The Character of Legislative Process Adopted to Amend the Constitution

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in the light of the European integration and constitutional identity

edited by Balázs Schanda

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Foreword

We present to the reader a monograph summarizing the research conducted in 2021 by the international Polish-Hungarian research team for changes in the constitution. The team was established as part of the Polish-Hungarian Research Platform project organized by the Institute of Justice in Warsaw, and it was composed of outstanding Polish and Hungarian lawyers: András Mázi, Aleksandra Syryt, Balázs Schanda, Marta Osuchowska and Konrad Walczuk.

The task of the team was to analyze the nature of the legislative processes adopted in individual countries in order to amend the constitution (in the light of European integration and constitutional identity), and its main goal was to understand the mechanisms and factors influencing the process of amending the constitution in a democratic state ruled by law.

The monograph has been divided into five independent parts on the following topics: Chapter I – Procedural and substantive limitations on constitutional amendments, Chapter II – Impact of the European Integration Process on the amendments in the Constitutional System of Public Authorities: between integration and sovereignty. The role of the constitutional identity, Chapter III – Amending the spirit of a constitution? From changing the text to changing the character, Chapter IV – Diagnosis of the direction of changes in the catalogue of constitutional principles of the political,

social and economic system and solutions on the status of an individual in the state – between constitutional identity and European integration, Chapter V – Analysis of the directions of changes in the constitutional system of the sources of law – between primacy of the constitution and the principle of supremacy of the law of the European Union.

We believe that the monograph will spark a lively discussion in the scientific world and will have a positive impact on the practices of individual countries and European institutions.

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Procedural and substantive limitations on constitutional amendments

Modern constitutions define the organisational and legal order of the state, the exercise of sovereign power, the functioning of state organs, the relationship between the state and the individual, and the rights (freedoms) and obligations of the individuals. The constitution is a framework which expresses the nation's will and defines the nation's values. This requires special rules regulating the adoption and amendment of the constitutions.

The aim of this chapter is to provide a comparative analysis of the procedural and substantive rules on constitutional amendments. In addition to the specific constitutional provisions of the EU member states, it also presents the case law of constitutional courts. The evaluation of the practice of constitutional courts focuses on their competence to review constitutional amendments, therefore the arguments of the decisions on the substance of the very amendments under review have not been assessed.

Given the scope and the length of this study, it does not discuss the general constitutional history/development of the states under examination. For the same reason, the paper does not cover such issues related to its scope as the influence of politics on the amendment process, the role of civil society and experts in constitutional change, the influence of international and European law

and jurisprudence on constitutional reform etc. These topics are described in detail in the literature reviewed and cited.

1. General observations on constitutional amendment

Constitutional change and its possible limitations have become a popular subject amongst constitutional law scholars. Given the prominent role played by constitutions in modern political systems, both the process of changing their contents and the procedural and substantive rules governing the amendment procedure are of paramount importance. This is reflected in a growing number of scientific articles and books that have focused on constitutional change and its limits over the last few decades, and the number of decisions of several national constitutional courts. The Venice Commission has devoted a separate report[1] to the subject.

The principle of democratic constitutionalism requires that the provisions governing the organisation and functioning of the states, the main rules governing the exercise of power and the guarantees of fundamental rights are stable and predictable. At the same time, however, there is a legitimate expectation that a constitutional system should be able to respond properly to political, social, and economic changes, even by changing the text of the supreme law (the constitution). It is obvious, that constitutions "require regular, periodic alteration, whether through amendment, revision, or replacement"[2]. The Venice Commission's report on constitutional change identifies situations where constitutional amendment is highly desirable[3].

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[1] Venice Commission, *Report on Constitutional Amendment* CDL-AD(2010)001.

[2] D.S. Lutz, *Toward a Theory of Constitutional Amendment*, [in]: *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (edited by Sanford Levinson), Princeton 1995, p. 242.

[3] The Venice Commission defined the main reasons as a) democracy in the traditional sense (majority rule); b) improvement of decision-making procedures; c) adjustment to transformations in society (political, economic, cultural); d) adjustment to international cooperation; e) flexibility and efficiency

Constitutional amendments have been used both for achieving "grand political and social objectives"[4] and to "refine the constitution to meet unanticipated needs that reveal themselves as either necessary or convenient for the smooth operation of government"[5]. Constitutional changes continue "the constitution-making project initiated at the founding or in intervening moments of refounding of the constitution. An amendment improves on the constitution's design where necessary or useful to align expectations about how it should function, fixes its flaws when they are discovered"[6].

Almost all constitutions contain rules on the amendment procedure. Providing a legal framework, these rules define the strict conditions under which constitutional norms may be replaced or even repealed. By their very nature, they reflect both a belief in and mistrust of political actors: they empower them to amend the constitution, while at the same time set limits on how, when and to what extent it can be done.

Some constitutions provide for a special, enhanced procedure for a full revision of the constitution (Austria, Spain) or for the adoption of a new constitution (*e.g.* Bulgaria, Hungary, Slovakia and Spain). Article 146 of the German Constitution explicitly recognises the right of the German people to create a new constitution identifying the German people as the original constitutional power, but remains silent on the procedure by which this can be done[7]. The Fundamental Law of Hungary lays down identical procedural rules for both amending its provisions and adopting a new constitution[8].

Providing procedural rules for the adoption of a new constitution is considered as best practice by the Venice Commission. Referring

in decision-making; f) ensuring, adjusting or reconfirming fundamental rights. Venice Commission, *Report on Constitutional Amendment* para 82.

[4] R. Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, New York 2019, p. 5.

[5] R. Albert, *op. cit.*, p. 4.

[6] R. Albert, *op. cit.*, pp. 79–80.

[7] "*This Basic Law, which, since the achievement of the unity and freedom of Germany, applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect*".

[8] See Article S.

to the peaceful regime changes of the last decades of the 20th century based on following the existing amendment procedures of the constitutions (Spain, most of Central and Eastern European countries), the Venice Commission "strongly endorses the principle of 'constitutional continuity', under which even new constitutions should be adopted following the prescribed amendment procedures in the old one – thus strengthening the stability, legality and legitimacy of the new system"[9].

A distinction should be drawn between constitutions that are created or amended in accordance with the existing procedural rules and those that result from revolutionary acts or other events that break the constitutional continuity. In the latter situations, according to the proponents of hierarchy between constituent and constituted power, the legitimacy of the new constitution and constitutional order is invoked as a manifestation of the unlimited constitutional power. In this context, it should be noted that, according to this concept, the constituent power is a power outside the law and the constitutional order which creates a new political and constitutional structure.

2. Procedural amendment provisions in national constitutions

Most written constitutions set specific procedural rules regulating their own amendment, which are stricter than those of ordinary legislation. Their aim is to achieve a broad consensus and to guarantee the legitimacy of the constitution and the constitutional system.

This subchapter covers the procedural rules for amending the constitutions of EU member states laid down in the constitutions; so-called informal means of amendment – altering the meaning of the constitution without formal textual change – will not be discussed. Although many authors describe informal constitutional amendments as a natural and positive phenomenon, it must be noted that the Venice Commission is critical of this issue[10]. Some

[9] Venice Commission, *Report on Constitutional Amendment* para 68.

[10] "*Constitutional change should preferably be adopted by way of formal amendment, respecting the democratic procedures laid down in the constitution, and not*

European constitutions contain provisions which limit or exclude the possibility of amending the constitution in certain specific situations, such as special legal order, state of emergency, vacancy for the office of head of state, etc.[11]. Although these are indisputably procedural limits to the amending power, it would be beyond the scope of this paper to examine them.

Contemporary constitutions use a wide variety of amendment formulas[12] that make the process of the amendment of the constitution more difficult than passing ordinary laws. These procedural limits or special obstacles of constitutional amendments can be grouped into four main categories: a) qualified majority b) delaying procedures; c) referendum; d) moratorium on amendments. These mechanisms are also usually combined in different ways[13], which finally gives a picture of great variety with almost as many amendment models as the countries.

It is important to note that, as the examples given at each point show, the majority of the constitutions examined apply several procedural rules simultaneously. The more of these exist, the more difficult it is to change the constitution. Many authors describe this as an explicitly positive phenomenon: in their view, imposing numerous procedural constraints serve to stabilise the constitution. However, a system of complex procedural obstacles can often become a barrier to constitutional change, making amendments *de facto*

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through informal change. When substantive informal (*unwritten*) *changes have developed these should preferably be confirmed by subsequent formal amendment.*" Venice Commission, *Report on Constitutional Amendment* para 246.

[11] See *e.g.*, Articles 196–197 of the Belgian Constitution; Article 7 para 11 and Article 89 para 4 of the French Constitution; Article 289 of the Portuguese Constitution, Article 169 of the Spanish Constitution.

[12] For a thorough overview of different typologies of formal constitutional change mechanisms see: O. Doyle, *Order from chaos? Typologies and models of constitutional change*, [in:] *Routledge handbook of comparative constitutional change* (edited by Xenophon Contiades and Alkmene Fotiadou), Abingdon, New York 2021, pp. 47–54.

[13] Albert distinguishes between single-track and multi-track amending models: the former means formal amendment rules that codify only one procedure for amendment while the latter consists of such systems which require more than one procedure and therefore set combined limits on amendment. R. Albert, *op. cit.*, pp. 178–182.

impossible. Although the stability of the constitution is an important aspect, absolutizing it may produce counterproductive results.

a) qualified majority required for a constitutional amendment

The constitutions of most of the EU member states require a larger majority for parliamentary approval of a constitutional amendment than for ordinary legislation. However, there is no such specific rule in Denmark[14], Ireland[15], and Sweden[16] (in these states, other mechanisms lift constitutional amendments out of the ordinary legislative framework).

In most EU member states, a two-thirds majority is required to amend the constitution. This is the case in Austria[17], Belgium[18], Croatia[19], Germany[20], Hungary[21], Latvia[22], Lithuania[23], Luxembourg[24], Malta[25], the Netherlands[26], Portugal[27], and Slovenia[28].

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[14] Article 88.

[15] Article 46 para 2.

[16] In Sweden there is no single document referred to as constitution, but instead four fundamental laws form the so-called Swedish Constitution: the Instrument of Government, the Act of Succession, the Freedom of Press Act, and the Fundamental Law on Freedom of Expression. To amend these fundamental laws, the Parliament adopt two decisions of identical wording with a general election between the two decisions. See Article 14 of Chapter 8 of the Instrument of Government.

[17] Article 44 para 1.

[18] Article 195 para 5.

[19] Article 138.

[20] Article 79 para 2.

[21] Article S) para 2.

[22] Article 76.

[23] Article 148 para 3.

[24] Article 114 para 2.

[25] Article 66 para 2.

[26] Article 137 para 4.

[27] Article 286 para 1.

[28] Article 169.

The amendment framework of Bulgaria[29], Cyprus[30], Finland[31], Poland[32] and Romania[33] combines the two-thirds majority with additional special majority rules.

A qualified majority of three-fifths is the general rule in the Czech Republic[34], Greece[35], and Slovakia[36].

[29] Article 155 stipulates, that a bill which has received less than three-quarters, but more than two-thirds of the votes shall be eligible for reintroduction after two months. To be passed at this new reading, the bill requires two-thirds of the votes of all members.

[30] According to Article 182 para 3, an amendment shall be passed by a majority vote comprising at least two-thirds of the total number of the representatives belonging to the Greek community and at least two-thirds of the total number of the representatives belonging to the Turkish community.

[31] According to Article 73, the proposal must be adopted with at least two-thirds of the votes cast. However, the proposal may be declared urgent by a decision that has been supported by at least five-sixths of the votes cast and can be adopted by a decision supported by at least two-thirds of the votes cast.

[32] According to Article 235 para 4, the amendment shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the senators.

[33] The draft or proposal of revision must be adopted by a majority of at least two thirds of the members of each chamber of the Parliament. If no agreement can be reached by mediation procedure, the chambers shall decide in joint sitting, by the vote of at least three quarters of the number of deputies and senators (see: Article 151 para 1–2).

[34] Article 39 para 4.

[35] A proposal to change the Constitution shall be approved by the Parliament by a three-fifths majority of the total number of its members, in two ballots held at least one month apart. After the next general elections, the new Parliament shall decide on the provisions to be revised by an absolute majority of the total number of its members. In the case the proposal received absolute majority but not three-fifths in the first Parliament, three-fifths majority is required in the new Parliament to amend the constitution. (Article 110 paras 2–6).

[36] Article 84 para 4.

The constitutions of Estonia[37], France[38] Italy[39] and Spain recognise multiple procedures with different majorities required.

The Spanish Constitution regulates two different procedures of constitutional change[40]: an ordinary and a qualified one, the latter for the most relevant or complex revisions. In the ordinary procedure a proposal for amendment requires three-fifths majority in both houses of the parliament. In case the text has been passed only by the overall majority of the members of the Senate, the lower house may pass the amendment by a two-thirds vote in favour. The qualified procedure is required when the total revision of the Constitution is proposed or in case of a partial revision affecting certain provisions[41]. This is a multi-step process where two-thirds majority of each house shall support the principle of the proposed reform; after general elections, the new parliament must first ratify the decision on the principle of the reform by simple majority, and proceed to examine the text of the amendment, which must be approved by two-thirds majority in each house.

[37] A bill to amend the Constitution must be supported by the majority of the members of Parliament and by the succeeding parliament by three fifths majority (Article 165).

[38] According to Article 89 para 3, if the amendment was initiated by the President of the Republic, he/she might decide after the bill has been passed in both houses of the Parliament, to submit the bill to the joint session of the parliament, instead of submitting it to a referendum. In this case the bill is approved by a majority of three-fifths of the votes and no referendum is required.

[39] Article 138 stipulates, that proposals for amending the constitution shall be adopted by each house of the legislation and shall be approved by an absolute majority of the members of each house, however in certain cases it must be submitted to referendum. If the amendment has been approved by each of the houses by a majority of two-thirds of the members, no referendum shall be held.

[40] Article 167 and 168.

[41] These are the Preliminary Title, Chapter II, Division 1 of Part I, and Part II and include, *inter alia*, the definition of Spain as social and democratic state, subject to the rule of law, which advocates freedom, justice, equality, and political pluralism as highest values of its legal system, the fundamental rights and public freedoms, and the provisions regulating the Crown.

b) Procedures delaying the adoption of the amendment

Almost half of the EU member state constitutions' provisions regulating constitutional change operate within so-called double-decision rules, which may include specified time delays or an intervening election. The simplest form of the delaying procedure is when multiple readings or even more consecutive votes are required before adopting the amendment. This is the case in Estonia[42], Italy[43], Lithuania[44], and Luxembourg[45].

A specific model of the delay procedure is the one that requires intervening elections and adoption by two different parliaments. An example for this is Belgium, where the Constitution sets particularly complex procedural rules for amendment. The mechanism consists of three separate phases. First, absolute majority in both houses must pass a declaration indicating the articles which are to be amended and the approximate content of the intended provision; it must be followed by a declaration of the monarch with the same content (subject to ministerial countersignature). These declarations are to be published in the official gazette and simultaneously the Parliament is dissolved, and general elections are called. This is the beginning of the second phase, which is practically a cooling-off period lasting until the newly elected houses of the Parliament convene (they are obliged to convene maximum 2 months after the former parliament had been dissolved). The last phase is the actual decision-making: two-thirds of the members of each house must be present and two-the thirds of the votes cast is required to adopt

[42] A bill to amend the Constitution receives three readings in the Parliament: the interval between the first and the second reading may not be shorter than three months, and the interval between the second and the third reading may not be shorter than one month (Article 163 para 3).

[43] Laws amending the Constitution and other constitutional laws shall be adopted by each house after two successive debates at intervals of not less than three months (Article 138 para 1).

[44] Passing an amendment requires the parliament to vote twice with at least three months break between (Article 148 para 3).

[45] A proposal for changing the Constitution requires two consecutive votes with an interval of at least three months between the votes (Article 114).

any of the amendments[46]. Similar rules apply in the constitutions of Greece[47], the Netherlands[48] and, regarding the qualified procedure, of Spain[49]. The amendment rules of Denmark[50], Estonia[51], Finland[52] and Sweden[53] require the same text of the amendment to be approved by two consecutive legislations without any changes.

c) REFERENDUM

The constitution is the legal and political foundation of a state; therefore, its legitimacy must derive from the people. This reflects the idea that the people are the source of sovereignty, which is a fundamental concept of democratic governance.

In many EU member states, approval of a constitutional amendment shall be subject to referendum. In some countries, the plebiscite is a mandatory element in the amendment process, while in other constitutional systems it is possible under certain conditions. In this respect, it should be stressed that according to the Venice Commission's opinion "the national parliament is the most appropriate arena for constitutional amendment, in line with a modern

[46] Article 195.
[47] Article 110 paras 2–6.
[48] Article 137–138.
[49] Article 168.
[50] Article 88.
[51] The bill to amend the Constitution is passed if it has received the support of the majority of the members of the previous Parliament and is passed by the succeeding legislation unamended in the first reading by three-fifths majority (Article 165 para 2). However, Article 166 provides that four-fifths majority of the parliament may consider the amendment as urgent and the same Parliament may pass the amendment by two-thirds majority.
[52] The proposal for amendment should be adopted in the Parliament and then it is left in abeyance until the first parliamentary session following the next elections. The proposal then shall be adopted by the next Parliament without material alterations. (Article 73 para 1) However, the proposal may be declared urgent by a decision that has been supported by at least five sixths of the votes cast. In this event, the proposal is not left in abeyance, and it can be adopted by a decision supported by at least two-thirds of the votes cast (Article 73 para 2).
[53] Article 14 of Chapter 8 of the Instrument of Government.

idea of democracy", therefore "it is equally legitimate either to include or not include a popular referendum as part of the [amending] procedure"[54].

The Danish[55], the Irish[56] and the Romanian[57] constitutions require all proposed amendments to be confirmed by referendum.

Other states regard referendum as a special procedure, to be used only in specific cases: mandatory referendum if the amendment changes the basic principles of the constitution or optional referendum which requires the initiative of a specific number of voters, members of Parliament or other political actors. The Estonian Constitution applies both the mandatory and the optional referendum[58]. The French Constitution prescribes approval by referendum, however, in case of a government bill, the President of the Republic may decide to submit the bill to the joint session of the Parliament[59].

Amendments regarding certain core elements of the constitution require mandatory referendum in Latvia[60], Lithuania[61] and Malta[62]. Similarly, the "total revision" of the Constitution must be submitted to a referendum in Austria[63]. Total revision implies altering the principles of the constitution: according to the practice of the

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[54] Venice Commission, *Report on Constitutional Amendment* para 183–184.

[55] In Denmark, after the amendment has been passed by two consecutive Parliaments, it is subjected to a referendum within six months. The amendment becomes valid, if majority of participants at the referendum and at least 40 percent of all the citizens who are entitled to vote supported it (Article 88).

[56] Article 47 para 1.

[57] Article 151 para 3.

[58] Article 162 prescribes that Chapter I (General Provisions) and Chapter XV (Amendment of the Constitution) of the Constitution may only be amended by referendum, while according to Article 164, three fifths majority of the members of the parliament may require a referendum on the amendment regardless its subject.

[59] In this case the bill is approved by a majority of three-fifths of the votes and no referendum is required (Article 89 para 3).

[60] Article 77.

[61] Article 148 para 1. Altering Article 1 ("the State of Lithuania shall be an independent democratic republic") requires three-fourths supermajority of voters at the referendum. See Article 148 para 2.

[62] Article 66 para 3.

[63] Article 44 para 3.

Austrian Constitutional Court, these are the democratic principle, the federal principle, and the principle of rule of law[64]. In Spain, after having been passed by two consecutive Parliaments, the amendment requires to be submitted to ratification by referendum if the total revision of the Constitution was proposed or a partial revision of fundamental provisions are affected by the proposal[65].

An example of the optional referendum mechanism is Poland. If the amendment relates to the provisions of Chapters I, II or XII of the Constitution, at least one-fifth of the statutory number of deputies, the Senate or the President of the Republic may require, within 45 days from the adoption of the bill by the Senate, ordering a confirmatory referendum[66]. These provisions are the fundamental core of the Constitution, such as general principles (*e.g.*, democracy, rule of law, popular sovereignty, separation and balance of powers, protection of marriage and family), the freedoms, rights and obligation and citizens, and the provisions on the amendment of the Constitution.

In Luxembourg, the text of the amendment adopted in the first reading must be submitted to a referendum, which substitutes for the second vote of the Parliament, if in the two months following the first vote more than a quarter of the members of the parliament, or 25,000 voters file a petition[67]. In Sweden, after the first voting on the amendment, if proposed by at least one tenth of the members of Parliament, provided at least one third of the members vote in favour of the motion, a referendum is held on the amendment proposal simultaneously with the general elections. The proposal is rejected if a majority of those taking part in the referendum vote against it, and if the number of those voting against exceeds half the number of those who registered a valid vote in the election. In other cases, the proposal goes forward to the Parliament for final consideration[68].

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[64] M. Stelzer, *Constitutional change in Austria*, [in:] *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA* (edited by Xenophon Contiades), London, New York 2013, p. 17.

[65] Article 168 para 3.

[66] Article 235 para 6.

[67] Article 114 para 3.

[68] Article 14 of Chapter 8 of the Instrument of Government.

In Austria[69], Slovenia[70] and Spain[71] (except for proposing total revision of the in the latter two countries), the amendment is submitted to referendum if requested by certain amount of the members of the legislation. In Italy, if the amendment was not supported by two-thirds of the members of each Houses, but absolute majority voted in favour of the bill at least in one of the Houses, the amendment is submitted to referendum if, within three months, such request is made by one-fifth of the members of a House of the Parliament or 500,000 voters or five Regional Councils[72].

d) moratorium on amendments

Some constitutions exclude the possibility of amending their provisions too often. Moratorium therefore is a provision that determines a period within which constitutional provisions cannot be changed. The Parliament may revise the constitution only five years after the last amendment in Greece[73]. The Constitution of Portugal applies a similar rule, however, the Parliament may use extraordinary revision powers if at least four-fifths of its members support the initiative[74]. The Estonian Constitution provides for a one-year amendment ban on issues rejected by a previous referendum or in the Parliament[75]. The constitution of Lithuania contains a similar provision[76].

The constitutional law literature has developed several models based on the procedural limits of the amendment. The common

[69] One third of the members of the National Council or the Federal Council may request the referendum. See Article 44 para 3.
[70] The National Assembly must submit a proposed constitutional amendment to a referendum if so required by at least thirty deputies (Article 170 para 1).
[71] The amendment, after having been passed by the legislation, shall be submitted to ratification by referendum, if requested by one tenth of the members of either house within fifteen days. See Article 167 para 3.
[72] Article 138 para 2.
[73] Article 110 para 6.
[74] Article 284.
[75] Article 168.
[76] Article 148 para 4.

starting point is the constitutional law textbook cliché that constitutional systems shall be classified as rigid or flexible based on the difficulty or ease of the amendment[77]. While this approach is based on facts, it must be emphasized, that whether a constitution is formally rigid or flexible shall not be considered a value judgment. Similarly, the degree of rigidity or flexibility of a given constitution can only be determined accurately in the context of the country's constitutional traditions and its economic, political and cultural characteristics. It is tempting to argue that certain solutions are more perfect than others, it is important to note that, as stressed by the Venice Commission, there is no universally accepted model for the rules of constitutional change[78].

