is missing in the EU constitutional culture, is that the legal harmony is missing in the European constitutional space. It is obvious that different views of the contours and content of the national constitutional identity create problems in the EU constitutional culture.

Problems derives from a different understanding of the relationship between EU law and the constitutional laws of the member states and existing of different concepts such as constitutional pluralism[36], the network concept[37], multilevel constitutionalism[38], and composite constitutionalism (*Verfassungsverbund)*[39], all of which aim to resist the absolute primacy of EU law. The joint characteristic of these scholars' arguments is that rather than seeking to definitely resolve the standoff between the ECJ and national constitutional courts through any 'all-purpose superiority of one system over another' (McCormick), they propose to leave the questions of Kompetenz-Kompetenz unsettled, and try to avoid conflicts through mutual accommodation between constitutional courts.[40]

Is this exit solution or the exit strategy for this problem?

Yes, this is one possible option.

Another exit solution is to analyze this question from a meta-constitutional perspective, perspective which is defined as a form of argument that occupies the intermediate space between national and European constitutional orders, thus helps negotiate the allocation of authority between them. Or as professor Walker argues, we ought to understand national and European constitutional claims as originating from fundamentally different perspectives that cannot be conclusively subsumed under, or measured against one another.

Third solution could be extracted from the Joseph Weiler and Daniel Sarmiento proposed perspectives to set up a new appeal jurisdiction within the Court of Justice of a mixed composition to adjudicate on disputes concerning the delimitation of competences between the member states and the Union.

Fourth solution could be by introducing a sort of pre-judicial dialogue Forum, kind of alert mechanism like the one available to national parliaments concerning the subsidiarity principle.

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[36] See: N. MacCormick (1995), "The Maastricht Urteil: Sovereignty Now", European Law Journal, p. 259, as well as: N. Walker (2002), "The Idea of Constitutional Pluralism", MLR, p. 317, M. Maduro (2003), "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in N. Walker (Ed.), Sovereignty in Transition, Hart, p. 501.; for a representative collection of essays on constitutional pluralism pro and con, see M. Avbelj and J. Komárek (2012), (Eds.), Constitutional Pluralism, Oxford: Hart.

[37] See: A. Peters (2001), "Elemente einer Theorie der Verfassung", Duncker & Humblot.

[38] See: I. Pernice (2002), "Multilevel Constitutionalism in the European Union", 5 EL Rev., p. 511.

[39] See: I. Pernice (2007), 'Theorie und Praxis des Europäischen Verfassungsbundes, in Callies (Ed.), Verfassungswandel im europäischen Staaten- und Verfassungsverbund, Mohr Siebeck.

[40] See more details in:
https://me.eui.eu/wp-content/uploads/sites/385/2018/05/IJPL_Special_Issue_Concluding_remarks_Halmai_final.pdf.

"If adequately organised (…), such mechanism could play a constructive role on a preventive basis (…)".[41]

4. Conclusion

Constitutional culture of the EU is a multidimensional concept that includes numerous legal, political and social elements. These elements constitute the national identities of the member states essentially linked to their constitutional identity. The EU founding Treaties in general prevents constitutional peculiarities of the member states through the notion of national identity.

The EU constitutional culture is specifically embodied through the principle of "united in diversity" enhanced with the elements of national differentiation. It is up to the member states to define the boundaries of their national/constitutional identity that must not be crossed by European law. The European constitutional literature considers that some of the "hard core" elements of the national constitutions are also the foundations of the European "constitutional" order. In practice it is clear that this does not mean that the national constitutions are the foundation of the European legal order especially when we consider the ECJ Costa/ENEL judgment from 1964.[42]

As it was explained in the paper, the German Constitutional Court considers the principle of the primacy of European law in a relative way. In many cases they have announced the possibility of refraining from applying European law when it conflicts with national identity. This condition opened the door for the same reaction of other MS constitutional courts (as it is explained in the paper), which relativize the principle of primacy of EU law on a wider manner.

From the paper it can be concluded that the constitutional judiciary plays the most important role in shaping the national and EU constitutional culture because it is a vital part of the existence of a democratic legal system, especially in the long-term. The constitutional judiciary is responsible for the efficient implementation of the principle rule of law, without which the existence of democracy would be impossible.

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[41] See: https://www.euractiv.com/section/politics/opinion/can-the-eu-avoid-further-clashes-with-the-german-constitutional-court/

[42] See: Court of Justice, judgment of 15 July 1964, C-6/64 (Costa v. E.N.E.L.): "The integration into the laws of each member state of provisions which derive from the community and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question".

The constitutional judiciary on a national level has the final say on the legitimacy of laws and regulations. At a European level, this power is vested in the Court of Justice of the European Union. It is essential for these two levels of constitutional judiciary to cooperate, to give mutual support and understanding, to work together in order to create a fair and just legal landscape which is accessible to every European citizen.

Through the open cooperation at both levels[43], it will be possible to reach a solution for the layered problems and misunderstandings regarding the issues in the constitutional culture domain. Court's cooperation is the best way of avoiding conflict between the Member States' constitutions and Union law. This cooperation is widely known as a constitutional dialogue between the Member States' constitutional or supreme courts and the European Court of Justice. Strengthened institutional cooperation aims to safeguard both the common values of the European Union and the right of nation states to self-determination, which is first and foremost expressed through their constitutional identity.

By safeguarding the right of nation states to self-determination the European Court of Justice will also strengthen the EU constitutional culture. It seems that the consolidation of the constitutional culture of the EU is in the ECJ's hands.

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