3. The nature of the amendment power: constituent or constituted?

As already mentioned above, most constitutions define procedural rules (and possibly substantive limits) for their own amendment, but they do not usually contain provisions that set out the framework for the creation of a new constitution. This is often explained by the theory that amending the constitution is an expression of constituted power, whereas the creation of a new constitution is necessarily a constitutive act. Consequently, qualitative distinction shall be made between the constituent and the amending power: while the constituent power is an original power, which manifests the sovereignty of the people, the amending power is constituted *i.e.* its legitimacy is derived from the constitution. While the former is unlimited, the amending power is curtailed by the original will of the framers of the constitution. According to this theory, it is necessary that the constitution should lay down not only the procedural rules of the amendment but also the provisions defining the limits of its content. Proponents of this position also consider that judicial

[77] See *inter alia* R. Albert, *op. cit.*, pp. 98–105; Venice Commission, *Report on Constitutional Amendment* paras 8–12.

[78] Venice Commission, *Report on Constitutional Amendment* para 7.

review of constitutional amendments can be derived and justified from this distinction.

Although the antecedents of this theory can be found in the works of ancient and medieval political thinkers, the distinction between constitutional and constituted powers is generally associated with the famous political pamphlet of the Abbé Sieyès, a prominent figure of the 1789 French Revolution. According to Sieyès, "the national will […] only needs to be real or to be legal, it is the very cause of all legality […] However the Nation wishes, it is enough that it wishes and all the forms are right, and its will is always the supreme law"[79]. This means that the constitutional power is the extraordinary power to form a constitution: the immediate expression of the nation which is independent of any constitutional restrictions. All other powers are constituted (*i.e.* created by the constitution): they are ordinary, limited powers, which function according to the forms and mode that the nation granted them.

In Germany, the idea that the two powers were distinct, was influenced largely by Carl Schmitt. He stated that the constitution was created through the act of political will and was composed of fundamental political decisions regarding the form of government, the state's structure, and society's highest principles and symbolic values. Schmitt accepted the distinction between constituent and constituted power, and conceived constituent power to be unlimited and unrestricted by positive constitutional forms or rules[80].

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[79] Cited by W. Mastor – L. Icher, *Constitutional amendment in France*, [in:] *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA* (edited by Xenophon Contiades), London, New York 2013, p. 119.

[80] "*The boundaries of the authority for constitutional amendments result from the properly understood concept of constitutional change. The authority to 'amend the constitution' granted by constitutional legislation, means that other constitutional provisions can substitute for individual or multiple ones. They may do so, however, only under the presupposition that the identity and continuity of the constitution as an entirety is preserved. This means the authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself. It is not the authority to establish a new constitution, nor is it the authority to change the particular basis of this jurisdiction for constitutional revisions*". C. Schmitt,

A more nuanced approach to the distinction between constitutional and amending power is that the latter is a peculiar and extraordinary authority, which is different both from ordinary law-making power and constitution-making power. According to this idea, the amendment power is situated in a grey area between the ordinary legislative power (constituted power) and the extraordinary constituent power: it both differs from ordinary constituted powers and is superior to them. Therefore, amending the constitution is an exercise of a power similar to the one which created the constitution (the constituent power). This approach concludes that the amendment power is *sui generis*: it is neither constituted power nor an expression of the original constituent power. It is an exceptional authority, yet a limited one, by which constitution-makers can share part of their authority with future generations so that every generation holds a part of this constituent power[81].

Although the qualitative distinction between constitution-making and constitution amending power is quite popular among constitutional theorists, many arguments can be raised against it.

a) The norm created by the amending power (usually technically incorporated into the constitution) becomes part of the constitution, so that the provisions created by the amendment have the same rank in the hierarchy of norms as the rules of the original (first) constitutional text[82]. Therefore, the amendment power should be understood to function as the constitution-making power.
b) It seems meaningless making constitutional amendments subject to the strictest possible procedural (and substantial) requirements, if the adoption of a new constitution – which, according to the proponents of separation, cannot, by

Constitutional Theory (translated and edited by Jeffrey Seitzer), London 2008, p. 150.

[81] Y. Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers*, Oxford 2017, pp. 105–134.

[82] For similar arguments see K. Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study*, Bursa 2008, pp. 75–77.

definition, be limited by any external factor – might radically change the entire constitutional system[83].

c) The purpose of amendments is obviously to change the content (or perhaps to add to the content) of an existing norm[84]. However, if the validity of a given constitutional amendment was questionable on the grounds that it was not coherent with or contradicts to the existing law (*i.e.*, the text of the constitution before the amendment), this would result in *de facto* denial of the power to amend the constitution (inevitably leaving room only for revolutionary, uncontrolled constitution-making). If this understanding was accepted, no constitutional amendment would be possible (except perhaps for provisions of a clarifying or supplementary type)[85].

d) While constitutional provisions setting procedural restrictions are designed in the form of limits on amendment, they can rather be understood as conditions of changing of the constitution. Accepting this approach, the failure to meet the conditions may not be assessed that the amending power has exceeded its constitutional limits, but rather that the amendment cannot be considered a valid expression of the will of the constituent power, and therefore it shall not enter into force[86].

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[83] "*Of course, no constitutional rule is really ever unamendable. Most obviously, none can survive revolution. If the political will exists to alter an obdurate constitutional text, a new constitution can be written with the unamendable rule removed or loosened. This would break legal continuity, but it would nonetheless overcome the rigidity of the text*" R. Albert, *op. cit.*, p. 141.

[84] The very essence of amending the constitution is to "*make possible sweeping but nonviolent political transformations*" R. Albert, *op. cit.*, p. 46. "*Any people who believe in constitutionalism will amend their constitution when needed, as opposed to using extraconstitutional means*" D.S. Lutz, *op. cit.*, p. 243.

[85] Z. Szente, *Az "alkotmányellenes alkotmánymódosítás" és az alkotmánymódosítások bírósági felülvizsgálatának dogmatikai problémái a magyar alkotmányjogban* [The dogmatic problems of "unconstitutional constitutional amendment" and judicial review of constitutional amendments in Hungarian constitutional law], [in:] Gárdos-Orosz Fruzsina – Szente Zoltán (eds.): Alkotmányozás, alkotmányjogi változások Európában és Magyarországon, Nemzeti Közszolgálati Egyetem Közigazgatás-tudományi Kar, Budapest 2014, p. 220.

[86] Z. Szente, *op. cit.*, p. 218.

e) It is difficult to define who or what body would be entitled to express and exercise the original constitutional power. The historical examples are, of course, well-known: since the 18th century, many European (and non-European) nation--states established the institution of the constituent national assembly: bodies elected by the people, based on popular sovereignty, whose sole function was to draft a constitution and after completing this task they subsequently ceased to exist. Nor is it without precedent in the constitutional history that the legislative body formally declared itself being a constituent assembly to adopt the constitution in this capacity. However, the institution of constituent assembly (although not unprecedented in existing European constitutions)[87] can be seen rather as a historical phenomenon more typical of the revolutionary period of constitution-making, therefore its application in the parliamentary democracies of 21st century Europe would rather be controversial. Furthermore, it seems obvious that the purest manifestation of the original constitutional power would be direct popular participation. It is undisputable that this could take the form of a decisive referendum at the end of the process – *i.e.*, popular vote on the whole text of the draft constitution –, but popular participation in the previous stages of the amending procedure – *i.e.*, drafting of the text proposed for adoption –, is a more complex question. While many scholars and politicians simplify this problem arguing that direct popular participation, namely mandatory referendum, shall be essential for adopting or amending the constitution, it must be emphasized that the will of the electorate might be expressed through various means or channels: via consultation mechanisms and other forms of communication with the electorate, both during and outside the election campaign period.

[87] Article 158 of the constitution of Bulgaria 158 stipulates that the Grand National Assembly shall adopt a new Constitution (according to Article 157 the Grand National Assembly shall consist of 400 Members elected according to the election law in force).

The nature of the amendment power can be explained according to different theoretical concepts and in practice legitimate constitutional rules can be established by adopting any of these approaches. While the distinction between constitutional-making and amending powers is realised in constitutions with eternity clauses, this does not exist in other constitutional systems (this is the case, amongst others, in Hungary). The choice between the different models is essentially a consequence of constitutional tradition.

4. Eternity clauses

Eternity clauses are provisions in the text of the constitution that define parts of the constitution as unamendable. This means that certain principles and provisions laid down by the framers of the constitution remain unchanged as long as the constitution is in force. It must be highlighted that eternity clauses are linked to constitutional systems, which treat constitutional amendment and constitution-making as different procedures.

Formal unamendability has been argued by many scholars as a principle that should be embodied in the form of eternity clauses in all modern constitutions. Proponents of this theory usually point out that unamendability has emerged gradually as a common feature of codified constitutions. To justify this, they quote some seemingly impressive statistics, according to which roughly 25% of new constitutions drafted between 1945 and 1988, and over 50% of new constitutions since 1989 exclude the amendment of certain provisions[88]. While These figures may seem convincing *prima facie*, this impression is nuanced by the fact that a large number of European constitutions do not have any rules on unamendability. Obviously, in the absence of such special provisions all parts of the constitution may be subject to amendment. Some constitutions *expressis verbis* declare that they can be amended without any substantial restrictions. The Irish Constitution explicitly states that any

[88] Y. Roznai, *Unconstitutional…*, pp. 20–21.

of its provisions may be amended, "whether by way of variation, addition, or repeal"[89].

Constitutions typically restrict substantive change in two ways. The less common option is that certain provisions cannot be altered at all, which means that any proposed amendment to the text of the provision is unacceptable. It is worth pointing out that none of the EU member states' constitutions contains such general prohibition. The more widespread technique is to declare that certain principles in the constitution may not be altered. This is a far more flexible approach, which leaves room for changing the text of the constitutional provisions if it does not violate the core elements of the protected principles.

The most famous eternity clause is Article 79 para 3 of the German Constitution (*Ewigkeitsklausel*), incorporating Carl Schmitt's idea that certain core elements of the constitution should remain unamendable, even by supermajorities in both houses[90]. The Article reads: "Amendments to this Fundamental Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible". Article 1 of the German Fundamental Law reads: "Human dignity shall be inviolable". Article 20 includes the principle of a "democratic and social federal state" and the principle of the rule of law. Constitutional amendments are restricted to the extent that they affect the principles laid down in Article 1 (1) and 20. This is the absolute limit of the amending power which concerns the following subjects: a) federalism (the division of the federation into states); b) the participation of the states in the legislative process; c) that respecting and protecting human dignity is the duty of all state authorities; d) the acknowledgement of inviolable and

[89] Article 46 para 1. The constitution for the Republic of Ireland was inaugurated with Eamon de Valera's proclamation: "*If there is one thing more than any other that is clear and shining through this whole Constitution, it is the fact that the people are the masters*" cited by G.J. Jacobsohn, *An unconstitutional constitution? A comparative perspective*, 4 International Journal of Constitutional Law (2006), p. 467.

[90] U.K. Preuss, *The Implications of "Eternity Clauses": The German Experience*, 44 Israel Law Review (2011), p. 439.

inalienable human rights; e) that fundamental rights enshrined in the constitution bind the legislature, the executive and judiciary as directly enforceable law; f) the republican form of government; g) the democratic and social welfare state; h) the sovereignty of the people; i) the separation of powers; j) the rule of law[91].

The French Constitution prohibits to revise the republican form of government[92]. Similar provisions are to be found in the Italian Constitution[93], while the Czech Constitution stipulates that "[a]ny changes in the essential requirements for a democratic state governed by the rule of law are impermissible"[94].

It must be noted that the existence of implicit limits to amendment has been a traditional view in the Italian constitutional doctrine, referring to core principles that can only be changed by the constituent power and therefore do not fall within the competence of the constituted amendment power. Scholars supporting this idea argue that a total revision of the Italian constitution is not allowed as it would lead to a change in the fundamental features of the constitutional system and consequently to a violation of core principles[95]. The Italian Constitutional Court explicitly supports the core principles theory in its jurisprudence, stating that the Constitution contains "some supreme principles, that cannot be subverted or changed in their essential content […]. These are explicitly provided by the Constitution as absolute limits to the power of constitutional revision, as the republican form of government […] as well as the principles which, although not expressly mentioned among those

[91] M. Kotzur, *op. cit*., pp. 131–133. See also: M. Kloepfer, *Verfassungsrecht I – Grundlagen, Staatsorganisationsrecht, Bezüge zum* Völker- und *Europarecht*, München 2011, pp. 24–25; D. Murswiek, *Zu den Grenzen der Abänderbarkeit von Grundrechten*, [in:] Handbuch der Grundrechte in Deutschland und Europa (herausgegeben von Detlef Merten und Hans-Jürgen Papier) Band II, Heidelberg 2006, pp. 166–178.

[92] Article 89 para 5.

[93] Article 139.

[94] Article 9 para 2.

[95] T. Groppi, *Constitutional revision in Italy. A marginal instrument for constitutional change*, [in:] *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA* (edited by Xenophon Contiades), London, New York 2013, p. 210.

not subject to the constitutional revision process, belong to the essence of the supreme values upon which the Italian Constitution is founded"[96]. However, the Court has not further elaborated on the constitutional foundation of this statement, neither has further specified the content of core principles.

The substantive core of the Czech Constitution has been specified in abstract terms by means of a general clause, which must be filled with content by the Constitutional Court. The jurisprudence of the Constitutional Court has not provided a clear (and the doctrine of Czech constitutional law has not provided a unified) answer regarding amendments not permitted in a democratic state under the rule of law[97]. In a 2009 decision[98], the Court declared that "*protection of the material core of the Constitution, i.e. the imperative that the essential requirements for a democratic state governed by the rule of law, under Art. 9 par. 2 of the Constitution, are non-changeable, is not a mere slogan or proclamation, but a constitutional provision with normative consequences*"[99].

The Greek Constitution sets strict material limits to the revision of the Constitution. The unamendable provisions include those which determine the form of government as a parliamentary republic, respect for human dignity, equality before the law, eligibility of Greek citizens for public service, prohibition of titles of nobility, right to free development of personality, personal liberty, freedom of religion, separation of powers[100].

The Romanian Constitution defines unamendable its provisions regarding a) the national, independent, unitary and indivisible character of the Romanian State; b) the republican form of government; c) territorial integrity; d) independence of justice; e) political pluralism; f) official language. Furthermore, no revision shall be

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[96] Decision 1146/1988, cited by T. Groppi, *op. cit.*, pp. 310–311.

[97] J. Sułkowski, *Tożsamość narodowa i konstytucyjna Republiki Czeskiej*, [in:] *Tożsamość konstytucyjna w wybranych państwach członkowskich Unii Europejskiej* (edited by Andrzej Wróbel, Michał Ziółkowski), Warszawa 2021, pp. 221–225.

[98] PL. ÚS 27/09.

[99] See also: O. Preuss, *The Eternity Clause as a Smart Instrument – Lessons from the Czech Case Law*, 57 Hungarian Journal of Legal Studies (2016), p. 297.

[100] Article 110 para 1.

made "*if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof*"[101].

The Constitution of Portugal sets certain subjects as substantive limits of revision of the constitution. These include 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 of ownership of the means of production; g) the existence of economic plans, within the framework of a mixed economy; h) the appointment of the elected officeholders of the entities that exercise sovereignty, of the organs of the autonomous regions and of local government organs by universal, direct, secret and periodic suffrage, and the proportional representation system; i) plural expression and political organisation, including political parties, and the right of democratic opposition; j) the separation and interdependence of the entities that exercise sovereignty; l) the subjection of legal norms to 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[102].

Although the Spanish Constitution was a result of similar political changes as the Portuguese Constitution, it opted to make the revision more complex and difficult for certain subjects rather than excluding these provisions from the possibility of amendment. Therefore, the Spanish Constitution does not contain explicit eternity clauses, demonstrating that states with similar historical experiences, do not necessarily choose the same models.

The position of the Venice Commission is fundamentally critical regarding eternity clauses. Though the Commission expressed its opinion cautiously, emphasizing that it does not hold any general view as to whether a given national system should include eternity clauses, the Commission underlined in its report on constitutional

[101] Article 152 para 1–2.
[102] Article 288.

amendment that they were not necessary elements of constitutionalism. Moreover, the Commission warned that unamendability was "a complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order. A constitutional democracy should in principle allow for open discussion on reform of even its most basic principles and structures of government. Furthermore, as long as the constitution contains strict rules on amendment, then this will normally provide an adequate guarantee against abuse – and if the required majority following the prescribed procedures wants to adopt reform, then this is a democratic decision, which should in general not be limited"[103]. Consequently, the Commission advocates a restrictive and careful approach to the interpretation and application of unamendable provisions.

5. Judicial review of constitutional amendments and the theory of unconstitutional constitutional amendment

Most constitutions remain silent regarding the possibility of judicial review of amendments. Only a few contain such provisions: they either expressly vest the constitutional court with this competence or, on the contrary, prohibit the review.

The Greek Constitution expressly allows for the judicial review of its provisions, except for the subjects listed in Article 110 para 1 (see above, under the eternity clauses). The Constitution of Romania established the *ex officio* review of constitutional amendment initiatives by the constitutional court[104]. It must be noted that this power only allows *a priori* review, therefore the court does not have jurisdiction to examine the constitutionality of enacted amendments[105].

[103] Venice Commission, *Report on Constitutional Amendment* para 218.

[104] Article 146 point a).

[105] In its decision No. 686 of September 30, 2003, the Romanian constitutional court rejected a petition emphasizing that it does not have competence to review constitutional amendments after their approval by the parliament. K. Gözler, *op. cit*., pp. 5–7. Suteu clarifies that the court "*exercises a double control*

In the absence of specific provision in the constitution, the constitutional court shall not establish its jurisdiction to review the amendments. This principle is followed by the French Constitutional Council, which consistently refuses the possibility to review constitutional amendments as these had been adopted by the sovereign (the legislation and the people)[106]. In the decision 2003–469 DC, the Council confirmed its previous jurisdiction[107], stating that "Article 61 of the Constitution vests the Constitutional Council with the power to review the constitutionality of institutional acts and ordinary laws when they are referred to in the Constitutional Council under the conditions laid down by this Article. The Constitutional Council did not receive, neither from Article 61, Article 89, nor from another Article in the Constitution, the jurisdiction to rule on a revision of the Constitution"[108]. The rejecting position of the Council is particularly noteworthy as the French Constitution expressly contains an eternity clause[109], therefore some scholars claimed that it was merely a paper barrier[110].

The examination of amendments is rejected by the Slovenian Constitutional Court on similar grounds[111]. The case law of the Irish Supreme Court also fits to this pattern, as the Court does not consider itself competent to review the constitutionality of

of constitutionality, abstract and ex officio: at the start of the amendment process, when it certifies that the revision initiative is within the procedural and material limits of the constitution; and again once the legislative amendment process has concluded but before a ratification referendum has been held, when the court checks whether the revision law still complies with these limits". S. Suteu, *Eternity Clauses in Democratic Constitutionalism*, Oxford 2021, pp. 157–158.

[106] W. Mastor – L. Icher, *op. cit.*, pp. 118–119; Venice Commission, *Report on Constitutional Amendment* para 229.

[107] In the decision 62–20 DC, 6 November 1962, the Council declared that it was not competent to examine a norm that had been directly adopted by the people.

[108] Cited by K. Gözler, *op. cit.*, p. 15. See also: Albert, Richard – Nakashidze, Malkhaz – Olcay, Tarik, *The Formalist Resistance to the Doctrine of Unconstitutional Constitutional Amendment*, 70 Hastings Law Journal (2019), pp. 661–665.

[109] See above in subchapter 3.

[110] Y. Roznai, *Unconstitutional…*, p. 207.

[111] K. Gözler, *op. cit.*, p. 17; see also Decision U-I-214/00 of the Constitutional Court.

amendments, stating that an amendment is "usually be designed to change something in the Constitution and will therefore, until enacted, be inconsistent with the existing text of the Constitution, but, once approved by the people under Article 46 and promulgated by the President as law, it will form part of the Constitution and cannot be attacked as unconstitutional"[112].

However, in some European countries, constitutional courts have established their power to review amendments despite not being expressly vested with this competence in the constitution. The most important and influential example is the German Federal Constitutional Court. It has no explicit power for revision of amendments: the Constitution only empowers the Court to rule "in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law with this Basic Law"[113]. The Court has interpreted its jurisdiction broadly stating that the term "federal legislation" includes the legal acts expressly modifying or supplementing the text of Constitution[114].

In the Southwest State judgment of 23 October 1953[115], the Constitutional Court declared the unconstitutional constitutional amendment doctrine, stating that "a constitutional provision itself may be null and void is not conceptually impossible just because it is a part of the constitution. There are constitutional principles that are so fundamental and so much an expression of a law that has precedence even over the constitution that they also bind the framers of the constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles". The Court concluded that "any constitutional provision must be interpreted in such a way that it is compatible with those elementary principles and with the basic decisions of the framers of the constitution"[116].

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[112] Riordan v. An Taoiseach cited by K. Gözler, *op. cit.*, p. 18.

[113] Article 93 para 1 point 2.

[114] K. Gözler, *op. cit.*, p. 22.

[115] 2 BvG 1/51: BVerfGE 1, 14.

[116] See the English translation in D.P. Kommers – R.A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham 2012, p. 82.

In subsequent decisions, such as the often-quoted *Abhörurteil*[117], the Court clarified that the purpose of the *Ewigkeitsklausel* was to prevent the substance and foundations of the existing constitutional order from being eliminated by means of a formal-legalistic law amending the Constitution and from being misused for the subsequent legalization of a totalitarian regime. Rejecting the doctrine of implicit substantive limitations, the Court referred to the expressed limitations of Article 79 para 3 stating that only fundamental abandonment of essential principles is prohibited, not their limitation. The Court stated that "[p]rinciples are from the very beginning not 'affected' as 'principles' if they are in general taken into consideration and are only modified for evidently pertinent reasons for a special case according to its peculiar character […] Restriction on the legislator's amending the Constitution […] must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional principles in a system- immanent manner"[118].

It must be noted that the German eternity clause doctrine has not played a substantive role in the annulment of unconstitutional amendments: it is in fact overrated and receives more attention from abroad than in Germany[119]. The German Federal Constitutional Court has never ruled that the eternity clause has been violated, and in very few of its decisions has it ever dealt with this provision at all; rather, the Court has invoked the importance of unchangeable constitutional provisions in decisions relating to European integration.

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[117] 2 BvF 1/69, 2 BvR 629/68, 2 BvR 308/69: BVerfGE 30, 1.

[118] "*Die mit der Formulierung des Art. 79 Abs. 3 GG verbundene Einschränkung der Bindung des verfassungsändernden Gesetzgebers muss bei der Auslegung um so ernster genommen werden, als es sich um eine Ausnahmevorschrift handelt, die jedenfalls nicht dazu führen darf, dass der Gesetzgeber gehindert wird, durch verfassungsänderndes Gesetz auch elementare Verfassungsgrundsätze systemimmanent zu modifizieren.*" Cited in English in Y. Roznai, *Unconstitutional…*, p. 221. See also: K. Gözler, *op. cit.*, pp. 55–59.

[119] H. Küpper, *Tur Tur, az álóriás? – avagy a Grundgesetz örökkévalósági klauzulájának a jelentése a német jogrendszerben* [*Tur Tur, the false giant? The meaning of the eternity clause of the Grundgesetz in the German legal system*], [in:] Gárdos-Orosz Fruzsina – Szente Zoltán (eds.): *Alkotmányozás, alkotmányjogi változások Európában és Magyarországon*, Nemzeti Közszolgálati Egyetem Közigazgatás-tudományi Kar, Budapest 2014, p. 185.

In Austria, the Constitutional Court – although it has no specific competence to do so – examines amendments to the constitution from both a procedural and a substantive point of view. The Court's case law originally held that it had jurisdiction to verify amendments in respect of procedural rules. The Court declared itself incompetent to review the amendments in substance alleging that standards for such an examination were missing. However, as the Constitution requires stricter procedural rules – namely approval by referendum – if an amendment aims to a "total revision" of the constitution, the Court necessarily examines the substance of the amendment to determine whether it involves "total revision". The Court has been confronted with this controversial situation in several cases before resolving it by defining "leading principles"[120] which, if affected by an amendment, require a referendum. This means, if no referendum was held to approve an amendment related to the leading principles, the amendment is contrary to the constitutional provision regarding total revision and therefore shall be annulled. Applying this interpretation, the Court claimed jurisdiction the examine the substance of the amendments[121].

The Czech Constitutional Court, inspired heavily by the German jurisdiction, argued in a 2009 case that the "development of democratic constitutionality in democratic countries at present emphasizes the protection of values that identify the constitutional system of freedom and democracy, which includes the possibility of judicial review of constitutional amendments"[122]. The Slovak Constitutional Court similarly accepted the doctrine of unconstitutional constitutional amendment having declared its competence to review the substance of amendments in a decision in 2019[123]. However, it must be noted that while the Czech Court relied on the expressed eternity clause of the Constitution, its Slovak counterpart reached the same conclusion only by interpretation, in the absence of any substantive

[120] These are: the democratic principle, the federal principle, and the principle of rule of law. See above in subchapter 2.
[121] K. Gözler, *op. cit.*, pp. 34–40.
[122] PL. ÚS 27/09.
[123] PL. ÚS 21/2014-96.

limits on amendment[124]. The jurisprudence of the Lithuanian Constitutional Court also acknowledges the doctrine of unconstitutional constitutional amendments distinguishing between absolute and relative limits on constitutional amendment[125].

The consistent practice of the Hungarian Constitutional Court[126], has been that it has no jurisdiction to review or annul constitutional provisions, and it has applied this approach to constitutional amendments too. Once a provision has become part of the Constitution by a two-thirds vote of the members of Parliament, it cannot, by definition, be declared unconstitutional. The legal act amending the Constitution becomes a part of it; therefore, the incorporation precludes the unconstitutionality of the content of a constitutional amendment. According to the reasoning of the Constitutional Court, substantial review of a constitutional amendment would not merely

[124] It must be noted that Slovak Constitutional Court had confirmed the existence of the substantive core of the Slovak Constitution in its earlier case-law step by step. See T. Ľalík, *The Slovak Constitutional Court on Unconstitutional Constitutional Amendment* (*PL. ÚS 21/2014*), 16 European Constitutional Law Review (2020), pp. 331–332. In its 2019 decision, the court argued that the protection of constitutionality is the protection of its core substance: "*if constitutionality is at stake, respectively, unconstitutionality and the constitutional court only looks at it and does not protect it, perhaps there is a constitutional disorder.*" Cited by L. Balaj, Luz – F. Muçaj, *The Extension of the Jurisdiction of Constitutional Court in Assessing the Constitutional Amendments – the Case of Slovakia and Kosovo*, 20 International and Comparative Law Review (2020), p. 248.

[125] See pp. D. Žalimas, *The Openness of the Constitution to International Law as an Element of the Principle of the Rule of Law*, [in:] *Constitutional Court of the Republic of Slovenia 25 Years: International Conference, Bled, Slovenia*, June 2016: Conference Proceedings. Ljubljana 2016, pp. 148–149.

[126] See decisions 293/B/1991, 1260/B/1997, 61/2011 (VII. 13.), 45/2012. (XII. 29.) and 12/2013. (V. 24.) For assessment of the case law of the Hungarian Constitutional Court regarding the possibility to review amendments see Trócsányi, László, *The Dilemmas of Drafting the Hungarian Fundamental Law. Constitutional Identity and European Integration*, Passau 2016, pp. 89–92; and Gárdos-Orosz Fruzsina, *Unamendability as a Judicial Discovery? Inductive Learning Lessons from Hungary*, [in:] *An Unamendable Constitution? Unamendability in Constitutional Democracies* (edited by Richard Albert and Bertil Emrah Oder), Cham 2018, pp. 236–243. It must be noted that the conclusions of the latter paper – especially that "*unamendability can be justified as a judicial discovery even when the constitution does not adopt explicit rules on unamendability*" – are highly questionable.

interpret the provisions of the Constitution but would necessarily qualify them, thus taking the Constitutional Court, which is institutionalised for the protection of the Constitution, beyond its constitutional powers and becoming constituent power.

The Fundamental Law of Hungary, entered into force on 1 January 2012, has significantly changed the powers of the Constitutional Court. However, the reviewability of constitutional amendments remained unregulated, as was the case with the previous Constitution. The issue was finally settled by the Fourth Amendment to the Fundamental Law in 2013, which stipulated that the Constitutional Court may review the Fundamental Law and its amendments only with respect to the procedural rules of the adoption laid down in the Fundamental Law itself[127].

One of the most common arguments in the literature on explicit (and even implicit)[128] limitations of constitutional amendments and supporting constitutional court control over them is that the protection of constitutions against constitutional amendments is globally widespread and has been continuously growing. While not disputing the usefulness of the comparative method, it should be noted that although the constitutional development and constitutional culture of the states often cited in the literature (India[129], Turkey[130], states of Latin America[131] etc.) share some common points (especially in terms of historical past) with European states,

[127] Article 24 para 5.

[128] The controversial doctrine of implicit substantive limits is based on the theory that certain substantive limits of the amendment are not written in the text of the constitution but invented or discovered by constitutional courts and/or scholars. For arguments in favour of this doctrine and their criticism see K. Gözler, *op. cit.*, pp. 66–77. The theory has proponents in Hungary, too, see F. Gárdos-Orosz, *op. cit.*, pp. 243–253.

[129] R. Albert, *op. cit.*, pp. 151–153; A. Barak, *Unconstitutional Constitutional Amendments*, 44 Isr. L. Rev. (2011), pp. 325–327; K. Gözler, *op. cit.*, pp. 88–95; Y. Roznai, *Unconstitutional…*, pp. 42–27; S. Suteu, *op. cit.*, pp. 131–138.

[130] A. Barak, *op. cit.*, pp. 322–325; K. Gözler, *op. cit.*, pp. 40–49, 64–66, 95–97.

[131] C. Bernal, *Unconstitutional Constitutional Amendments in the case Study of Colombia: An analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 International Journal of Constitutional Law (2013), 339; Y. Roznai, *Unconstitutional…*, pp. 64–69.

it is highly questionable whether they can serve as a model for the states of the Central European region.

The example of India is extremely popular among authors advocating substantive reviewability of constitutional amendments, particularly because the Indian Supreme Court has established its jurisdiction despite the fact that the Constitution contains neither eternity clauses nor an explicit judicial power to review constitutional amendments. However, one must agree with the observation that it is "frightening" to suggest that the Indian Supreme Court's jurisprudence on unconstitutional amendments could be a model for Hungary or countries of our region[132]. In this context, it is necessary to point out that the basic structure doctrine was not the result of an organic development but emerged in the midst of a particularly hectic political situation, partly in a state of emergency, and that the Court maintained its doctrine despite the subsequent prohibition provision of the constitution – *i.e.*, it acted *contra constitutionem*.

The doctrine of unconstitutional constitutional amendment is "not a necessary feature of modern constitutionalism, nor even of the narrower idea of modern liberal democracy"[133]. The substantive review of amendments cannot, by definition, be called into question if amendment of certain provisions of the constitution is expressly excluded or it is subject to special procedural conditions and at the same time the constitutional (or supreme) court is vested explicitly with power to review amendments. Serious concerns arise, however, when a constitutional court declares its jurisdiction to defend the eternity clauses itself (or invents such clauses by interpretation), without being authorised to do so by the constitution. In constitutional democracies, it is a fundamental requirement of the rule of law that public authorities operate only within the framework of the constitution and in compliance with the laws that apply to them[134].

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[132] See Z. Szente, *op. cit.*, p. 215.

[133] R. Albert – M. Nakashidze – T. Olcay, *op. cit.*, p. 642.

[134] "*The Constitutional Court's powers are also limited under the system of separation of powers. Consequently, it does not have the power to review the Constitution and new provisions amending it without express authorisation.*" Decision 12/2013. (V. 24.) of the Constitutional Court of Hungary para 35.

If the constitution prescribes the necessary and sufficient procedural conditions for altering its text, amendments meeting these rules become part of the constitution. They are equivalent to any other provision of the constitution, so they shall be reviewed (altered, modified, abolished) only by the constituent power and not by a (constitutional) court, since this would mean that the constitutional court acts as not the guardian but the master of the constitution.

Some scholars have addressed the issue of so-called abusive constitutionalism in this respect[135]: in their view, this phenomenon refers to situations where political power uses the possibilities provided by the constitution, such as constitutional amendments, to erode the democratic order with the purpose of consolidating its own power. They argue that if the means to prevent abusive constitutionalism, such as the inviolable parts of the constitution or the power of the constitutional court to review constitutional amendments, are not explicitly defined in the constitution, they must be developed by judicial practice in order to protect the rule of law. This implies a hyperactive role for the constitutional court, in which the body called upon to defend the constitution, goes far beyond by qualifying itself as co-constituent, arbitrarily deriving powers for itself *contra constitutionem*, essentially contrary to the intentions of the constitutionalist. This is the attitude of the constitutional courts in those states where the power of review has been established by the body itself in the absence of a specific constitutional rule[136]. Arbitrary judicial review of constitutional amendments can be seen as "the takeover of the constituent power openly, since, in this case, the constitutional court's monopolized access to the constitution becomes almost complete"[137].

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[135] One of the often-cited articles on the subject is D. Landau, *Abusive Constitutionalism*, 47(1) UC Davis L. Rev. (2013), 189.

[136] The concept of the "invisible constitution", which marked the early activist period of the Hungarian Constitutional Court, was based on similar principles; however, its evaluation is beyond the scope of this study. See A. Zs. Varga, *From Ideal to Idol? The Concept of the Rule of Law*, Budapest 2019, pp. 98–99.

[137] B. Pokol, *The Juristocratic State. Its Victory and the Possibility of Taming*, Budapest 2017, p. 44.

In this respect the position of the Venice Commission should be considered too. In its opinion on constitutional amendments, the Commission concluded, that "substantive judicial review of constitutional amendments is a problematic instrument", while "as long as the special requirements for amendment are respected and followed, then these are and should be a sufficient guarantee against abuse. In most countries such decisions require a qualified majority of the elected representatives in parliament, as well as other requirements. Constitutional decisions adopted following such procedures will in general enjoy a very high degree of democratic legitimacy – which a court should be extremely reluctant to overrule"[138].

The Commission emphasized that judicial review of constitutional amendments was not a general rule, therefore such control could not be considered as a requirement of the rule of law. The Commission also stated that "constitutional revision is legitimised by the people itself and is an expression of popular sovereignty. The people is represented by parliament which acts as a constituent. The authority of the decision to amend the Constitution is increased by the specific requirements for constitutional amendment (qualified majority)"[139].

6. Recommendations

As mentioned above, there is no universal standard for the rules for amending constitutions. As a result of the constitutional development of nation states, a variety of procedural and sometimes substantive obstacles can be observed in the European constitutional systems.

In the democracies of the 21st century, political parties gaining majority during democratic contest for the electorate do not pose real threat to the national constitutional systems, provided that they respect the existing constitutional rules. This is also true if a political

[138] Venice Commission, *Report on Constitutional Amendment* para 235–236.
[139] Venice Commission, *Opinion on the Revision of the Constitution of Belgium* (CDL-AD(2012)010) para 50.

force with sufficient political legitimacy from the electorate wishes to amend the constitution.

The real challenge is supranational. The European Union is continuously seeking to create law that supersedes nation-state rules on several issues that threaten sovereignty. This risk may be enhanced by the shift from consensual to majority decision-making mechanisms. If these efforts succeed, nation states may, against their will and intentions, be subject to decisions that limit or infringe their sovereignty and identity on issues that affect even the very essence of their existence.

Consequently, the dilemma of the near future is how to increase the ability to defend nation states' constitutional values against trends that undermine sovereignty. In responding to this challenge, it may be necessary to eliminate, or at least reduce the procedural and substantive barriers that prevent these values from being reflected in a constitution. At the same time, the supervisory role of the constitutional courts may also change: the task of constitutional courts in the 21st century, in addition to protecting individual rights, must be defending the constitutional identity of the member states[140].

The following recommendations can be made *de constitutione ferenda*.

1. The constitution must be drafted and amended in accordance with clear procedural rules laid down in the text of the constitution.

[140] *When Member States conferred certain parts – or the exercise of certain parts – of their competences arising from their sovereignty upon Community (EU) institutions, they did not waive the essence of their statehood, sovereignty and independence, neither the free determination of the fundaments of the structure of their state. Member States retained the right to dispose of constitutional principles essential to maintain their statehood and constitutional identity.* LászlóTrócsányi's concurring opinion to Decision 143/2010. (VII. 14.) AB of the Constitutional Court of Hungary. See also the decision 22/2016 (XII. 5.) of the Hungarian Constitutional Court, in which the Court declared that it may examine whether the joint exercise of powers under Article E) (2) of the Fundamental Law [*i.e.*, exercising some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union] would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution.

2. Given that the amendment of a provision of the constitution, by being incorporated into the text of the constitution, becomes itself constitutional, it is advisable to establish the same procedural rules for the amendment and for the drafting of a future constitution. Changing the constitution (whether it adds, takes away or amends) shall be an expression of the same constituent power, and therefore the legitimacy of the amendment shall be the same as that of the original constituent act.
3. The content of the procedural rules governing the provisions establishing and amending the constitution depends to a large extent on the historical traditions and constitutional culture of the nation states. Given that there is no single model and that many mechanisms may be legitimate, only general statements can be made in this respect:
   a) The procedural rules shall necessarily contain different, stricter conditions than the formal requirements of ordinary legislation.
   b) The act of constitutional power must have sufficient legitimacy; therefore, the direct or indirect involvement of the political community (the electorate) is essential, either by referendum/consultation mechanisms or by requiring a qualified majority in the legislature.
   c) It is not advisable to establish an excessively complicated procedure, and at the same time it is recommended to avoid the accumulation of procedural rules which would *de facto* make impossible to amend the constitution.
4. In the context of substantive limits, it should be considered to avoid the inclusion of eternity clauses or, if they have become part of the constitutional culture, to link them to constitutional identity (see point 6).
5. It is recommended to limit the constitutional review of constitutional amendments to procedural violations. Constitutional courts execute control over the acts of the legislative, executive and judicial branches of power, but they must bow to the will of the constitution-making or the amendment-power.

6. Provisions representing the elements of constitutional identity should be incorporated to the text of the constitution to protect them in the supranational area. By creating a framework of the responsibility and obligation constitutional courts, they may be able to defend these values which represent the uniqueness of a constitutional system, *i.e.*, the constitutional identity of the nation.

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Impact of the European Integration Process on the amendments in the Constitutional System of Public Authorities: between integration and sovereignty. The role of the constitutional identity

1. Introduction

The Sovereign State is free to form the shape of the system of public constitutional authorities. The will decides this matter of the Sovereign. It is usually expressed in the national constitution. It means that any changes made in the state system model and the shape or principles of functioning of each organ must relate to an amendment to the constitution. At the same time, the relations between each organ of public authority should be constructed to enable their cooperation.

The process of European integration caused the state to transfer the competencies of state authorities concerning some of the issues to an international organisation (the European Union). The transfer was made through an international agreement. However, the specific nature of an organisation of integrating nature, i.e., European Union means that there is a risk (and recently even a practice has arisen) of the EU institutions influencing the constitutional organs of the state and their competencies outside the scope of the transferred competencies.

This research aims to determine the optimal solutions for the shape of competencies and relations between public authorities. The assumption is to define these competencies so that it is possible for

each authority to cooperate while preserving their constitutional identity and taking part in the integration process.

Furthermore, based on comparative legal analysis, the impassable limits of the activity of the European Union and its institutions to interfere with the issues of the political system and constitutional competencies of state organs will be determined, including the permissible limits of amendments to the Constitution because of the standards on the rule of law created by the European Union institutions. Consideration will also be given to the extent to which specific EU standards may join an obligation for nation-states to introduce amendments to the Constitution on the issues of the state's political system and its constitutional organs.

The clash between the sovereign state and the integration process requires the context of permissible constitutional amendments to find specific measures/criteria that can be invoked to justify certain changes in domestic law, including the state's constitutional system. In this context, an important category is the notion of constitutional identity. Although heterogeneous and differently understood in legal theory and practice, constitutional courts and tribunals, and the constitutional legislators are a perspective for assessing and arguing actions taken, including decisions on constitutional change.

Due to the above, the problem requiring consideration is finding the answer to the question on how the category of constitutional identity may affect the relationship between the institutions of the European Union and the organs of state power of an EU Member State in the context of the EU's influence on the shaping of the system of these organs.

The starting point of the analysis will be a reminder of how constitutional identity is understood in literature and jurisprudence. This understanding (approach) of constitutional identity will also be indicated, which may help shape the above-indicated relations. Such constructs as the integration process, the principle of loyal cooperation, the transfer of competencies, and the nature of EU competencies and the tenets of their exercise will be recalled. The context of proportionality and subsidiarity will also be discussed.

The issues mentioned above set the framework for consideration of the permissible interference of the EU in the competencies of

national public authorities. It includes such interference that is aimed at amending the Constitution. The research aims to articulate postulates on shaping the relations between the EU and the state and what tools to use to fulfil the international commitments. The answers given are thus meant to come closer to answering the question about the limits of European integration.

2. The concept of constitutional identity – in search of an appropriate definition

2.1. Determining the impact of EU relations on the state system and the competencies of public authorities in the context of constitutional amendments requires recalling the meaning of the term constitutional identity. It is very enigmatic. Its meaning is reconstructed from the statements of doctrine and jurisprudence of national constitutional courts and tribunals, auxiliary, from the jurisprudence of the Court of Justice of the European Union (CJEU).

It is worth recalling the previous findings of doctrine and jurisprudence on constitutional identity to understand this phenomenon better. It is necessary to point to that perspective of constitutional identity, which is of operational significance for the shaping of the EU-state relations. Indeed, constitutional identity is a category invoked primarily to legitimise difficult political decisions or decisions of constitutional courts and tribunals. It is a concept loaded with a solid axiological charge[1].

Michel Rosenfeld argues that references to constitutional identity can explain changes in the formation of the constitution's subject, content, and legitimacy in a given legal system[2]. In this sense, constitutional identity defines the features of the constitution, not the

[1] A. Śledzińska-Simon, *Koncepcja tożsamości konstytucyjnej: wymiar indywidualny, relatywny oraz zbiorowy*, Acta Universitatis Wratislaviensis, No. 3744, "Przegląd Prawa i Administracji" CVII, Wrocław 2016, p. 335; L. Tribe, *A Constitution We are Amending: In Defense of a Retrained Judicial Role*, "Harvard Law Review" 433, 1983, p. 440.

[2] M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Culture, and Community*, New York 2010, p. 5.

matter of authority. According to Rosenfeld's position, constitutional identity is related to the fact that the state has a constitution and its content and the context in which it occurs. Thus, constitutional identity does not require a written constitution but constitutional norms. They may also result from customs and court precedents.

Therefore, it can be considered whether the concept of constitutional identity assumes that every entity having a constitution also has an identity denoting selfhood and autonomy understood in terms of sovereignty[3]. Or perhaps constitutional identity derives from the constitution but is not equivalent to it. If the second position is taken, constitutional identity could be seen as the spirit of the constitutional culture permeating a given legal order[4].

The work of G.J. Jacobsohn points out that constitutional identity constitutes the constitutional core. It should be understood as a set of fundamental values and principles that must not be violated in any way, even when amending the constitution[5].

Depending on the concept adopted, the sources of constitutional identity may be constitutional norms or meta-norms, i.e., rules on which the validity of the constitution itself or its amendment depend on. Michel Rosenfeld considers constitutional identity as equivalent to the collective identity emerging from constitutional norms and their interpretation. In this view, the protection of constitutional identity belongs to the courts, especially the constitutional courts and tribunals. These bodies set limits to the actions of the legislative and executive powers. Constitutional identity may be defined by reference to protecting the fundamental rights of a particular legal order and its specific features[6].

Based on the interpretations of M. Rosenfeld and G. Jacobson, it can be assumed that every constitution necessarily gives expression

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[3] G.J. Jacobsohn, *Constitutional Identity*, Cambridge 2010, p. 9.

[4] F. Mayer, *L'identité constitutionnelle dans la jurisprudence constitutionnelle allemande*, [in:] *L'identité constitutionnelle saisie par les juges en Europe*, ed. L. Burgorgue-Larsen, Paris 2011, pp. 63–88.

[5] G.J. Jacobsohn, *Constitutional Values and Principles*, [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2012.

[6] A. Śledzińska-Simon, *Koncepcja…*, pp. 337–338.

to the "aspirations", "traditions" and "commitment to values" that constitute the identity of the constitution, state, or nation[7].

The phenomena of constitutional identity are met with criticism. As M. Ziółkowski notes, "Critics of research on constitutional identity seem to focus on only one, static, understanding of it. Understandably, this static reading of identity can be found in the statements of constitutional populists and judicial decisions. However, it ignores other (dynamic) elements of the concept (i.e., identity continually worked out in constitutional discourse)"[8].

Mirosław Granat points to the legitimacy of a broader reading of constitutional identity as the limit not so much of the transfer of competencies, but of constitutional change[9].

According to Polish doctrine, there is an axiological divergence between Polish and European constitutionalism. Some representatives of the science of constitutional law follow an approach to constitutional identity that identifies the constitution with the basic structure and fundamental constitutional principles. For instance, M. Granat seems to perceive constitutional identity statically and reduces it to the issue of the material limits of constitutional change (unchangeable or relatively unchangeable norms)[10]. In turn, W. Jóźwicki (like K. Wojtyczek and K. Wójtowicz) writes about "the basic principles and values expressed in it, constituting the foundation of the state system, without prejudging the role of identity in the procedure of amending the constitution. This identity would consist of all the fundamental principles of the constitutional system, of which changing or removing one would change the system"[11].

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[7] M. Ziółkowski, *Mozaika tożsamości konstytucyjnych*, [in:] *Tożsamość konstytucyjna w wybranych państwach członkowskich Unii Europejskiej*, eds. A. Wróbel, M. Ziółkowski, Warszawa 2021, p. 23.

[8] M. Ziółkowski, *Mozaika…*, p. 25.

[9] M. Granat, *Rozumienie zmiany Konstytucji RP a tożsamość konstytucyjna*, [in:] *Problemy zmiany konstytucji*, ed. R. Chruściak, Warszawa 2007, p. 257 and n.

[10] M. Granat, *O paradoksach pojęcia nieformalnej zmiany konstytucji*, "Państwo i Prawo" 2019/12, p. 137.

[11] W. Jóźwicki, *Ochrona wyższego niż unijny konstytucyjnego standardu prawa jednostki i tożsamości konstytucyjnej RP*, Poznań 2019, p. 313.

A. Śledzińska-Simon and A. Dębowska represent a dynamic approach to constitutional identity. In the concept of constitutional identity, they see "a limit for the interpreter of the constitution, which should prevent extracting from the basic law what has not been expressed in it"[12]. So far, a dynamic and discursive approach to constitutional identity as recognition of "one's cultural, national distinctiveness through reflection on the fundamental rights accepted in a given society" has not been developed in domestic dogmatics[13].

Developing the above thought, one may conclude that constitutional identity overlaps with the area lying within the margin of states' discretion, i.e., in matters concerning individual rights, where no consensus exists on the scope of their protection or permissible limitations. Constitutional identity may also overlap with the notion of national identity, although there is not a complete consensus on this position in doctrine[14].

Anna Śledzińska-Simon expresses the opinion that "constitutional identity results from the interaction between universal and particular constitutional aspirations, which sometimes leads to conflicts of values"[15]. She also points out that the multiple dimensions of constitutional identity reflect the polycentric nature of the legal environment in which numerous constitutional orders intersect[16]. Constitutional identity is shaped simultaneously at different levels. The formation of constitutional identity should be based on a dialogue. Although each of the groups comprising constitutional identity is somehow autonomous, the process of constitutional identity construction may incidentally lead to tensions. It is increasingly pointed out that the contemporary concept of constitutional

[12] A. Dębowska, *Tożsamość konstytucji RP z 1997 r. jako granica dopuszczalnej wykładni jej norm*, [in:] *Konstytucja Rzeczypospolitej polskiej w pierwszych dekadach XXI wieku wobec wyzwań politycznych*, gospodarczych i społecznych, ed. S. Biernat, Warszawa 2013, p. 95.

[13] M. Zirk-Sadowski, *Tożsamość konstytucyjna a prawo europejskie*, "Analizy Natolińskie" 2012/1, p. 1 and n.

[14] M. Rosenfeld, *The Identity*… p. 12.

[15] A. Śledzińska-Simon, *Koncepcja*…, p. 339.

[16] J.H.H. Weiler, *Prologue: Global and Pluralist Constitutionalism Some Doubts*, [in:] *The Worlds of European Constitutionalism*, eds. G. de Búrca, J.H.H. Weiler, Cambridge 2011, pp. 8–19.

identity is replacing the idea of sovereignty. The modern approach to sovereignty means that it is not treated as an exclusive sphere but as an area of competence resulting from functional and sectoral divisions of power that cut across territorial divisions[17].

However, the concept of constitutional identity has no static content. It is confirmed by the jurisprudence of constitutional courts and tribunals, in which this identity appears in different contexts.

In this case, the constitutional identity serves to justify the formation of relationships with other constitutional actors or constitutional orders through convergence or merger. It can be found in judgments concerning the migration of constitutional ideas. However, it cannot be excluded that by applying the concept of constitutional identity, an entity will reject the external world of global and comparative constitutionalism and defend itself against the influence of international and foreign sources of law or judicial decisions[18].

Constitutional identity appears in judgments concerning constitutional amendments[19]. Reference to this category protects the constitutional order from radical changes that could threaten its existence.

Constitutional identity also occurs in judgments concerning the transfer of competencies within supranational organisations. It is an essential aspect for the nation-states participating in a supranational integration process, of which the European Union is an example. In the EU context, the concept of constitutional identity is usually used to protect national identity (sovereignty) from the priority of the EU[20].

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[17] A. Śledzińska-Simon, *Koncepcja…*, p. 340; N. Walker, *The Idea of Constitutional Pluralism*, "Modern Law Review" 65, 2002, pp. 317, 345.

[18] See more [in:] *The Migration of Constitutional Ideas*, ed. S. Choudhury, Cambridge 2006.

[19] K. Gozler, *Judicial Review of Constitutional Amendments: A Comparative Study*, Bursa 2008.

[20] R. Toniatti, *Sovereignty Lost, Constitutional Identity Regained*, [in:] *National Constitutional Identity and European Integration*, eds. A.S. Arnaiz, C.A. Lliviña, Cambridge 2013, pp. 49–75; J.H.H. Weiler, *A Constitution for Europe? Some Hard Choices*, "Journal of Common Market Review Studies" 40, 2002,

By invoking constitutional identity, judges – especially in constitutional courts and tribunals – become the guardians of this identity. Constitutional identity itself can be used as an argument to justify contentious decisions and extend, strengthen, or consolidate the courts' authority and the judges' position in the judicial dialogue. In the Kesavananda case[21], the Supreme Court of India developed the doctrine of the basic structure under which the ability to amend the Constitution is subject to the limitations imposed by the basic system of the Constitution. Constitutional identity was defined by referring it to abstract constitutional principles which are open to various interpretations.

The approach above may be a point of reference at the argumentative (not normative) level for assessing the fulfilment of specific standards stemming from international law. In this context, the assessment of the compliance of the introduced constitutional amendments may follow exhaustive legal means such as the rule of law, democracy, or human rights.

2.2. CONCERNING THE CONCEPTION OF CONSTITUTIONAL IDENTITY IN SELECTED EU COUNTRIES, THE FOLLOWING SHOULD BE NOTED

2.2.1. In Italy, the concept of constitutional identity is linked to the institution of *cotrolimiti*. Since the 1970s, the Italian Constitutional Court (*Corte Costituzionale*) has maintained a line of jurisprudence (*controlimiti*), reserving the possibility of reviewing the constitutionality of Community law and possibly derogating from the principle of primacy. This line of jurisprudence has involved refusing to apply two judgments of the CJEU and waiving the principle of primacy on the grounds of incompatibility with the provisions of the Italian Constitution.

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pp. 563–580; judgment of Polish Constitutional Tribunal (CT) of 24 November 2010, ref. K 32/09, No. 9/A/2010, pos. 108.

[21] Kesavananda Bharati v. Region Kerala, 1973 SC 1461, 1973, p. 1492; see more [in:] S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, Oxford 2009.

In the *Corte Costituzionale* judgment of 18 December 1973 in *Frontini v. Ministero delle Finanze*, the Constitutional Court held that Article 11 of the Constitution of the Italian Republic creates certain limitations on state sovereignty, which are the fundamental principles of the constitutional order and the inalienable rights of the human person. As a result of the above, it would be unacceptable for Italy to limit its sovereignty in favour of an international organisation that did not provide guarantees of protection of the fundamental rights of the human person, at least to the same extent as the Constitution of the Italian Republic[22]. However, the Italian Constitutional Court pointed out that if interpretation were attempted to be given to Article 189 of the Treaty establishing the European Union, the Constitutional Court could assess whether the Treaty's compatibility with the principles and fundamental rights expressed in the Constitution was preserved. The interpretation could concern the violation of the highest values of the national legal order, such as the inalienable rights of the human person. The Constitutional Court also limited the ability of federal judges to apply Community law. In the event of a conflict between Community and national law, judges cannot decide on their own not to use a national norm – the Constitutional Court must first declare such a norm unconstitutional[23].

In a judgment of 5 June 1984 in the Granital case (ref. 170/184), the Italian Constitutional Court confirmed its exclusive competence to review the constitutionality of the Treaties and the laws ratifying them. Regarding compliance with the fundamental principles of the constitutional system and the rights of the individual, the Treaties should be interpreted in a way that authorises the EU institutions to enact acts that violate those principles[24].

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[22] See more: J. Wawrzyniak, *Opinia w sprawie kognicji Sądu Konstytucyjnego Republiki Włoskiej w zakresie prawa wtórnego UE*, "Zeszyty Prawnicze BAS" 2/30 (2011), p. 23.

[23] See more: F. Fabbrini, O. Pollicino, *Constitutional Identity in Italy*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. Ch. Calliess, G. van der Schyff, 2019, pp. 201–221.

[24] See: https://www.deepdyve.com/lp/kluwer-law-international/constitutional-court-italy-decision-no-170-of-8-june-1984-s-p-a-9tGQkz70HW (accessed on: 10.09.2021).

One of the most commented cases on the dialogue between a Member State and the CJEU is the so-called "Taricco Saga"[25]. The Italian Constitutional Court rejected in its entirety the applicability of both CJEU judgments. The Constitutional Court's order to completely disregard the CJEU judgments came to be known as the doctrine – *riserva di legge* (reservation of law)[26]. The first decisions of the courts thus focused primarily on defining the position of EU law in the domestic system. Concerning the CJEU judgments in Taricco II, the Constitutional Court took the view that the implementation of a CJEU judgment must not lead to a violation of the constitutional identity of a Member State. It stressed the need for constitutional dialogue between courts and the protection of Italy's constitutional identity[27].

Kamila Doktór-Bindas explains that the Italian constitutional identity is an essential factor initiating control over the constitutionality of the law and a point of reference for many cases of controversy resulting from membership in the European Union. Indeed, it is the essence of the theory of *controlimiti*[28]. The Italian Constitutional Court has so far not created any definitive catalogue of principles and rights of the individual, and what constitutes an element of *controlimiti* is decided on a case-by-case basis when confronted with a specific case of a potential violation. This body has consistently sought to determine what principle or right constitutes the essence of Italian constitutional identity universally (ECHR, CJEU)[29]. Open-

[25] CJEU judgment of 8 September 2015, ref. C-105/14, Ivo Taricco et al., ECLI:EU:C:2015:555; CJEU judgment of 5 December 2017, ref. C-42/17.

[26] Corte Costituzionale, Comunicato del 31 maggio 2018 – act available on: https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20180531112725.pdf, (accessed on: 15.07.2021).

[27] CJEU judgment of 8 September 2015, ref. C-105/14, Ivo Taricco et al., ECLI:EU:C:2015:555; CJEU judgment of 5 December 2017, ref. C-42/17, M.A.S. and M.B., ECLI:EU:C:2017:936; opinion of Advocate General Yves Bot of 18 July 2017, ref. C-42/17, M.A.S. and M.B., ECLI:EU:C:2017:564.

[28] K. Doktór-Bindas, *Tożsamość konstytucyjna jako controlimite w Republice Włoskiej*, [in:] *Tożsamość konstytucyjna w wybranych państwach członkowskich Unii Europejskiej*, eds. A. Wróbel, M. Ziółkowski, Warszawa 2021, p. 115.

[29] K. Doktór-Bindas, *Tożsamość konstytucyjna*…, p. 115.

ness to European integration processes is also an element of Italian constitutional identity.

The consequences of applying the *controlimiti* theory do not include the option of automatic withdrawal from the European Union in the event of a ruling on the unconstitutionality of the EU law[30]. The protection of the constitutional identity of the Italian State could, in an extreme situation, result in its withdrawal from the European Union. The alternative to this solution, so far preferred by the Italian Constitutional Court, is a constructive dialogue with the CJEU[31]. The *Corte Costituzionale*'s final reaction to the CJEU's Taricco II judgment was expressed in a sentence of 31 May 2018 (Judgment 115/2018). The Constitutional Court moved away from the notion of common constitutional traditions, the essence of which was emphasised by the CJEU in the Taricco II case, in favour of Italian constitutional identity, wishing to mark its independent place in the common European space[32].

K. Doktór-Bindas points out that the EU Member States' attempt to emphasise national constitutional identities in the conditions of multicentric protection of individual rights is always in danger of provoking a conflict. Therefore, the safety of individual rights, which constitutes a sensitive area of contact between the competencies of states and the Union, requires effective and well-thought-out cooperation. Dialogue should take place[33].

[30] K. Doktór-Bindas, *Italexit – realny scenariusz, czy jedynie element polityki włoskiego rządu?*, [in:] *Potentia non est nisi da bonum. Księga jubileuszowa dedykowana Profesorowi Zbigniewowi Witkowskiemu*, eds. M. Serowaniec, A. Bień-Kacała, A. Kustra-Rogatka, Toruń 2018, pp. 185–196.

[31] K. Doktór-Bindas, *Tożsamość konstytucyjna*…, p. 118.

[32] A. Kustra-Rogatka, *Pytania prejudycjalne włoskiego Sądu Konstytucyjnego do Trybunału Sprawiedliwości Unii Europejskiej. Historia trudnego dialogu*, [in:] *Potentia non est nisi da bonum. Księga jubileuszowa dedykowana Profesorowi Zbigniewowi Witkowskiemu*, eds. M. Serowaniec, A. Bień-Kacała, A. Kustra-Rogatka, Toruń 2018, pp. 504–505.

[33] K. Doktór-Bindas, *Tożsamość konstytucyjna*…, pp. 118–119.

2.2.2. In case of France, constitutional identity is analysed during the judicial dialogue[34]. The response to the principle of the priority of Union law is provided by concepts that set the impassable limits of national constitutional orders. The line of jurisprudence adopted after the Constitutional Council decision 2006–540 DC helps to clarify the general relationship between the French and EU directives and defines the division of competencies between the CJEU and the French constitutional judge. Judicial concepts take the form of formulas in French constitutional law that protect national sovereignty and French constitutional identity. This division implies the protection of the essential conditions for the exercise of national sovereignty when assessing the constitutionality of the primary law of the European Union. In the case of the assessment of national measures transposing directives, it refers to rules and principles inherent in French constitutional identity[35].

In the jurisprudence of the Constitutional Council, one can read a position that recognises the existence of features of the national legal order that should constitute an inviolable foundation, not subject to any influence from the progressive integration processes. Thus, the Constitutional Council introduces the concept of a constitutional core into the French constitutional order, based on the notion of identity. It is also linked to the attempt to establish a hierarchy of constitutional norms[36].

It should be stressed that the protection of national sovereignty against deepening integration is stronger than the protection of constitutional identity. Notably, the Constitutional Council has on four occasions found proposed revisions to the EU treaties to

[34] See more: D. Harasiumiuk, *Tożsamość narodowa i konstytucyjna V Republiki Francuskiej*, [in:] *Tożsamość konstytucyjna w wybranych państwach członkowskich Unii Europejskiej*, eds. A. Wróbel, M. Ziółkowski, Warszawa 2021, pp. 47–85; F-X. Millet, *Constitutional Identity in France*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. Ch. Calliess, G. van der Schyff, Cambridge 2019, pp. 132–152.

[35] See https://www.conseil-constitutionnel.fr/en/decision/2006/2006540DC.htm (accessed on: 20.09.2021).

[36] J.P. Kovar, *Vers un statut du droit d'execution du droit communautaire dans la jurisprudence du Conseil constitutionnel*, "Europe" 2007/2, p. 5.

violate the essential conditions for the exercise of national sovereignty. Their ratification in France required a prior amendment to the Constitution. The Constitutional Council has precisely indicated the constituent elements of the conditions for exercising national sovereignty. These included, first and foremost, legal solutions guaranteeing the people's voice in the state's political life within the framework of representative democracy and those concerning the transfer of competencies in critical areas for each state. As a result of the treaty provisions being considered incompatible with the exercise of national sovereignty, Chapter XV "On the European Union" was introduced into the Constitution of the French Republic[37]. In this way, the integration processes were constitutionalised in France, and, at the same time, the different nature of Community (EU) law from the traditional international legal order was emphasised. The protection of national sovereignty has led to a strengthening of the status of EU law in France.

Not only has the Constitutional Council so far not once found a violation of the rules inherent in constitutional identity by national laws implementing EU directives or adapting the national order to EU regulations, but it has also not given sufficient indications to determine the content scope of this concept. The protection of constitutional identity in France is treated as a functional and formal shield. So far, the rule related to constitutional identity allowing for the application of the constitutional reservation has not been singled out. Instead of focusing on the content scope of constitutional identity, the Constitutional Council points to the interplay between national law and EU law[38].

2.2.3. When analysing the meaning of constitutional identity, the example of the Czech Republic is interesting. Jarosław Sułkowski

[37] At the time of its introduction, it was designated as Chapter XIV "On the European Communities and the European Union", on the basis of Constitutional Law No. 93–952 of 27 July 1993.

[38] *Prawa człowieka, społeczeństwo obywatelskie, państwo demokratyczne. Księga jubileuszowa dedykowana Profesorowi Pawłowi Sarneckiemu*, eds. P. Tuleja, M. Florczak-Wątor, S. Kubas, Warszawa 2010, p. 223.

points out that neither from the jurisprudence of the Constitutional Court of the Czech Republic nor the statements of the doctrine can one identify even one element that could be considered an element of the national and constitutional identity of the Czech Republic. For constitutional identity, the invariability clause (*věčnosti clause*) could be of great importance. Its generality and direction of interpretation do not allow the conclusion on the existence of an original, identifying element of Czech statehood[39].

In literature, the authors say that the content of the "legal" constitutional identity is developed by the Czech Constitutional Court and its formation in court case law. The authors argue that it is here where the gap between the "legal" constitutional identity and the "popular" constitutional identity is growing, with significant repercussions for the Czech constitutional order as well as for its relationship with the EU law[40].

The reference to national identity may be treated as an exception from the application of the European Union law due to the country-specific solution. In the Czech Republic, it has not yet been possible to define such an element. Although the limit of the priority of EU law over the constitutional order of the Czech Republic developed in the jurisprudence of the Constitutional Court, it isn't easy to imagine the Czech Republic invoking art. 4(2) TEU in order not to comply with the EU law. This role can instead be fulfilled by invoking the ultra vires plea[41]. It is currently the most critical limitation on EU membership, and therefore, it can be expected that the ultra vires check will co-shape a country's EU membership in practice[42].

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[39] M. Kruk, *Zasada państwa prawa w konstytucji Republiki Czeskiej* (*kilka uwag z punktu widzenia doświadczenia polskiego*), "Acta Universitatis Lodziensis. Folia Iuridica" 2018/84, p. 22.

[40] D. Kosar, *Constitutional Identity in the Czech Republic*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. Ch. Calliess, G. Van der Schyff, pp. 85–113.

[41] M. Bainczyk, *Polski i niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej*, Wrocław 2017, p. 221.

[42] J. Sułkowski, *Tożsamość narodowa i konstytucyjna Republiki Czeskiej*, [in:] *Tożsamość konstytucyjna w wybranych państwach członkowskich Unii Europejskiej*, eds. A. Wróbel, M. Ziółkowski, Warszawa 2021, p. 229.

2.2.4. About Spain, neither the national identity nor constitutional identity has received much attention from public law. These concepts have only marginally appeared in the case-law of the Spanish Constitutional Court[43].

Spain joins the list of EU Member States whose constitutional courts do not accept the principle of primacy's effectiveness in EU law vis-à-vis the Constitution. The Constitutional Court has come up with an original and controversial distinction between the primacy of EU law and the supremacy of the Constitution. It also acknowledges a core of the Constitution – its constitutional identity – that falls outside the scope of primacy. Its content lies in the respect for state sovereignty, basic constitutional structures, and the system of core values and principles in the Constitution, where fundamental rights acquire their substantive nature[44].

The need to refer to identity was mainly related to constitutionalizing the Catalan "nation" in the Community Statute. The Spanish Court also referred to identity issues in Declaration No. 1/2004, concerning the place of European Union law in the legal order of the Spanish monarchy. The TCE's passivity is noticeable compared to the activity of, for example, the Italian *Corte Costituzionale*, which has referred to the concept of identity on several occasions, for the first time as early as 1973 in the Frontini judgment[45].

2.2.5. On the other hand, the doctrine and practice of Austrian law use the notion of fundamental constitutional principles, constitutional principles, instead of constitutional identity. These can only be changed in the constitutional revision procedure, i.e., with the

[43] J. Sułkowski, *Tożsamość narodowa i konstytucyjna Królestwa Hiszpanii*, [in:] *Tożsamość konstytucyjna w wybranych państwach członkowskich Unii Europejskiej*, eds. A. Wróbel, M. Ziółkowski, Warszawa 2021, p. 121.

[44] J. Martín Y Pérez de Nanclares, *Constitutional Identity in Spain*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. Ch. Calliess, G. Van der Schyff, Cambridge 2020, pp. 268–283.

[45] J. Sułkowski, *Tożsamość narodowa i konstytucyjna Królestwa Hiszpanii*, [in:] *Tożsamość konstytucyjna w wybranych państwach członkowskich Unii Europejskiej*, eds. A. Wróbel, M. Ziółkowski, Warszawa 2021, p. 122.

people's consent expressed in a referendum. They constitute the benchmark of scrutiny for constitutional change, which the Constitutional Court carries out. Also, the competence of the Constitutional Court to assess the compliance of laws with the constitution is part of the basic constitutional principle. In this context, it can be concluded that the constitutional principles – *Grundordnung* – form relatively unchangeable norms of the constitution and constitute the identity of the Austrian constitutional system. The concept of an inviolable, even using a total constitutional amendment, the constitutional core has also emerged in doctrine. It stems from the idea of a democratic constitutional state as an institution that protects the autonomy of the individual (their freedom and right to equality)[46].

In the literature, it is said that Austria's constitutional identity comprises the Basic Principles and several other provisions of the Federal Constitution. The Basic Principles rank highest in the Austrian legal order. They form a constitutional core that may not be limited by the EU law. This core concerns the Democratic Principle, the Republican Principle, the Federal Principle, and the Principle of the Rule of Law. It also includes the Principle of the Separation of Powers and the Liberal Principle. The Austrian Federal Constitution is rather "flexible" as far as constitutional amendments are concerned. Such amendments occur at frequent intervals. Thus, special care must be taken when determining which constitutional provisions form part of Austria's constitutional identity beyond the Basic Principles. Some Objectives of the State, as well as several other constitutional norms, qualify as constitutional identity[47].

2.2.6. The concept of constitutional identity is best discussed based on German law. The Federal Constitutional Court (FCC) plays

[46] Sz. Pawłowski, *Tożsamość konstytucyjna Republiki Austrii*, [in:] *Tożsamość konstytucyjna w wybranych państwach członkowskich Unii Europejskiej*, eds. A. Wróbel, M. Ziółkowski, Warszawa 2021, p. 209.

[47] G. Lienbacher, M. Lukan, *Constitutional Identity in Austria*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. Ch. Calliess, G. Van der Schyff, pp. 41–58.

an essential role in "discovering" the individual elements of constitutional identity[48].

The term "constitutional identity" (*Verfassungsidentität*) is not a complete or completed institution. Its essence is the delimitation of the core of German constitutional regulation. In particular, it is about the identification of those constitutional norms within the Basic Law that must be given special significance[49].

Thus, in the German view, constitutional identity shall mean the need to identify certain institutions or constitutional regulations that are "resistant to change" (*änderungsfest*). The doctrinal justification for this construction assumes that if the core of the basic law is modified, the constitutional act will become incoherent, and a new constitutional shape will be given to the state. This modification is only permissible by repealing the entire constitutional act, thus including its "nucleus" and enacting a new constitution.

The concept of constitutional identity is considered in internal and external aspects and a context of a limitation of fundamental rights. This institution shows that it excludes the change of the nucleus of the constitution using an "ordinary" constitutional amendment. Moreover, it prevents the implementation of EU and international commitments that are contrary to constitutional identity. It is also related to the limitation of the constitutional authorities' freedom of action in external relations. Constitutional identity also affects the dogma of fundamental rights[50].

The concept of *Verfassungsidentität* was first used in 1928 by representatives of the doctrine of constitutional law – C. Schmitt

[48] Sz. Pawłowski, *Tożsamość konstytucyjna Republiki Federalnej Niemiec*, [in:] *Tożsamość konstytucyjna w wybranych państwach członkowskich Unii Europejskiej*, eds. A. Wróbel, M. Ziółkowski, Warszawa 2021, p. 304.

[49] German constitutional law doctrine emphasises that identity is a feature of the constitution as a legal act. The institution thus conceived is to be distinguished from the American doctrine's notion of constitutional identity, which refers to the community; see more [in:] A. v. Bogdandy, *Europäische und nationale Identität: Integration durch Verfassungsrecht?*, 2002, p. 156.

[50] See more: Sz. Pawłowski, *Tożsamość konstytucyjna Republiki Federalnej Niemiec*, p. 236.

and K. Bilfinger[51]. Both drew attention to the existence of the norm, arising implicitly from the constitutional provisions, limiting the admissibility of specific substantive changes to the constitution. C. Schmitt called this institution "identity and continuity of the constitution as a whole" (*Identität und Kontinuität der Verfassung als eines Ganzen*)[52]. K. Bilfinger held that the identity of the constitutional system stems from the provisions of the Basic Law[53].

Nowadays, constitutional identity is referred to in art. 79 (3) Grundgesetz (GG), which reads that "No amendment of this Basic Law concerning the division of the Federation into Länder, the principle of participation of the Länder in legislative proceedings or the principles laid down in Articles 1 and 20 shall be permitted". The quoted provision provided the doctrine of constitutional law with a normative basis for inferring the institution of constitutional identity. Part of the doctrine saw in the provision a continuation and normative expression of the idea of C. Schmitt that the limitation of the ability to modify it ensures the permanence (stability) of the constitution, protects its identity and continuity, and that changes to the constitution cannot affect its core. The constitutional principles are protected by the perpetuity clause – art. 1 and art. 20 of the *GG* – thus determine its identity. The exclusion of some issues from the scope of constitutional change means that within the German system, a distinction can be made between the *pouvoir constitutant* and the *pouvoir constitué*, and only the former is the holder of the unchanging matter.

Amendments to the Basic Law under art. 79 (1) and (2) GG, i.e., with the Bundestag, the Bundesrat, and the Federal President, are the result of action by the "*pouvoir constitué*". Article 79 (3) GG places impassable material limits on the amendment of the constitution on these bodies and deprives them – for the duration of the GG – of the possibility to make modifications in the indicated areas. Article 79 (3) GG is intended to prevent a situation in which a constitutional

[51] See [in:] C. Schmitt, *Verfassungslehre*, Berlin 1928; K. Bilfinger, *Der Reichssparkommissar*, Berlin–Leipzig 1928.
[52] C. Schmit, *Verfassungslehre*, p. 103.
[53] K. Bilfinger, *Der Reichssparkommissar*, Berlin–Leipzig 1928, p. 17.

amendment law formally abolishes the existing constitutional system, and a totalitarian regime is legalised. By binding the ordinary legislature, this provision constitutes a regulation for the constitution's protection (*Verfassungsschutzbestimmung*). It also marks the core of constitutional identity (*Kern der Verfassungsidentität*)[54].

The Federal Constitutional Court did not initially use the concept of constitutional identity. Due to Article 79 (3) GG establishing the material limits of a constitutional amendment, this body had to face the question of the unconstitutionality of the Basic Law Amendment Act. The assessment of compliance with inviolable norms was thus an opportunity to speak about the "core" of the constitution and the powers of the original constitutional legislator and the ordinary legislator.

The term "constitutional identity" first appeared in FCC case law when examining the constitutionality of community or EU institutions acts. The constitutional court used the word *Identität der Verfassung* for the first time in the Solange *I* judgment of 28 May 1974. The Federal Constitutional Court examined the admissibility of reviewing the EEC regulation (obligations imposed by Community law) with the fundamental rights laid down in the Basic Law. In interpreting Article 24 GG – the provision authorising the transfer of supreme rights to international institutions – the Court explained that this provision must be construed about the normative constitutional context. It cannot be understood as a provision authorising the modification of the foundations of the Constitution, on which its identity is based through the law-making of international institutions, without amending the Constitution[55]. In the Solange *I* judgment, the FCC stated that the integration clause does not open the way to changes in the basic structure of the constitution without the introduction of a formal constitutional amendment.

The EU institutions are entitled to valid and directly apply legislation on German territory to the extent that the German constitutional authorities cannot legislate. However, art. 24 GG limits

[54] G. Roellecke, *Identität und Variabilität der Verfassung*, [in:] *Verfassungstheorie*, Hrsg. O. Depenheuer, C. Grabenwarter, 2010, § 13, nb 71.
[55] BVerfGE 37, 271 (Solange I), nb 4.

this power of the Community institutions as it does not allow such a modification of the treaties, which would nullify the identity of the existing German constitution by breaking down important constitutional structures[56].

In its judgment on the constitutionality of the Lisbon Treaty, the FCC returned to the concept of constitutional identity and linked it explicitly to art. 79(3) GG[57]. The constitutional court emphasised that non-compliance with art. 79 (3) GG implies a violation of constitutional identity. Thus, it means an unacceptable interference with the legislator's power from the point of view of the democratic principle. The constitutional legislator has not authorized constitutional bodies to dispose of constitutional identity. None of the constitutional organs has the competence to change the constitutional principles covered by constitutional identity. The Federal Constitutional Court guards the inviolability of constitutional identity[58].

The Federal Constitutional Court has clarified that it is also a constitutional imperative for state organs to participate in the European integration. However, the principle of openness to the European integration limits constitutional identity. It includes the principle of democratic self-determination of the people. The instruments for its preservation are the EU principles of conferral of powers and respect for national identity. They express the constitutional foundations of the EU's authority in Germany, acceptable to the system's legislator.

The treaty regulations that transfer competencies to EU institutions with unlimited scope are constitutionally excluded. In the FCC's view, the law giving consent to ratification and the laws accompanying it on constitutional grounds must ensure that European integration is based on the principle of delegated competence. The law should prevent the creation of competencies on the European Union (*Kompetenz – Kompetenz*) or a breach of constitutional identity.

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[56] BVerfGE 73, 339.

[57] FCC judgement on constitutionality of a Lisbon Treaty – BverfGE 123, 27.

[58] Sz. Pawłowski, *Tożsamość konstytucyjna Republiki Federalnej Niemiec*, p. 283.

As the FCC explains, there should be mechanisms to protect the inviolable core of constitutional identity in the event of a clear breach of the limits of competence in the relationship between the EU bodies and the national ones. The FCC has therefore created a mechanism for *ultra vires* control. It consists in verifying whether the EU institutions exceed the competencies granted to them in their actions or not. Based on the principle of subsidiarity, if legal protection is not given at the level of the Union, the FCC can verify whether the activities of the Union institutions fall within the scope of the delegated powers. The FCC shall then assess whether the nucleus of constitutional identity is determined based on art. 23(3) and art. 79(3) GG has been infringed. The assessment made takes into account the constitutional imperative of openness to European integration. In the FCC's view, the existence of such a form of control over the actions of the EU institutions does not violate the injunction of loyal cooperation. It fulfils the EU's demand to respect the constitutional sovereignty of the Member States within the process of dynamic integration. The FCC in its conception has combined the constitutional and EU guarantees of national constitutional identity. The consequence is that the principle of primacy of EU law will only apply based on and within the framework of constitutionally delegated competencies. Both ultra-vires and identity checks can lead to a declaration of the inapplicability of EU law on German territory. To ensure the effectiveness of EU law, both statements, in the context of which constitutional regulations must be interpreted in favour of EU law, can only be exercised by the FCC. The constitutional court further explained that the identity and ultra-vires control might be exercised in the procedures provided for by law so far. Still, the legislator may introduce a new, specific method for exercising this control into the legal system[59].

The FCC in explaining its position stressed that constitutional bodies could only transfer competencies to the EU to the constitutionally permissible extent. Thus, there is no relationship of supremacy (priority) of the EU law over constitutional identity.

[59] Sz. Pawłowski, *Tożsamość konstytucyjna Republiki Federalnej Niemiec*, pp. 284–285.

A judicial EU body within the scope of delegated competence cannot uphold the constitutional limits of integration or protect constitutional identity. Only the FCC has competence in this respect. The competence might also be exceeded if, within the framework of the authority delegated to the EU institutions or beyond its borders, an EU act is applied in such a way, with effect on the German legal area, that it violates national identity. It is also protected by the first sentence of art 4(2) TEU. It is a consequence of the sovereignty of the Member States. Despite the constitutional injunction to participate in integration, the nation must have the last word on its own identity. In this sense, it is constitutionally permissible for the legislator, exceptionally, in the knowledge of international responsibility, not to apply international (EU) law binding on the state in violation of the fundamental principles of the constitution.

Under the EU law, a Member State must provide effective legal protection. Still, questions of the organisation, personnel composition, and financing rules of the judiciary are within the competence of the Member States[60].

The position of the constitutional court that constitutional identity is the constitutional benchmark for assessing the admissibility of further steps in the EU integration was subsequently confirmed in subsequent rulings of the FCC[61].

In the Honeywell case, the FCC stressed that matters determining constitutional identity could not be transferred to the supranational level. Gross infringements of competencies leading to significant shifts of powers in favour of the EU institutions and the detriment of the Member States may result in a declaration of the inapplicability of a Union act on German territory based on a judgment of the FCC. Unlawful imputation of competence by an EU institution is possible in areas other than those protected by constitutional

[60] Sz. Pawłowski, *Tożsamość konstytucyjna Republiki Federalnej Niemiec*, p. 288.

[61] See i.e., FCC judgment of 2 March 2010, BVerfGE 125, 260; FCC judgment of 6 July 2010, (Honeywell), 2 BvR 2661/06; FCC judgment of 19 June 2011, (Anwendungserweiterung), BVerfGe 129, 78; FCC judgment of 18 March 2014, (ESM), BVerfGE 135, 317 (ESM- Vertrag); FCC judgment of 15 December 2015; BVerfGE 140, 317 (Identitätskontrolle).

identity. Still, in the sphere protected by Article 79 (3) GG, they are particularly flagrant[62].

The FCC stated that an element of constitutional identity is the principle of national sovereignty[63]. In its judgment on the Lisbon Treaty, the FCC used the concept of constitutional identity as a criterion to examine the compatibility of the EU treaty law with the GG. The FCC considered itself competent to assess whether the EU law or domestic legislation implementing the EU law violates the separation of powers grossly or adversely affects the constitutional identity defined by the Basic Law[64]. Referring to the concept of constitutional identity, the FCC confirmed that the German legal order is based on inviolable fundamental principles which may not be set against other legal interests. The FCC further stated that the so-called "perpetuity clause" does not allow legislation amending the Basic Law to dispose of the identity of a free constitutional legal order. The FCC said that the Germans' constituent power, which gave itself the Basic Law, wanted to set an impossible boundary to any future political development. Amendments to the Basic Law affecting the principles laid down in Article 1 and art. 20 GG shall be inadmissible. The so-called eternity guarantee even prevents a constitution-amending legislature from disposing of the identity of the free constitutional order[65].

The FCC defined the constitutional identity through the prism of the non-amendable provisions of the German Basic Law and referred to it as an identity taking the form, not of national identity but constitutional identity. Democracy, the rule of law, the principle of the welfare state, the republican form of government, federalism, and the principle of the protection of human dignity and fundamental rights play an essential role in the German legal order. The meaning of constitutional identity is to protect national sovereignty, even when there is no explicit reference to sovereignty in the text of

[62] See more: FCC judgment of 6 July 2010, (Honeywell), 2 BvR 2661/06.

[63] Sz. Pawłowski, *Tożsamość konstytucyjna Republiki Federalnej Niemiec*, pp. 299–301.

[64] See FCC judgment of 30 June 2009, 2 BvE 2/08, 123 BVerfGE 267 (on Lisbon Treaty).

[65] See FCC judgment of 30 June 2009, 2 BvE 2/08, 123 BVerfGE 267.

the Basic Law. It is rather the result of an interpretation of the concept of self-determination (democracy). The FCC has also identified so-called "taboo" areas, including those concerning sovereignty. The areas also contain matters about which European integration should be pursued with extreme caution (it should be limited or even excluded), as the nature of these areas requires the adoption of solutions tailored to the specifics of the states[66].

FCC's constitutional identity seems to be shaped by the reference to relations with the European Union. The FCC recognises that it is difficult to see how the European Union, professing the same principles (Article 2 TEU) and the obligation to respect the national identity of the Member States, Article 4(2) could infringe the core of the Constitution. Bearing in mind that concepts such as democracy, the sovereign state, and the people's power are extremely vague, the German Federal Constitutional Court reserves the right to assess the European Union in all matters relevant to protecting the above principles[67].

To sum up, the concept of constitutional identity has been unfolded by the FCC to frame and control the process of the European integration. The constitutional identity is nowadays mainly associated with art. 79(3) GG. Accordingly, the notion primarily comprises the protection of human dignity, the principle of democracy, the social state objective, and the rule of law. The FCC exercises its control by a fundamental rights review, the *ultra vires* review, and the constitutional identity review. All three types lately seem to have been merged under the umbrella of constitutional identity review. The concept of responsibility for integration requires all German constitutional bodies to respect the European integration agenda and protect German constitutional identity. Art. 4(2) and

[66] See more: C. Tomuschat, *The Defense of National Identity by the German Constitutional Court*, [in:] *National constitutional identity and European integration*, eds. A. Sáiz Arnaiz, C. Alcoberro Llivina, 2013, p. 211; I. Pernice, *Motor or Brake for European Policies? Germany's New Role in the EU after the Lisbon-Judgment of Its Federal Constitutional Court*, [in:] *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts*, eds. J.M. Beneyto, I. Pernice, Nomos 2011, pp. 355–391.

[67] Ch. Tomuschat, *The Defense…*, p. 212.

(3) TEU underpin the necessity of close and constructive judicial dialogue between the ECJ and the national constitutional courts and tribunals[68].

2.2.7. The Polish Constitutional Tribunal discussed the concept of constitutional identity in detail in its judgment on the constitutionality of the Lisbon Treaty (K 32/09). It combined it with the issues of sovereignty, national identity, and the scope of transferring competencies to an international body or organisation. The Tribunal agreed that the concept of sovereignty as supreme and unlimited power, both in a state's internal relations and its external relations, is changing. Sovereignty is no longer seen as an unlimited ability to influence other states or an expression of power not subject to external influence. The state's freedom of action is subject to international legal constraints. At the same time, however, sovereignty is an intrinsic characteristic of a state that distinguishes it from other subjects of international law[69]. The literature stresses that the ability to incur international obligations is what international law inscribes in the state's legal nature and constitutes the state's identity in international law. Thus, it is not a limiting factor of sovereignty, as it originally acts rather as a proof of sovereignty[70].

From the point of view of the impact of the integration processes on the scope of sovereignty, the legal order of the European Union, as compared with the law enacted by international organisations, is distinguished by the wider range of the Union's competencies as compared with other international organisations, the binding character of a significant part of Union law, and the direct effect of Union law in the internal relations of the Member States. To assess Poland's sovereignty after accession to the European Union,

[68] Ch. Calliess, *Constitutional Identity in Germany*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. Ch. Calliess, G. Van der Schyff, Cambridge University Press.

[69] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne*, Warszawa 2004, pp. 135 and n.

[70] R. Kwiecień, *Suwerenność państwa. Rekonstrukcja i znaczenie idei w prawie międzynarodowym*, Kraków 2004, p. 128.

the creation of the basis for membership in the Constitution as an act of sovereign authority of the nation is of decisive importance. Membership in the European Union is furthermore based on an international agreement, ratified according to constitutional rules – with the consent given in a nationwide referendum. The Constitution allows, in art. 90, for delegation of powers to organs of state authority only in certain matters. It means a prohibition on delegating all the powers of a given authority, secondly on empowering all of the powers in a given area, and thirdly a ban on delegating powers as to the substance of the matters determining the gestures of a given organ of state authority. A possible change of the mode and subject of delegation requires compliance with the rigours of amending the Constitution[71].

The Constitutional Tribunal said that the sovereignty of the Republic and its independence, understood as a separate state existence of Poland within its current borders, in the conditions of membership of the European Union under the principles set out in the Constitution, signify a confirmation of the primacy of the Polish Nation to determine its fate. The normative expression of this principle in the Constitution; in particular the provisions of the Preamble, art. 2, art. 4, art. 5, art. 8, art. 90, art. 104(2) and art. 126(1). The sovereignty of the Republic is expressed in the non-transferable competencies of the organs of state authority that constitute the State's constitutional identity. Article 4 of the Constitution provides that the supreme power "belongs to the Nation", which excludes its transfer to another superior. By art. 5 of the Constitution, the Republic shall safeguard the independence and inviolability of its territory, ensure human and civil rights and freedoms. Article 4 and art. 5 of the Constitution, in conjunction with the Preamble, delineate the fundamental relationship between sovereignty and the guarantee of the constitutional status of the individual. They exclude the renunciation of sovereignty, the recovery of which the Preamble to the Constitution confirms as the prerequisite for the Nation to stand up for itself.

[71] CT judgment of 11 May 2005, ref. K 18/04.

The Constitutional Tribunal has explained that the competencies covered by the prohibition of transfer constitute constitutional identity and thus reflect the Constitution's values[72]. In the understanding of the Polish Constitutional Tribunal, the constitutional identity is, therefore, a concept determining the scope of exclusion from the transfer competence of the matters belonging to the "hardcore", cardinal for the foundations of the system of a given state, the transfer of which would not be possible based on art. 90 of the Constitution. Among the catalogue of non-transferable competencies (i.e., those covered by the prohibition of transfer), the Tribunal lists the provisions defining the fundamental principles of the Constitution and the provisions concerning the individual's rights, which determine the state's identity. In particular, these are the requirement to ensure the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, the requirement to ensure better implementation of constitutional values and the prohibition of the transfer of legislative power and competences[73].

The Constitutional Tribunal adds that the guarantee of the preservation of the constitutional identity of the Republic is constituted by art. 90 of the Constitution and the limits to the transfer of competencies set out therein. Article 90 of the Constitution may not be understood so that it exhausts its meaning after a single application. Such an interpretation would result from the assumption that the transfer of competencies to the European Union in the Treaty of Lisbon is one-off and opens the way to further transfers, already without the requirements set out in art. 90. Such an understanding of art. 90 would deprive this part of the Constitution of the features of a normative act. The provisions of art. 90 shall apply to changes to the Treaty provisions constituting the basis of the European Union that occur otherwise than by way of an international

[72] See: L. Garlicki, *Normy konstytucyjne relatywnie niezmienialne*, [in:] *Charakter i struktura norm Konstytucji*, ed. J. Trzciński, Warszawa 1997, p. 148.

[73] K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, pp. 284 and n.

agreement if those changes result in a transfer of competencies to the European Union.

The ECJ has recognised the concept of national identity mentioned in art. 4(2) TEU as a counterpart of constitutional identity in primary European law. As the ECJ points out, one of the aims of the European Union, as indicated in the preamble to the Treaty on European Union, is to fulfil the desire "to strengthen solidarity between their peoples in respect of their history, culture and traditions". The idea of affirming one's own national identity in solidarity with other nations, and not against them, constitutes the essential axiological basis of the European Union in the light of the Treaty of Lisbon.

The preservation of sovereignty in the European integration requires respect for the constitutional limits of the transfer. It is determined by the narrowing of that transfer down to certain matters. A proper balance should be struck between the transferred and the retained competences, consisting in the fact that the competencies comprising the essence of sovereignty (including the establishment of constitutional rules and the control of their observance, the administration of justice, the power over the state's territory, the army and the forces ensuring security and public order), the relevant authorities of the Republic have decisive powers. The concretisation of this principle is precisely the exclusion of giving the delegation of competences a "universal character", and at the same time the prohibition of the delegation "in its entirety of the most important competencies"[74] and to make the transfer of competences conditional upon the observance of the special procedure laid down in art. 90 of the Constitution. The principle mentioned above excludes recognizing that the entity to which the competence has been delegated may extend its scope independently. It has been emphasised in the doctrine that "the Constitution does not authorise a general transfer of sovereignty within a given scope, leaving the detailed determination of competencies to the entity to which the transfer has been made"[75].

[74] L. Garlicki, *Normy konstytucyjne…*, p. 56.
[75] K. Wojtyczek, *Przekazywanie kompetencji…*, p. 120.

Both modifications of the scope of the delegated competencies and their extension are possible "only using concluding an international agreement and subject to its ratification by all interested states"[76].

From the point of view of the fundamental principles of the Union, an interpretation of the treaty provisions aimed at an overthrow of national sovereignty or a threat to national identity, to an extra-treaty assumption of sovereignty within the scope of competences that have not been transferred, would be contrary to the Treaty of Lisbon. The Treaty explicitly confirms the importance of preserving sovereignty in European integration, which is fully consistent with the determinants of the culture of European integration formulated in the Constitution.

Mutual loyalty between the Member States and the Union they form remains an important marker of the culture of the European integration. The European integration is proving its worth by striking a balance between modernisation, which is indispensable in today's world, and the preservation of national traditions based on a transnational cultural community"[77].

2.2.8. The above review of literature and case law on the understanding of constitutional identity does not provide for a single answer to this category. In the domestic context, constitutional identity is a feature or set of features of a public authority or constitutional law institution resulting from interpreting constitutional provisions. It is also descriptively recognised as shaping a legal institution, reproduced from the binding legal requirements. Such an understanding is associated with the principle of separation of powers. Constitutional identity will consist of the essence of competencies or the nature of the institution of constitutional law. A change in the identity so understood would require a difference in the constitutional provisions that determine the separation of state functions and the assignment of those functions to specific bodies.

[76] L. Garlicki, *Normy konstytucyjne…*, p. 57.
[77] See CT judgemetn of 24 November 2010 r., ref. K 32/09.

The indicated understanding of identity may serve as an argument against any action that would violate the original constitutional division of competencies.

In the external (EU) context, constitutional identity is an ambiguous expression that is used both about the treaty-defined objectives of the EU and the interpretation of the Article 4(2) TEU, and in statements about constitutional values, constitutional principles, and institutions of constitutional law. Determining the impact of constitutional identity on the formation of relations between EU institutions and public authorities of the EU Member States depends on which conception of constitutional identity one adopts. The operationalisation of constitutional identity – made in the jurisprudence of constitutional courts and tribunals, and referred to by the CJEU – makes it possible to make this category a justification in shaping the relations in question.

Anna Śledzińska-Simon draws attention to the possibility of applying the three-part model of identity, existsting in the social sciences, to constitutional identity. It assumes that creating the identity of the subject of power in the state takes place in three dimensions: individual, relative and collective[78].

In the individual dimension, in case of a nation-state, it may, in some cases, overlap with national identity. It is based on a conception of the self as distinct from others. National identity is often created about others presented as potential enemies to its integrity, independence, or distinctiveness. Individual identity is responsible for such actions of the constitutional subject that aim to emphasise the value of one's own culture, traditions, and distinctiveness. In this context, individual constitutional identity is an expression of the specific constitutional content of the rights promulgated in the time and place defined by the constitutional framework. Although these rights contain a moral and axiological charge, they differ from the moral norms that are valid for all people regardless of time and place[79].

[78] See more: A. Śledzińska-Simon, *Koncepcja…*, pp. 351–352 and the literature cited by the Author.

[79] A. Śledzińska-Simon, *Koncepcja…*, p. 354.

The relative dimension of constitutional identity describes the relationships between the constitutional self and other actors, such as other nation-states and intergovernmental organisations. The key issue is to determine the extent to which a state's constitutional identity is created by relating it to universal principles of international law. In particular, this concerns international standards of human rights protection, compliance with international treaties and cooperation with other states. This part of the identity-building process is based on respect for others and otherness by adopting an attitude of openness to dialogue and cooperation. It can be built primarily on the adoption of and compliance with international human rights standards and the judgments of international courts[80].

The concept of constitutional identity has emerged in the context of the struggle for priority and primacy of EU law over the constitutions of the Member States and in response to the problem of loss of sovereignty. On a collective level, constitutional identity is built on the common values and objectives of the European Union. The recognition of the same values and goals as embodied in art. 2 TEU presupposes respect for all the Member States. The collective dimension of constitutional identities concerns international cooperation (integration) within structures such as the European Union, created based on shared values and goals, and may clarify the relationship between the Member States and the European Union as a distinct constitutional entity.

Constitutional identity in a specific formulation may also indicate the impassable framework of making changes in the constitution – and in consequence, the scope of the influence of EU institutions in the system of state organs. Constitutional identity is thus a determinant of the pace and depth of the integration process. Suppose constitutional identity marks the impassable limits of constitutional change due to external factors. In that case, this may lead to a stage at which it will be impossible to fulfil international obligations imposing, directly or indirectly, changes to the political

[80] M. Kumm, *Democractic Constitutonalism Encounters International Law: Terms of Engagement*, [in:] *The Migration of Constitutional Ideas*, ed. S. Choudhry, University Press 2007, pp. 256, 277.

system. Because references to national identity have appeared in the jurisprudence of the constitutional courts and tribunals of the EU Member States, it is necessary to clarify the relationship between constitutional identity and national identity.

Because the concept of constitutional identity may raise doubts about its content, one should assume such a meaning that can be used in practice to justify decisions of public authorities, including decisions related to the introduction of system changes and shaping international relations.

It should be emphasized that despite the transfer of ideas and the formulation of a catalogue of values common to the EU Member States, it is impossible to provide a single definition of constitutional identity. It is justified – as the constitutional courts and tribunals in different countries intuitively do – to reconstruct this identity, based on the constitutional order of a given state. In particular, the constitutional identity as a kind of system ID should be searched for in the texts of the constitution (regardless of what form they take in individual countries). In particular, it should be derived from the supreme principles, provisions relating to an individual's status and those provisions that shape the axiology of the constitution. In this way, individual states define relatively stable and impassable limits of interference in their systems, as well as the permissible framework for introducing amendments to the constitution.

3. Constitutional identity versus national identity in Article 4(2) TEU

The issue of constitutional identity started to become popular in connection with the Treaty of Lisbon and the determination of the current wording of Article 4 of the Treaty on the European Union. The interpretation of the treaty provision and its relation to the national understanding of constitutional identity became the subject

of consideration by constitutional courts and tribunals[81] and the CJEU[82] in cases such as Michaniki[83], Melloni[84] and Akerberg[85].

Several principles can be deduced from Article 4 TEU that determine the relationship between the EU and the Member States. Article 4 (1) TEU establishes the principle of limited conferral of powers to the EU. Finally, Art. 4 (2) TEU establishes the principles of respect for the national identity of Member States, the equality of the Member States and the guarantee of the essential state functions of Member States. Art. 4 (3) TEU contains the principle of loyal cooperation between the EU and the Member States[86].The literature indicates that constitutional identity through art. 4(2) TEU is an element of the EU treaty law[87]. According to this provision, "the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental

[81] K. Wójtowicz, *Sądy konstytucyjne wobec prawa Unii Europejskiej*, Warszawa 2012, pp. 118–129; A. Kustra, *Sądy konstytucyjne a ochrona tożsamości narodowej i konstytucyjnej państwa członkowskich Unii Europejskiej*, [in:] *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, eds. S. Dudzik, N. Półtorak, Warszawa 2013, pp. 51–78; J. Barcz, *Wybrane problemy związane z wyrokiem niemieckiego Federalnego Trybunału Konstytucyjnego z 30.06.2009 r. na temat zgodności Traktatu z Lizbony z Ustawą zasadniczą RFN*, "Europejski Przegląd Sądowy" 2009/9, p. 16 and n.; M. Ziółkowski, *Mozaika*…, p. 16.

[82] K. Kowalik-Bańczyk, *Tożsamość narodowa – dopuszczalny wyjątek od zasady prymatu?*, [in:] *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, eds. S. Dudzik, N. Półtorak, Warszawa 2013, pp. 29–50; M. Safjan, *Pomiędzy Mangold a Omegą. Prawa podstawowe versus tożsamość konstytucyjna* (*perspektywa orzecznicza*), [in:] *Problemy polskiego i europejskiego prawa prywatnego. Księga pamiątkowa Profesora Mariana Kępińskiego*, eds. K. Klafkowska-Waśniowska, M. Mataczyński, R. Sikorski, M. Sokołowski, Warszawa 2012, pp. 535–544; A. Wróbel, *Tożsamość narodowa czyli różnorodność w jednorodności*, "Europejski Przegląd Sądowy" 2012/8, p. 1; L.F.M. Besselink, *National and constitutional identity before and after Lisbon*, "Utrecht Law Review" 2010/6/3.

[83] CJEU judgment of 16 December 2008, ref. C-213/07, Michaniki AE v. Ethniko Symvoulio Radiotileorasis et. Al., ECLI:EU:C:2008:731.

[84] CJEU judgment of 26 February2013, ref. C-399/11, Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107

[85] CJEU judgment of 26 February 2013, ref. C-617/10, Åklagaren p. Hans Åkerberg Fransson, ECLI:EU:C:2013:105.

[86] A. v. Bogdandy, S. Schill, *Overcoming absolute primacy: respect for national identity under the Lisbon treaty*, "Common Market Law Review" 2011, vol. 48, p. 1425.

[87] A. Śledzińska-Simon, *Koncepcja*…, p. 349.

structures, political and constitutional, including their regional and local self-government. […]". Some authors interpret art. 4(2) 2 TEU as an exception to the priority rule. Others see it only as a "footnote" to the integration process[88].

According to Monica Claes, this provision is part of the EU law. According to this understanding, the CJUE aims to determine whether the national authorities' argument relating to constitutional identity is permissible and whether it can justify departing from the principle of uniform application of the EU law, thus allowing national law to be incompatible with the EU or to derogate[89].

Among the many meanings attributed to the treaty expression of "national identity", attention is drawn to the view emphasising the convergence of purposes in scope with the term "constitutional identity"[90] and to the statement emphasising that constitutional identity is semantically contained in national identity[91]. National identity in art. 4(2) TEU has been analysed, among other things, in the context of:

- the argumentation strategy in proceedings before the CJEU[92],
- dialogue with constitutional courts and tribunals of the Member States[93],

[88] G. Martinico, *What Lies Behind Article 4(2) TEU?*, [in:] *National Constitutional Identity and European Integration*, ed. A.S. Arnaiz, C.A. Llivina, Cambridge 2013, p. 100.

[89] M. Claes, *National Identity: Trump Card or Up for Negotiation?*, [in:] *National Constitutional Identity and European Integration*, eds. A.S. Arnaiz, C.A. Llivina, Cambridge 2013, p. 112. See also: M. Claes, J.-H. Reestmann, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, "German Law Journal" 2019, vol. 16, No. 4, pp. 932–934.

[90] E. Cloots, *National Identity in EU Law*, Oxford 2015, pp. 168–169; K. Kowalik-Bańczyk, *Tożsamość…*, p. 46; M. Ziółkowski, *Mozaika…*, p. 17.

[91] F.C. Mayer, *Rashomon in Karlsruhe: A reflection on Democracy and Identity in the European Union*, "International Journal of Constitutional Law" 2011/9, p. 757 and 781; T. Konstadinides, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, "Cambridge Yearbook of European Legal Studies" 2011/13, pp. 195–197.

[92] I.e. the question if the protection of constitutional identity is gradable and can it constitute an argument in the test of proportionality of limitations.

[93] I.e. the question if the CJEU can adopt a different understanding of the constitutional identity of the state than that developed in national constitutional case-law.

– the conflict with the principle of primacy of the EU law[94],
– the exercise of competencies by the EU institutions[95],
– the allegation of ultra vires action[96].

Some of the above issues have returned in connection with the strong reaction of some supreme courts to the CJEU case law[97]. Finally, the Taricco saga became the culmination and a new opening for the protection of constitutional identity[98].

Michał Ziółkowski points to five fundamental contexts in legal science in which the concept of constitutional identity plays an important or even central role[99].

The first one is described by M. Polzin and boils down to a discussion about the interpretation of Article 4(2) TEU. In particular, the relationship between the concept of constitutional identity and national identity is considered[100]. The second context concerns the permissibility of a state as a subject of international law to invoke the need to protect its own constitutional identity from justifying its reservations to an international agreement or from evading the application of an already concluded international agreement. The third perspective is a continuation of the reflections of the theorists of constitutionalism of the Weimar Republic period, including all the above findings of C. Schmitt on the identity of the political community and the function of the constitution understood as a set of

[94] I.e. the question if the protection of identity is an exception to the principle of primacy.

[95] I.e. the question if these bodies always have a treaty obligation to assess the degree of interference of the adopted act with constitutional identity.

[96] I.e. the question if interference with the constitutional identity of a state constitute an action outside the law, which is by definition ineffective. See more: K. Wójtowicz, *Kontrola konstytucyjności aktów Unii Europejskiej podjętych ultra vires – między pryncypiami a lojalną współpracą*, [in:] *W służbie dobru wspólnemu*, eds. R. Balicki, M. Masternak-Kubiak, Warszawa 2012, p. 518.

[97] See i.e. CJEU judgments of 16 June 2015, ref. C-62/14, Peter Gauweiler et al. v. Deutscher Bundestag, ECLI:EU:C:2015:400; of 19 April 2016, ref. C-441/14, Dansk Industri (DI) p Sucession Karsten Eigil Rasmussen, ECLI:EU:C:2016:278.

[98] P. Faraguna, *The Italian Constitutional Court in re Taricco: "Gauweiler in the Roman Campagna"*, 31 January 2017.

[99] M. Ziółkowski, *Mozaika…*, p. 19.

[100] M. Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, "German Law Journal" 2017/18/7, p. 1597.

values of this political community or the constitution understood as a normative act[101]. In the fourth perspective, constitutional identity is treated as a feature of the political community (e.g., the nation) expressed in the constitution and shaped by it in the historical process. The last perspective refers to the reflection on the constitutional aspects of the migration of individuals.

The concepts of constitutional identity and national identity also serve as an argument and justification for the ethno-cultural interpretation of the constitution[102]. Interpreting the position of K. Kovács, Michał Ziółkowski points out that in the presented approach – which stems mainly from the judicial decisions – constitutional identity is perceived statically, as a set of features that distinguish a particular state from other states; features that sometimes require absolute protection. Protection prevails in the case of conflict over the state's international obligations or the protection of human rights. In this way, constitutional identity may be an argument to justify the evasion of an EU Member State from its obligations arising from membership of a particular international structure[103].

Alternatively, in doctrine, it has been proposed that national and constitutional identity be discussed within the concept of common constitutional traditions of the Member States[104].

The jurisprudence of the constitutional courts and tribunals provides no basis for equating the expression of constitutional identity with the treaty concept of national identity or the EU concept of constitutional identity derived from it. The legal basis for the injunction to respect national identity is primary the EU law, whereas the legal basis for the demand to respect constitutional identity is

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[101] C. Schmitt, *Nauka o konstytucji*, tł. M. Kurkowska, R. Marszałek, Warszawa 2013, pp. 26–37, 184–185.

[102] See: K. Kovács, *The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Court*s, "German Law Journal" 2017/18/7, pp. 1703–1720.

[103] M. Ziółkowski, *Mozaika*…, p. 22.

[104] F. Fabrini, O. Pollicino, *Constitutional identity in Italy. Institutional disagreements at a time of political change*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. Ch. Calliess, G. van der Schyff, Cambridge 2020, pp. 220–221.

constitutional provisions. The scopes of the EU injunction to respect the national identity and the constitutional injunction to respect constitutional identity are not identical. Article 4(2) TEU provides national identity, inseparable only from fundamental political and constitutional structures. Michał Ziółkowski considers that it is more reasonable to interpret art. 4(2) TEU. The scope of the article covers only certain elements of a Member State's identity[105]. The range of application of the EU injunction to respect national identity will vary from one Member State to another. The treaty qualification of well-established constitutional customs differs from that of a state with an unwritten constitution allowing for customary law to a state whose territory is governed by a single act of constitutional rank, providing for a closed catalogue of sources of law, including only normative acts[106]. The constitutional courts or tribunals of those states determine the scope of constitutional identity in individual states[107].

The addressees of the injunction to observe constitutional identity and the treaty injunction to respect national identity are different in the case ref. K 32/09, the Constitutional Tribunal found that the concept of constitutional identity, on the one hand, sets a limit to the competence of the Polish legislator, and on the other hand – empowers the Tribunal to assess whether this limit has been exceeded. The notion of national identity, on the other hand, is addressed to the CJEU as the guardian of the principle of the priority and primacy of the EU law[108].

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[105] K. Kowalik-Bańczyk, *Tożsamość*..., p. 45; opinion of General Advocate M. Poiaresa Madura of 8 October 2008, ref. C-213/07, Michaniki AE p. Ethniko Symvoulio Radiotileorasis, point 33.

[106] See: E. Cloots, *National*..., p. 166.

[107] M. Ziółkowski, *Mozaika*..., p. 34.

[108] It is considered that while the constitutional courts of the Member States are competent to define constitutional identity, it is incumbent on the CJEU "to verify that the assessment made is compatible with the fundamental rights and objectives whose respect is ensured by the Union within the Community framework" (opinion of General Advocate M. Poiaresa Madura of 20 May 2005, ref. C-53/04, Cristiano Marrosu, Gianluca Sardino p. Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate, point 40).

In domestic law, the protection of constitutional identity is a matter of internal law; from the perspective of the CJEU, the protection of national identity must be integrated into the complex system formed by the principle of primacy and the principle of uniform application of the EU law. It must not lead to a mechanical undermining of the autonomy of the EU law[109]. In the CJEU, the concept of national identity, including constitutional identity, is embedded in the idea of constitutional pluralism.

There is a different application in the case-law of the injunction arising from the provisions of the TEU and the requirement to protect constitutional identity arising from national law. The CJEU points out that the Treaty injunction to protect national identity, including constitutional identity, does not justify a Member State's authorities in refraining from applying of the EU law which, in the opinion of those authorities, may infringe the said identity[110]. The case law does not derive an autonomous exception from art. 4(2) TEU and objecting by a Member State before the CJEU law violates constitutional identity constitutes an additional justification for applying an already existing exception to the Treaty or case-law (e.g. the public policy exception)[111].

The consideration of the protection of national identity is sometimes treated as an argument in the proportionality test, when the CJEU assesses a limitation introduced by a Member State's legislature. The European Union may only respect such an identity when it has been formulated unambiguously and explicitly in the constitutional law of the Member States and does not violate the foundations of the Treaties[112].

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[109] See: opinion of General Advocate Nilsa Wahla of 10 April 2014, ref. C-58/13 i C-59/13, Angelo Alberto Torresi p. Consiglio dell'Ordine degli Avvocati di Macerata, Pierfrancesco Torresi p. Consiglio dell'Ordine degli Avvocati di Macerata.

[110] CHEU judgment of 22 December 2010, ref. C-2018/09, Ilonka Sayn-Wittgenstein p. Landeshauptmann von Wien, ECLI:EU:C:2010:806.

[111] See also: K. Kowalik-Bańczyk, *Tożsamość…*, pp. 48–49.

[112] Ch. Calliess, G. van der Schyff, *Constitutional Identity Introduced and Its EU Law Dimension*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. Ch. Calliess, G. van der Schyff, Cambridge 2020, p. 5.

In the doctrine, one can find a postulate to separate the analysis of the notions of the constitutional identity and the treaty concept of national identity. Their scopes are only partly convergent.

The Treaty on European Union refers to national identity in the context of competencies delegated to the Union. Articles 4 and 5 TEU aim to work out specific limits of cooperation between sovereign states. It may be based on the assumption that each state has its peculiarities resulting from nation-building factors such as history, culture, language, the consciousness of origin, national awareness, blood ties or attitude to cultural heritage. A national identity defined in this way is not referred to in art. 4 TEU. It does not include the foundations of sovereign states' political and Treaty positions within the European Union. The Union is also a subject of law. Its functioning must be based on certain institutional rules created by the Member States based on their constitutional provisions and, already within the framework of delegated competencies, based on European Union law. The diversity of legal orders also requires the identification of fields of cooperation and, possibly, the identification of specific conflict rules between the legal order of the European Union and the national legal systems.

The concept of respect for national identity, which determines the effectiveness of the institutional functioning of the Union, may become such a collision mechanism. Constitutional identity is thus strongly linked to the fundamental law of a Member State. Although a modern democratic state is a constitutionally universal state, constitutional provisions may determine the individual characteristics of a given country. National identity and constitutional identity cannot, however, be reduced exclusively to legal issues, for as M. Zirk-Sadowski aptly points out: "The law itself cannot provide an answer to the question: why do we need a constitutional identity? The answer to this question goes beyond the limits of positivist discourse. Only in political discourse can we determine what we consider the essence of our political community and what concept of man and citizen we want to realise[113].

[113] J. Sułkowski, *Tożsamość narodowa i konstytucyjna Republiki Czeskiej*..., pp. 227–229.

Whether and to what extent sovereignty has been transferred from the member states to the European Union (EU) remains a central topic of debate within the EU and is linked to issues such as *Kompetenz-Kompetenz*, direct effect and primacy. Central to any claim to sovereignty is the principle of primacy, which requires member states to uphold the EU law over national law in the event of a conflict. However, limitations to the principle of primacy can traditionally be found in national case law. The Maastricht Treaty introduced a possible regulation at the EU level by requiring the EU to respect the national identities of member states. The Lisbon Treaty provided minimal further support for the primacy principle while developing the national identity provision found in art. 4(2) TEU. The literature, national constitutional courts or tribunals and the CJEU indicate that this provision is gaining strength as a legal tool and is likely to have a broader scope than its text would suggest. In its new role, art. 4(2) TEU reinforces Member States' claims to sovereignty and the possibility of upholding key aspects in conflict with EU law and the principle of primacy. It is central to the relationship between the Member States' constitutional courts or tribunals and the CJEU.

There is a question of the national identity under art. 4(2) TEU the function of preserving the Member States' "sovereignty" within the integration process and counterbalancing the integrative powers such as supremacy and direct effect. The provision does not define a specific content of national identity. It rather appears as a mechanism to protect diversity represented in the structures of the Member States: stating the equality of Member States (an aspect of pluralism), the respect for their national identities, fundamental structures, political and constitutional, for essential State functions, for ensuring the territorial integrity of the State, for maintaining law and order and safeguarding national security. This list of goods, which addresses the protection of essential state structures and functions, clarifies that it cannot serve as an instrument to undermine the functionality of the EU on the domestic side. In this sense, it is the Union's functionality that preserves the legal order of the EU and sets the limits of interpretation of any reserve of national identity or any domestic restriction that may be derived from art. 4(2) TEU.

Timmermans argues that art. 4(2) TEU is not codifying constitutional pluralism into primary law, but it only "integrates the legitimate claim of national constitutional core values into the EU legal system itself"; in his view, art. 4(2) TEU provides absolute protection that excludes balancing a national identity against other interests. By contrast, where the CJEU has ruled on art. 4(2) TEU did not use the provision as an absolute reserve of national sovereignty, but rather as an additional interest of a Member State which has to be taken into consideration when balancing various interests (thus in a relative meaning). Similarly, Konstadinides refers to the case Sayn-Wittgenstein to maintain that, when balancing interests, the national identity does not enjoy a higher status than public policy interests and that a rigorous proportionality assessment against other legal interests is relevant for the advancement of integration needs to be applied. He concludes that the national identity should be broadly construed according to the traditional democratic values underpinned in art. 2 TEU[114].

Oliver Mader points out that both ideas should be read together: the immense advantage of integrating a counterbalance like national identity under art. 4(2) TEU into UE law is that the Member States would defend their national interests in terms of the Union law in a value debate and not by resorting to a national concept of sovereignty or democracy. Any remaining argument about sovereignty must acknowledge that it is of de-nationalised and shared nature and subject to an integrated balancing of interests that duly considers the core foundational values of art. 2 TEU and "EU-identity". It will be of particular significance for the acceptance and enforcement of values[115].

The above means that the national identity mentioned in art. 4 (2) TEU should guarantee the nation-state in protecting its sovereignty and constitutional identity; it is not always interpreted in this

[114] Cited by O. Mader, *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law*, "Hague Journal on the Rule of Law" 2019, 11, p. 148 and literature cited by the Author.

[115] O. Mader, *Enforcement…*, p. 149.

spirit. There is a strong desire to give priority to common EU values, irrespective of national identity. The problem is that the meaning of these values will not always correspond in practice to what results from the constitutional identity of individual states.

One of the main problems in using the principles mentioned above is that national identity is a concept embodied in a normative act in an international agreement. In contrast, constitutional identity is primarily shaped in the jurisprudence of constitutional courts and tribunals and through doctrine. This is likely to result in different understandings of constitutional identity across EU Member States and, therefore, different potential limits to EU interference in this sphere of the state.

4. Limits to the exercise of competencies by the EU and public authorities in the face of constitutional identity

With the importance of constitutional identity and national identity recognised, it is necessary to consider the competencies of the EU and its bodies and what their sources are. It is also required to indicate the limits of the transfer of competence and determine whether the transfer limit is the category of constitutional identity.

These considerations will help to identify where the integration process is heading and whether it has any limits. In particular, it should be considered whether the constitutional identity may be the limit. The functioning of the European Union is based on the transfer of competencies (conferral of competencies). The transfer takes place under certain conditions, namely, using an international agreement requiring ratification.

The European Union has only the competencies conferred on it by the Treaties (principle of conferral). The Lisbon Treaty clarifies the division of competencies between the EU and the EU countries. It means that the organisation can only act within the limits of the competencies granted by the EU countries under the Treaties to achieve the objectives set out therein. Competences not conferred upon the EU by the Treaties remain with the EU countries. These competencies are divided into three main categories:

exclusive competencies, shared competencies and complementary competencies[116].

Exclusive competencies are areas in which the EU can legislate and adopt binding legal acts on its own. EU countries have the right to do the same only when acting under authority from the EU (customs union, establishing the competition rules necessary for the functioning of the internal market, monetary policy for the Eurozone countries, conservation of marine biological resources under the common fisheries policy, common commercial policy, the conclusion of international agreements under certain conditions)[117].

Shared competencies are those in which the EU and the EU countries can legislate and adopt binding legal acts. The EU countries exercise their competencies in areas where the EU does not exercise or decides not to exercise its competencies. Shared competencies between the EU and the EU countries concern the following areas: internal market, social policy, but only for aspects explicitly dealt with in the Treaty, economic, social and territorial cohesion (regional policy), agriculture and fisheries (except for the protection of marine biological resources), environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice, shared security concerns for public health matters limited to the scope set out in the TFEU, research, technological development, space, development cooperation and humanitarian aid[118].

Complementary competencies are that the EU can only intervene to support, coordinate or supplement the actions of the EU countries. Legally binding EU acts may not require harmonisation of the laws and regulations of the EU countries. Supporting competencies concern the following areas: protection and improvement of human health, industry, culture, tourism; education, vocational training, youth and sport, civil protection, administrative cooperation. In

[116] Art. 2 Treaty on the Functioning of the European Union. See more about changes in the area of EU competencies: A. Benz, Ch. Zimmer, *The EU's competences: The 'vertical' perspective on the multilevel system*, "Living Reviews in European Governance" 2000, vol. 5, No. 1.

[117] Art. 3 Treaty on the Functioning of the European Union.

[118] Art. 4 Treaty on the Functioning of the European Union.

addition, the EU may have specific competencies. The EU can ensure that EU countries coordinate their economic, social, and employment policies at the EU level[119].

The EU's Common Foreign and Security Policy is characterised by certain institutional features, such as the limited participation of the European Commission and the European Parliament in the decision-making procedure and the exclusion of legislative action. The policy is defined and implemented by the European Council (composed of the heads of state or government of the EU countries) and the Council (consisting of representatives from all EU countries at the ministerial level). The President of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy represent the EU on the common foreign and security policy.

The exercise of EU competencies is subject to two fundamental principles set out in Article 5 of the Treaty on European Union. These are the principle of proportionality: the content and scope of EU action shall not exceed what is necessary to achieve the objectives of the Treaties, and the principle of subsidiarity: in areas which do not fall within its exclusive competence, the EU shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the EU countries and can therefore be better achieved by the EU.

The EU's competencies derive from the Treaties, which means that the EU Member States have defined the EU's areas of competence. The transfer of competencies of state authorities can only cover "certain matters" and the scope of the competencies transferred by the Accession Treaty is strictly defined. The European Union does not have a general competence (only states have it under their sovereignty) but a specific competence. The transfers of competence that were made by the Accession Treaty are strictly limited in scope. The scope of the competence delegated to the European Union may be extended only with the consent of the Member State.

The delegation of powers for certain matters must be understood as both

[119] Art. 6 Treaty on the Functioning of the European Union.

- a prohibition on transferring the entirety of the competence of the body in question,
- a prohibition of delegation in respect of the whole of the matter in question,
- a prohibition on delegation in respect of the substance of the issues which determine the competence of the authority concerned.

Therefore, it is necessary to define precisely the areas and indicate the scope of the competencies to be transferred.

Actions by which the transfer of competencies would undermine the existence or functioning of any state authority would be contrary to the Member States' constitutional orders.

Competences of public authorities cannot be transferred to the extent that would make the state a sovereign and democratic state. The limits of the delegation are determined in each case by constitutional identity, and this is a concept that may express different issues for the other Member States.

These remarks lead us to reflect on how far a nation-state needs to bring its constitution in line with the objectives of European integration to fulfil the international obligations it has assumed, and at the same time, not to lose its sovereignty and what it defines in its internal order as its constitutional identity.

What is dangerous is that even within the internal system, different state bodies may understand the given identity in different ways, and this already causes the limits of impassable interference of EU bodies in the design and competencies of constitutional state bodies to become blurred, and this leads to the relativisation of relations between the EU and the nation-state. As an example, one can cite the position of the Polish Ombudsman concerning the preliminary questions of the Supreme Court regarding the Disciplinary Chamber of the Supreme Court. The Ombudsman concluded that:

1. the invocation by a Member State of a clause for the protection of national identity does not authorise the State's authorities to derogate on their own from their obligations under Union law. The national authority must conduct a constitutional dialogue with the CJEU based on art. 267 TFEU and for the CJEU to recognise the

admissibility and correctness of the State's invocation of considerations of constitutional identity in the light of art. 4(2) TEU;

2. the interpretation of the constitutional identity of a Member State must not affect the substance of European Union law. The exclusion of national courts from the requirements of effective judicial protection may lead to a permanent and irremediable weakening of the European Union legal order, interfere with the autonomy of European Union law and nullify its uniform application and full effectiveness.

The lack of a clear and uniform position of the state (its organs) to which one should refer to the understanding of constitutional identity makes it difficult to indicate the clear boundaries. However, such limits should be derived by the Constitutional Tribunal and regarded as binding upon all organs of public authority. Indeed, the Constitutional Tribunal is the best body competent to interpret the Constitution and its provisions.

5. Conclusions

Referring to the issue of constitutional identity, R. Grzeszczak points out that: "the national perspective imposes the location of the fundamental structures and values of the national normative order beyond the reach of European supremacy. Where the European law would violate the identity of the national constitutional order, the law opposes it"[120].

The answer to the question of whether the EU and its organs can shape the constitutional system of the constitutional organs of the Member States, and if so, to what extent, as well as whether given actions can lead to obligatory constitutional changes can be provided through the prism of the concept of constitutional identity.

[120] R. Grzeszczak, *Federalizm wykonawczy w Unii Europejskiej – o dwóch rządach na jednym terytorium i pluralizmie konstytucyjnym*, [in:] *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, eds. S. Dudzik, N. Półtorak, Warszawa 2013, p. 162.

So far, constitutional identity has been used as a theoretical and doctrinal concept in the discussion on the grounds, forms and limits of constitutional change. In the context of the European integration, identity has been referred to when considering the admissibility of the control of the boundaries of the transfer of competencies of the Member States of the European Union and the related subsequent changes (formal or informal) of the constitutions of the Member States.

It should be emphasised that to determine the limits of integration, and thus also the boundaries of the EU's influence on the amendment of constitutional provisions concerning the competencies of state organs; it is useful to assume that constitutional identity is a bundle of unchangeable or relatively unchangeable legal conditions, constitutional values or legal institutions or the competences of constitutional organs that are not subject to transfer to an international organisation. It is a feature either of a particular democratic state or the Constitution itself as a normative act.

In a static view, a relatively stable and unchanging set of only the most important constitutional norms, values or institutions arising from the constitution and reconstructed mainly by constitutional courts or tribunals and law doctrine. In dynamic terms, constitutional identity is worked out in constitutional discourse. It is based not only on constitutional provisions but also on constitutional history and experience.

And although the literature emphasises that constitutional identity (referring to the national system) is not synonymous with national identity as referred to in the TEU, this does not imply a complete lack of connection between national and constitutional identity. Under specific historical, social, legal and political conditions, the uniqueness of two different imagined communities may be concerning each other.

Theoretical accounts of constitutional identity have been conceived neither as a criterion for controlling the law's constitutionality nor as a legitimation of national identity nor a tool for judicial dialogue in a multilevel jurisdiction. It is only in M. Troper's view that constitutional identity as located in the constitution determines

the scope of the constitutional principles fundamental to the normative act[121].

Judicial consideration of constitutional identity does not correspond with dynamic theories of identity and its discursive functions. Judiciary and the literature of legal science use the concept of constitutional identity in the process of systematisation of constitutional norms (e.g. constitutional identity as a determinant of the hierarchy of constitutional norms), argumentation (e.g. constitutional identity as a treaty-justified exception or determinant of ultra vires action) and decision-making (e.g. constitutional identity as a benchmark for the control of constitutionality of primary or derived EU law).

The jurisprudence of constitutional courts and tribunals at the current stage of development does not provide clear answers to whether judicial considerations of constitutional identity shape new tools of judicial review vis-à-vis already existing and applied jurisprudence.

Regardless of theoretical and doctrinal disputes, practice deals with the issue precisely by drawing on constitutional principles and referring to constitutional identity. Since the constitutional courts or tribunals have the power to review the procedure and the scope of the transfer of competencies to the EU, they also set an impassable framework in this respect. Respecting the principle of loyal cooperation, subsidiarity, and proportionality, these courts or tribunals decide on the constitutionality of the primary acts of the EU law with the Constitution. In turn, the legislator chooses whether it is justified to change the state's fundamental law based on the established conflict.

The process of European integration should be looked at from the perspective of the EU and the nation-state. In the first one, it is a question of better and better realisation of the aims of the Union and the application of the tools supporting these aims, including the effectiveness of Union law. In the second perspective, we can ask about how far international obligations arising from the treaties

[121] M. Troper, *Behind the Constitution? The Principle of Constitutional Identity in France*, [in:] *Constitutional Topography: Values and Constitutions*, eds. A. Sajó, R. Uitz, The Hague 2010, p. 202.

may lead to the state ceasing to be sovereign and elements of its political system constituting its constitutional identity in the sense of a bundle of values, principles and rules, including the core of the constitution will have to be verified formally or informally. It is the level at which the State will have to amend the Constitution.

In a judgment of 11 May 2005, ref. K 18/04, the Polish Constitutional Tribunal set out a certain framework in this respect, commenting on the notion of transfer of competence to the EU. This guideline may be a point of reference for determining the impact of the EU on the political system of the Member States (in the jurisprudence of other constitutional courts or tribunals, similar considerations may be found, with the reservation that the attitude to the integration process and consent to the intensity of this process differs in individual states). However, it is not without reason that the member states have been cautious in this process and have not led to enacting a Constitution for a United Europe.

The Polish Constitutional Tribunal, speaking on the subject of the transfer of competencies, has indicated that the transfer of competences "in certain matters" must be understood both as a prohibition on the transfer of the entirety of the competences of a given body, the transfer of competences in the whole of matters in a given field and as a prohibition on the transfer of competences as to the essence of the issues determining the competence of a given body of state authority. Therefore, it is necessary to define the fields precisely and indicate the scope of the competencies to be transferred. There is no basis for the assumption that to meet this requirement; it would suffice to retain in a few cases, even if only for the sake of appearances, the competencies of constitutional authorities. The concerns of the applicants in this direction, as expressed at the hearing, are not justified. Actions as a result of which the transfer of competencies would undermine the sense of existence or functioning of any of the organs of the Republic would moreover remain in clear conflict with art. 8(1) of the Constitution.

In other words, the Constitutional Tribunal believes that no constitutional provisions may provide a basis for delegating to an international organisation (or its body) the authority to enact legal acts or to take decisions that would be contrary to the Constitution of

the Republic of Poland. In particular, the norms indicated herein may not be used to transfer competence to the extent that would result in the Republic of Poland not functioning as a sovereign and democratic state.

Thus, on the one hand, we have a state that wishes to be sovereign, and on the other, the EU exercises competencies to realise integration objectives.

At this point, it should be stressed that the European Union's legal system is dynamic. It provides for the possibility of changes in the content of the law compared to the state at the time of accession. It also includes the option of evolution in the principles and scope of functioning of the Union. Therefore, there is no absolute certainty about all the elements of further development at the moment of accession.

According to Art. 4 (3) TEU, by deciding to join an international organization of an integrative nature (through an international agreement), Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and shall abstain from any measure which could jeopardise the attainment of the Union's objectives.

It has therefore given its consent to an interpretation that is favourable to Union law. It means that where there are several possible interpretations of a law, the one closest to the acquis communautaire should be chosen. Also, in the name of loyalty, the EU and its bodies should give an interpretation favourable to national legal systems.

The concept and the model of the European law have created a new situation in which autonomous legal orders exist side by side. Their interaction cannot be fully described using the traditional concepts of monism and dualism: domestic law – international law. The existence of relative autonomy of legal orders does not mean the absence of mutual interaction. Nor does it eliminate the possibility of a collision between the EU law and the provisions of the Constitution. A crash would occur when there is an irremovable contradiction between a norm of the Constitution and a norm

of Community law. This contradiction cannot be eliminated by an interpretation that respects the relative autonomy of the European law and the national law.

Member States retain the right to assess whether the legislative bodies of the Union, when enacting a particular act (provision of law), acted within the framework of the powers delegated and whether they exercised their abilities under the principles of subsidiarity and proportionality.

It should also be borne in mind that from the point of view of the fundamental principles of the Union, it would be contrary to the Treaty of Lisbon to interpret the provisions of the Treaty of Lisbon in such a way as to cancel out national sovereignty or jeopardise national identity, or to assume sovereignty extra-transitively in the field of non-transferred competences. The Treaty confirms the importance of preserving sovereignty in European integration, which is fully consistent with the determinants of the culture of European integration.

Mutual loyalty between the Member States and the Union they form remains an important marker of the culture of the European integration. The European integration is proving its worth by striking a balance between modernisation and preserving national traditions based on a supranational culture community.

To conclude, there are complex processes of interdependence between the Member States of the European Union, linked to the fact that they have delegated part of their powers of state authority to the Union. Based on the jurisprudence of the Constitutional Tribunal, it may be indicated that from the point of view of the influence of integration processes on the scope of sovereignty, the legal order of the European Union, against the background of the law established by international organisations, is distinguished by a broader range of competences of the Union in comparison with other international organisations, the binding character of a significant part of the law. In the sphere of delegated competencies, States have renounced the power to take autonomous legislative action in internal and international relations, which, however, does not lead to a permanent reduction in the sovereign rights of those States since the delegation of competencies is not irreversible. The relationship between exclusive

and competing competencies is dynamic. Member States have only accepted the obligation to exercise State functions in the areas covered by cooperation jointly. As long as they retain the full capacity to determine the forms of exercise of State functions, coextensive with the power to decide on their competencies, they will remain sovereign entities under international law. However, these states remain subjects of the integration process, they retain "competence of competence, and the model of European integration remains the form of an international organisation".

The sovereignty of the Republic of Poland is expressed in the non-transferable competencies of the organs of state authority, which constitute the constitutional identity of the state.

In the Polish jurisprudence of the Constitutional Tribunal, the competencies covered by the prohibition of transfer constitute the constitutional identity and thus reflect the values on which the Constitution is based.

Irrespective of the difficulties associated with the establishment of a detailed catalogue of non-transferable competencies, the matters covered by the absolute prohibition on transferring should include provisions determining the main principles of the Constitution and conditions concerning the rights of the individual, determining the identity of the state, including in particular the requirement to ensure the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement to ensure better implementation of constitutional values and the prohibition on transferring constitutional authority and competence to create competencies. The guarantee for the preservation of constitutional identity remains the mode of transfer of competence, which takes the form of ratification of an international agreement in a qualifying formula.

The abovementioned research allows for *de lege ferenda* conclusions, which relate primarily to the Polish legal system. It then may be applied to the system of the EU Member States. In particular, when looking at the role of constitutional identity in defining the

impassable limits of interference by the European Union in the shape of national public authorities, the following should be considered:

- distinguishing in the constitution a catalogue of values and principles that have a higher rank than other constitutional provisions (similar to the German system), or even specifying in the text of the constitution itself what constitutes the constitutional identity of a given state; in this way, the constitution-maker will obtain binding provisions which include the impassable limits of introducing amendments to the constitution, regardless of whether internal or external factors cause these amendments; it seems that at present deriving the given content by the constitutional court or tribunal is not sufficient to ensure state sovereignty;
- indication in the constitution of clear limits to the delegation of competencies of public authorities in some matters to an organization or an international body; although these limits are generally defined by the constitutional court or tribunal, in practice doubts may arise as to the permissible scope conferral of competences. Therefore, it would be advisable to review the manner of regulating the core of powers of individual supreme organs of state authority in the constitution and indicate the matters and competencies that are not subject to transfer already at the level of a normative act; this action should be harmonized with the constitutional provisions on constitutional identity; defining a clear core of competences of individual state organs would also be an impassable limit of changes in the constitution, also related to the influence of the EU organs on the system of national organs;
- the formulation of a European chapter in the constitution, which would detail the relations between the state and the EU, including issues related to the place of the EU law in the system of sources of law, as well as the limits of the integration process; in this chapter, or the catalogue of general principles determining constitutional identity, one could include clauses that the state participates in the integration process as long

as it retains sovereignty; integration must not lead to the EU becoming a federal state[122];
– the constitutional formulation of the mechanisms of control by the constitutional court or tribunal of the scope of conferral of competences; actions of the EU bodies outside the law, the necessity to amend the constitution due to the fulfilment of obligations under international law.

In addition, at the EU level, the relationship between national identity resulting from the text of Art. 4 (2) TEU, and constitutional identity, which is a concept developed in particular in domestic law by constitutional courts or tribunals. Perhaps the doubts as to the relationship between these two concepts, noticed in this study, should lead to such harmonization of regulations so that the EU fully guarantees the sovereignty of the state in the treaties. There are no interpretative doubts in this respect.

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[122] The given solution could refer to what follows from the CT judgment of 7 October 2021, ref. K 3/21, point no 1 of the sentence: "Art. 1, first and second paragraphs in conjunction with Art. 4 sec. 3 of the Treaty on European Union (Journal of Laws of 2004, No. 90, item 864/30, as amended) to the extent to which equal and sovereign states established the European Union, creating an "ever closer union between the peoples of Europe" whose integration – taking place based on EU law and through its interpretation by the Court of Justice of the European Union – reaches a "new stage" in which:

a) the bodies of the European Union operate outside the limits of powers conferred by the Republic of Poland in treaties,

b) the Constitution is not the highest law of the Republic of Poland, having priority of validity and application,

c) The Republic of Poland cannot function as a sovereign and democratic state

– is inconsistent with Art. 2, art. 8 and art. 90 sec. 1 of the Constitution of the Republic of Poland".

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Amending the spirit of a constitution? From changing the text to changing the character

At least two decades is a timeframe that enables the evaluation of experiences with a constitutional system. Its success or inability to provide a solid framework for the state and for the society depend on a set of issues behind the content: politics, economic prosperity, changing cultural attitudes of new generations determine the fate of a constitution. Stability is certainly a value, but not at all costs: only a just peace is a good peace. Changes are often brought about by a crisis but the price of a crisis may be too high. However a crisis may also strengthen a constitution – when it proves to be a well-functioning framework to handle the crisis. Without the readiness for compromise no democracy can survive. Anyway, almost three decades after the collapse of the communist regime countries formerly under communist rule cannot be called "new" democracies any more. Countries like Hungary or Poland are solid democracies with many challenges similar to other democracies and different with regard to others.

Constitutions should safeguard stability and express an eventually changing social consensus at the same time. They should preserve the accord concerning values – knowing that this consensus cannot be maintained by the legal order itself. What happens if the consensus is disappearing but the words of the law or the words of the constitution are still there? What happens when the meaning of words change?

Constitutions have to provide for smooth functioning of state organs as well as for the protection of fundamental rights but they are way more than just a technical statute and a reception of international human rights instruments. Constitutions should express the identity of the nation and contain a dense expression of values the constitution maker believes in. Constitutional amendments may be technical and partial but may also target the sprit, the very essence of a constitution. The same format may, however, carry highly different contents. The same wording may have a different meaning for different generations of citizen – and for different generations of judges. Values and principles that are evident for one generation may be challenged by another.

This paper aims at the understanding of the spirit of constitutions, at safeguarding or challenging it, with a special focus on a fairly recent constitution, the Fundamental Law of Hungary (2011).

1. What came first? The nation or the constitution?

It may seem to be a constitutional chicken or egg dilemma: nations adopt constitutions or constitutions make nations? In fact, constitutional traditions are highly different. Most European nations are determined by their history, culture and often by their language, but many nations in the world were established by a legal bond. A recent European example would be Bosnia-Herzegovina. An evident example for a nation created by a constitution could be the United States of America where the Declaration of Independence is an obvious founding document[1] and it seems to be evident that by becoming an American citizen one is signing up to the Constitution.

Even in Europe we have different notions on the nation. For some nations nationhood is defined by citizenship, but for others this link is not so evident. For Hungarians it is obvious that also a cultural identity may determine belonging to the nation. The Fundamental

[1] F. Hörcher, *The National Avowal*, "Politeja", No. 17, Księgarnia Akademicka, 2011, pp. 19–38.

Law refers to "one single Hungarian nation"[2] including Hungarians living beyond the borders not being Hungarian citizens. The existence of many nations is rather dependent on history and culture than on a given constitution, but even with this historic background the respect of constitutional traditions can be an integral part of constituent national traditions. For Hungary it has become obvious that the respect of the countries legal and constitutional traditions is essential to govern the country. As chancellor Metternich has observed two centuries ago "Hungary cannot be governed but by its constitution"[3].

A number of constitutional principles seem to be common to all constitutional systems of our age. All constitutions provide for popular sovereignty, democracy, the separation of powers, an understanding of the rule of law, as well as for the respect of human rights. Government systems may be different, these differences are of interest, but in essence a parliamentarian system, a presidential system and different modalities of judicial review are not so dissimilar – they are just different methods of limiting power. Details of course play an important role and make constitutional systems unique.

Most nations would survive with a different constitution – but a disrespect to their constitutional traditions could create a serious discrepancy. Different countries, however, could not have the same constitution. Real discrepancies stem from differences between traditions. We cannot imagine the United Kingdom as a republic (although some British people may) and we cannot imagine the United States of America as a monarchy or Switzerland without referenda. Notwithstanding, countries in which the organic development of the constitution became interrupted (e.g., by the communist regime) that are facing the challenges of reconstructing the interrupted tradition and catching up with new tendencies. Some traditions could not be restored after the collapse of communism

[2] Article D of the Constitution of the Republic of Hungary.

[3] R.J.W. Evans, *The Habsburgs and the Hungarian Problem, 1790–1848*. "Transactions of the Royal Historical Society" 39 (1989), pp. 41–62. Accessed August 3, 2021. doi:10.2307/3678977. I. Kukorelli, *Magyarországot saját alkotmánya nélkül kormányozni nem lehet. A közjogász almanachja*. Méry Ratio, Budapest 2015.

(like monarchy in Hungary), whereas a number of solutions – constitutional jurisdiction, the system of ombudsmen – were taken over from other countries.

The character of the constitution, however, is not determined by technical details of the electoral system or the standing orders of the parliament. Constitutional identity is not just about respecting general principles of constitutionality. These are much alike in all European countries. It is determined to a much greater extent by the constitution's relation to tradition and culture. Tradition needs to be cherished. Sometimes we do not understand the legacy we have inherited. Many citizens do not know the heraldic meaning of the symbols used in the coats of arms of their native cities. Still, this is heritage that we need to treasure as they constitute an inherent part of the identity of the community.

The Lisbon Treaty refers to the notion of national identities in Article 4 (2) TEU – inherent in the fundamental political and constitutional structures of the states. The text is a result of a compromise and its interpretation is challenging[4]. Limiting the concept of national identity to some constitutional principles seems to be a simplification[5]. This paper assumes that national identity goes beyond the principles laid down in a constitution.

Most European nations existed before their constitutions. Poland and Hungary have different constitutional histories – Poland has a tradition of a constitutional document, whereas Hungary has a tradition of a historical constitution. But both nations have a pre-existing cultural and historical identity that determined their nationhood

[4] A. von Bogdandy and S. Schill, *Overcoming absolute primacy: respect for national identity under the Lisbon Treaty*, "Common Market Law Review", 48 (2011), 1417–54; For a critical view of the Hungarian reception: B. Bakó, *The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires-, and Fundamental Rights Review in Hungary*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht", https://www.zaoerv.de/78_2018/78_2018_4_a_863_902.pdf [accessed on: October 14, 2022].

[5] L. Trócsányi, *Az alkotmányozás dilemmái. Alkotmányos identitás és európai integráció* Budapest, HVGORAC, 2014, 73; I. Stumpf, *Alkotmányos hatalomgyakorlás és alkotmányos identitás*, Budapest, Gondolat Kiadó – Társadalomtudományi Kutatóközpont, 2020, 230.

even in periods when their independence and liberty were curtailed and constitutional traditions neglected.

Nowadays, we are facing the challenge of synthesizing modern constitutionality and national traditions – both are important and need reflection. Constitutions are legal and political documents at the same time. Private law can survive centuries and different political regimes, while constitutions are made for a given political system. Their stability is a means and a result of political stability.

The role of tradition is questioned by all generations. We need to start a debate on its role and the effort to pass it on should be evident for all. In general, however, even if tradition is not fully understood, respect for it makes more sense than engaging into social experiences.

Constitutional norms and practices – from preambles to the symbolic communication of state organs – play an important role in expressing the identity of a political community. Besides ethnicity, religious identities shape national traditions to a high degree, but for various reasons they appear in formal legal documents often only in a hidden way (closely linked to historical traditions, e.g. a national anthem or a coats of arms). Symbols and customs may be perceived as evident by majorities. Minorities (often new minorities) may challenge them by pointing to the religious content of cultural phenomena. The *Lautsi* case shows the difficulties in finding a consensus based on solid arguments[6].

Identity can be expressed in various ways. A community may become aware of its identity when it is at stake. Elements of a culture that are being taken as granted and not even cherished as long as they are not openly challenged. The challenge, however, is much more a tacit development. Hardly anyone would argue to abolish Christmas as a public holiday. It is more likely that the holiday increasingly loses its original meaning.

[6] Case of *Lautsi and others v Italy*, judgment of 18 March 2011. A. Koltay, *Europe and the Sign of the Crucifix: On the Fundamental Questions of the Lautsi and Others v. Italy Case*, [in:] *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, ed. J. Temperman, Leiden 2012, pp. 355–382.

2. Hungary's historic constitution – subsequent generations to amend

Hungary has had no written constitution until the communist takeover. The first written constitution was the 1949 communist constitution that had no legitimacy as it had not been adopted by a democratically elected parliament and could not be regarded as a democratic constitution by any standards. It also lacked any connection to the countries constitutional tradition.

An organic historic constitution is flexible and solid at the same time. Legislation adopted by Parliament may change the content of the Constitution; according to a legal consensus it needed a generation's time for "new" legislation, cardinal acts to be regarded as a constitution[7]. A general consensus determined the content of the Constitution. Beyond Acts of Parliament tradition played an important role.

Hungary emerged as a state a century after Hungarian tribes arrived in central Europe in 896. In the year 1000 the pope acknowledged Hungarian statehood by sending a crown to its Christian king, the founder of the monarchy later known as Saint Steven (977–1038). By the 15th century – despite a devastating Tatar invasion in 1241 – Hungary emerged as a significant feudal kingdom in central Europe. The nobility gained important rights that were embodied in a Magna Charta (Bulla Aurea) in 1222, seen as a fundament of the Hungarian Constitution. The privileged status of the nobility was a source of later parliamentary powers: the king could only make laws with the consent of the peers.

The expanding Ottoman Turks occupied the central part of the country for 150 years in the 16th and 17th century. In the east, the Principality of Transylvania emerged as a safe haven for religious freedom and Hungarian national culture. The Kingdom of Hungary was reduced to its northwestern lands, maintaining statehood and its traditional legal system even as it was absorbed into the emerging Habsburg Empire. As the Turks were driven out by the end of the

[7] P. Teleki, *Válogatott politikai* írások és *beszédek*, OSIRIS, Budapest 2000, p. 443.

17th century, ethnic Hungarians in Hungary were outnumbered by ethnic minorities (Germans, Romanians, Slovaks and Serbs). The following centuries were characterized by the fight for independence, Protestant emancipation and a drive to catch up with the economic and cultural progress that had occurred in Western Europe. The revolutionary legislation of 1848 brought a new constitutional settlement. The parliament (the House of Representatives) became a representative, elected body while the king lost nearly all his executive powers, as these were now to be exercised by an administration responsible to parliament. Although it took until 1867 for Austria and Hungary to reach a new compromise (Austro-Hungarian Empire) that consolidated the constitutional structure, the era saw economic progress and rapid modernization. With the breakup of the Austro-Hungarian Empire after World War I (1914–18), the Kingdom of Hungary lost about two–thirds of its territory, most of its ethnic minorities and a third part of its ethnic Hungarian population. Hungary became a small country surrounded by former territories, all populated with large ethnic Hungarian minorities. The country became involved in World War II (1939–45) as an ally of Nazi Germany. In 1944 after the German occupation of Hungary, three–fourths of all Hungarian Jew became victims of the Holocaust. After the war, in 1946, Hungary became a republic. A short democratic period was undermined by massive Soviet influence, ending in an outright communist takeover in 1948. The written constitution was adopted in 1949, breaking away from centuries of constitutional tradition, and neglecting all established values of constitutionality: eliminating human rights, democracy, the rule of law and the separation of powers. The revolution against communism in 1956 was crushed by a Soviet invasion but the regime had to grant some concessions that made Hungary a relatively open place behind the Iron Curtain. Communism, however, has left Hungary an atomized society and a moral vacuum. With the collapse of European communism in the late 1980s, Hungary won a new chance to establish itself as an independent country. Following the revision of the Constitution as a result of negotiations between the communist party and the democratic opposition in 1989, free elections were held in 1990. Since then Hungary has

had a multi-party system, a parliamentarian form of government, an independent court system, and judicial review, with a Constitutional Court as the ultimate warrant of the constitution. The transition to democracy was done under the principle of legality: pre-democratic law remains in force until it is substituted by new legislation or abolished by the Constitutional Court. The country joined NATO in 1998 and the European Union in 2004.

Despite the influence of continental legal traditions, and some efforts at codification after 1867, Hungarian law remained to a large extent customary. There was neither a written constitution, nor a civil code. In matters of civil law, the law book (*Corpus Iuris Hungarici*) collected and published by judge Werbőczy in 1514 remained authoritative for centuries and it has ensured that Hungarian law has survived centuries when Hungary had no independent statehood. A peculiar cornerstone of Hungarian public law was the theory of the Holy Crown. According to this, the nobility (the "nation") is to be regarded as member of the Crown, as an expression of shared sovereignty. In fact, this law book made the Hungarian law accessible and applicable even in parts of the country under different sovereigns.

The 1989 constitutional compromise did not result in a new constitution just in a revision of the communist constitution. The preamble of the Constitution called for a brand new replacement of it, but the political consensus needed to achieve that end has not existed since the collapse of communism until the 2010 parliamentary elections. Certainly, following the revisions introduced during the transition of 1989 and 1990, the interim constitution has become a new constitution in fact. It has also become "real law" after a period when it had a merely declarative-political character, but formally it has not been else a revised version of the 1949 communist constitution.

At the very last period of the communist regime the government argued for an adoption of a new constitution, whereas the democratic opposition pointed out that prior to free elections such a document would have no legitimacy. Over the National Roundtable negotiations, a political agreement was reached on a revision of the communist constitution to serve as an interim constitution

until the adoption of a new constitution. For two decades the necessary majority for a new constitution did not emerge, whereas the general attitude did not regard the country as successful in general. The landslide victory of Fidesz and the Christian Democrats at the parliamentary elections in 2010 occurred under these circumstances. The winning coalition gained 173 from the 176 majoritarian constituencies. Under these circumstances not beginning to work on a new constitution would have been difficult to explain as the interim constitution has called for a new one since 1989. The constitution project could not become one to overcome political division lines. As the governing coalition has won subsequent elections after the adoption of the Fundamental Law and opposition has been taking part in the democratic procedure running the state (also winning important positions on municipal elections) the constitutional rules of the game seem to be widely accepted despite repeated verbal attacks on the Fundamental Law.

3. The fundamental features and the principles of the Fundamental Law

Since January 1, 2012 the Fundamental Law as Hungary's written constitution, codified in a single document takes precedence over all other national law. It has to be noted that the Fundamental Law is the first constitution adopted by a democratically elected parliament as a constitution in Hungary.

The principle of the hierarchy of norms requires that provisions of local self-government conform to central norms, and that provisions of the administration conform to acts of the parliament – and all domestic norms conform to the Fundamental Law.

Hungary's system of government is a parliamentary democracy. There is a strict division between the executive, legislative, and judicial powers, based on checks and balances. The judiciary is independent; apart from the regular court system, there is an independent Constitutional Court.

The Hungarian constitutional system is based on a number of leading principles. Article B Section (1) provides the following

definition: "Hungary shall be an independent, democratic state under the rule of law".

Indirect, representative democracy has precedence over direct democracy. Direct democracy, where voters can voice their choice directly, has a more practical role on the local than on the national level. However, even the Parliament may be bound by a referendum, although no referenda are allowed in certain matters enumerated by the Constitution and the law, including modification of the constitution itself, the budget, taxes, duties and fees, and international obligations. A national referendum must be held if requested by at least 200,000 voters – and the question complies with the Fundamental Law. In this way the Fundamental Law itself cannot be subject of a referendum[8].

Rule of law is of decisive impact. All state actions impairing the rights of the people must have a basis in parliamentary law, and the judiciary must be independent and effective. The principle of legal certainty is inherent to the rule of law. Legal certainty requires the law to be stable, foreseeable, and accessible, so that those obliged by the law can learn of the obligations they are supposed to follow.

The Fundamental Law commits Hungary to respect international law, and renounces war as a means of solving disputes between nations. The Fundamental Law contains a comprehensive bill of rights, including not only civil and political rights and freedoms, but also some 'second generation' economic, social and cultural rights. The environment is protected by the acknowledgement of a right of everybody to a healthy environment.

By constitutional law, Hungary is obliged to international cooperation, European integration, and to a responsibility for ethnic Hungarians living abroad.

The principle of republican government has rather limited meaning in Hungary today. It simply means that there shall be no

[8] This has been stated earlier by the Constitutional Court: 25/1999. (VII. 7.) AB; L. Komáromi, *A népszavazásra vonatkozó szabályozás változásai az Alaptörvényben és az új népszavazási törvényben*, "MTA LAW WORKING PAPERS", 2014 (35).

monarchy, although some understand the republican principle to include the participatory nature of decision-making as well.

Changing the Fundamental Law is relatively easy, requiring only the votes of two-thirds of the Members of the Parliament, this way it is subject to a political super-majority. Only the proportion of required votes makes a constitutional amendment different from any other law. Eventually the lack of political consensus on the one hand, and the moral respect of the stability of the Constitution as a value on the other, may prevent too frequent changes. In case of an amendment of the Fundamental Law, the President of the Republic has no right to refer the amendment to the Constitutional Court for preliminary review, as the Constitutional Court itself has no jurisdiction over the Constitution itself, only the respect of formal procedure could be subject of scrutiny[9].

4. The concept of the nation – political and cultural community

Hungarian citizenship is primarily acquired by birth. The principle of *ius sanguinis* applies. This means that a child acquires Hungarian citizenship if one of his or her parents is a Hungarian citizen. It is of no relevance where a child is born. Dual citizenship is not excluded.

The law on citizenship strives to prevent statelessness, and to ensure that family members have the same citizenship. Ethnic Hungarians may acquire citizenship easily irrespective their residence.

Besides the concept of the political nation as a community of all citizens there is a strong notion of a cultural nation of all ethnic Hungarians regardless of their citizenship. The Fundamental Law provides for the unity of the nation that has to be seen as a clear statement to embrace all Hungarians irrespective of citizenship. Hungary as a kin-state of ethnic Hungarian communities living outside the borders bears a responsibility for their fate. This commitment needs to be read together with the provision committing

[9] This is not a novelty as it has already been stated by the Constitutional Court itself: 23/1994. (IV. 29.) AB.

Hungary to the respect of international law. Hungary does respect the sovereignty of its neighbors but insists on the respect of minority rights so that ethnic Hungarians can preserve their language, culture and identify and prosper in the countries where they live.

5. The relation of international law and domestic law. Hungary in the European Union

Hungary applies a moderate dualistic approach to international law. Generally accepted norms of international law may be directly applicable, while the Fundamental Law pledges for the conformity of domestic law with accepted international obligations[10]. International agreements need transformation, that is, if the subject of the agreement is a legislative issue, they have to be ratified by an act of the Parliament. International agreements ratified by an act of the Parliament have a higher standing in the hierarchy of norms than merely domestic acts of the Parliament: if a merely domestic act of the Parliament and an international agreement ratified by an act of the Parliament are in collusion, the domestic act is to be abolished by the Constitutional Court as if it would violate the Fundamental Law itself. The procedure would be abstract. Without a case or a controversy the Constitutional Court had the power to strike down a domestic law.

The Fundamental Law declares that Hungary exercises certain public powers jointly with other European countries, and that these actions may also be exercised by the organs of the European Union itself. This provision of the Fundamental Law enables a transfer of certain elements of state sovereignty to the European Union organs. The final say about the limits of this shared exercise of sovereignty lies with the Hungarian Constitutional Court: "The Constitutional Court may examine upon a relevant motion – in the course of exercising its competences – whether the joint exercise of powers under Article E) (2) of the Fundamental Law would violate human dignity, another fundamental right, the sovereignty of Hungary or

[10] Article Q of the Constitution of the Republic of Hungary.

its identity based on the country's historical constitution"[11]. The presumption of withheld national competence would apply.

The question of precedence of the law of the European Union is a current issue: as in all member countries of the European Union[12]. A possible collision between directly applicable European law and the constitution of Hungary would confront the Constitutional Court with a delicate legal issue. On the one hand the ability of functioning of the European Union is at stake. At the same time it cannot be forgotten, that the Union has received all of its powers from its member states.

Could the EU law force a constitutional amendment? The constitution can only be adopted and amended by the national constitution-making power. Pressure for amendments can come both from domestic forces as well as from abroad. Simply a judgment by the Court of Justice could not change the constitution of any EU country.

The parallel claims of the Court of Justice having a final word on the interpretation of EU law on the one hand, and the national Constitutional Court having a final word on the interpretation of the constitution of the given country can peacefully coexist as long as national constitutions do not constitute a ground of a violation of EU law or EU law does not develop elements contrary to a national constitution. Of course in the vast majority of legal issues a collision does not come in to question. But in the rare and unpredictable cases such a collision may happen. Courts should contribute to the solution of collisions rather than to their escalation. If dialogue and self-restraint do not help for the Court of Justice there remains no space to backup. Whereas the Court of Justice could afford leaving national jurisprudence out of consideration – including decisions of the Constitutional Court – the national courts and constitution-making powers cannot neglect

[11] 22/2016. (XII. 5.) AB; https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016-1.pdf [accessed on: October 14, 2022].

[12] See: K. Walczuk, *Analysis of the directions of changes in the constitutional system of the sources of law – between primacy of the constitution and the principle of supremacy of the law of the European Union*.

the decisions of the Court of Justice. The constitution maker can of course resolve the collision by amending the Constitution, but if it is not willing to do so (for any reason) the collision remains. It seems to be important to make it clear that forcing a national constitution making power to an amendment would not do less harm as living with a collision. We might enter into a period when we eventually have to live with the unresolved collisions. Limiting conflicts may be a task of both courts and of politics.

6. Controversies concerning the Fundamental Law

A constitution is supposed to be the framework of the democratic process. Under certain circumstances, however, it may become target of the political debate. Challenging the framework is risky but not without a precedence.

Although one third of the Fundamental Law is literally the same as the previous constitutional text and another third is practically identical the document as a whole has another character than the previous constitution[13]. This lies within the choice of values, like the respect for national traditions, in underlining individual responsibility towards the community, a conservative vision on the human person, on marriage and the family. A set of important elements of the Fundamental Law are not subject of significant debate whereas others are negotiable without challenging the identity of the document.

DEFICIT LEGITIMACY?

The Fundamental Law was adopted according the rules of the previous constitution by 2/3rds of the votes of the MPs. There has been no serious doubt concerning the formal validity of the document as the new constitution. A significant part of the opposition, however, did not take part in the parliamentary procedure, whereas others voted

[13] L. Csink – J. Fröhlich, *Egy alkotmány margójára*. Gondolat, Budapest 2012, p. 108.

against the Fundamental Law as the opposition had no political interest in assisting to a success of the majority. The divided political landscape did not even make it possible to recognize gestures and compromises made by the majority[14]. No political force boycotted the constitutional structure on subsequent elections after the adoption of the Fundamental Law. MPs, mayors, local authorities have all taken oath on the Fundamental Law since 2012. At the given point of history, the fate of the Fundamental Law is unpredictable. A different parliamentarian supermajority could overwrite it as for and amendment a qualified majority is sufficient (2/3rds of all MPs). There are no unchangeable provisions protected by an eternity clause foreseen[15]. A different majority lacking the supermajority could try to pass around it or could create a constitutional chaos. But a different majority could also discover that the Fundamental Law can serve as a solid basis for any government. How a different majority would relate to the value choices of the Fundamental Law remains even more unclear.

WHAT IS NEW AND WHAT IS NOT?

The Fundamental Law has hardly brought any changes with regards to the organization of the state. In fact, the constitutional practice that has evolved since the 1990s has received positive recognition in the Fundamental Law, e.g. concerning the position of the President of the Republic, his competences with regard to the Prime Minister and the Parliament. Aa set of changes reflect previous Constitutional Court decisions[16]. In many respects the text of the Fundamental Law

[14] K. Pócza, *Kontroverse Verfassunggebung mit Kompromisslösung? Text und Kontext des ungarischen Grundgesetzes*, [in:] E. Bos – K. Pócza (eds.), "Verfassunggebung in konsolidierten Demokratien. Neubeginn oder Verfall eines politischen Systems?" Baden-Baden, Nomos 2014, p. 211.

[15] A. Mázi, *Procedural and substantive limitations on constitutional amendments*. MANUSCRIPT IN THIS VOLUME.

[16] For example, the circumscription of the competences of the prime minister vis a vis the president was elaborated the Constitutional Court (48/1991. (IX. 26.) AB and its results receipted by the Fundamental Law.

provides for more clarity than the previous constitution: competence regulations, emergency powers etc. or provides for more discipline in public spending.

The catalogue of fundamental rights is almost unchanged. Some social rights were reworded as goals of the state – this has not changed much in the content as it was more an endorsement of the interpretation. More emphasis is laid on the responsibility of the individual towards themselves as well as towards the society. Protection of the environment also got more emphasised.

VALUE CHOICES

The crucial question is not if the Fundamental Law remains the constitution of Hungary for the next fifty or hundred years, but if the value choices of it prevail. The Fundamental Law without its characteristic value choices would not be the same. Eventually another constitution carrying on the value choices of the Fundamental Law would not be a completely different scenario.

A consensus at peril may receive constitutional protection – like the definition of marriage as a bond between a man and a woman: an evident statement for human history up until the most recent times. A constitution, however can hardly safeguard a consensus lost for over a generation. If the social consensus disappears, the legal-constitutional arrangement is likely to follow.

The Fundamental Law has a personalised view on the human person emphasizing his or her dignity and responsibility towards his or her fate as well as towards the community[17]. Instead of social rights (proclaimed by the previous constitution but remaining dead letter of it) the duty of solidarity with the those suffering need for reasons beyond their responsibility[18]. In this respect duties come first: the responsibility towards him- or herself, towards the community and the rights second. Property shall entail social responsibility[19].

[17] Article O).
[18] Article XIX.
[19] Article XIII. (1).

Marriage is defined as a bond between a man a woman – this provision can be seen as a preventive measure against initiatives opening the institution of marriage to same-sex couples. Family ties shall be based on marriage or relationship between parents and children[20] making a clear distinction between a household shared by different people and a family. Cohabitants would not be regarded as a family – but certainly a common child would establish a family bond. The ninth amendment (2020) inserted the sentence: "The mother shall be a woman; the father shall be a man." The precaution with regard to gender-ideology has gained a constitutional footing. Changing the concept of marriage or opening adoption rights for same-sex couples would need an amendment of the Fundamental Law.

With this set of value choices, the Fundamental Law took clear stand in issues that are dividing Europe and despite a clear majority in the society they are also dividing citizens. Safeguarding traditional concepts has been even enhanced by subsequent amendments.

Clearly the constitution-maker has a limited space as the public opinion is supportive in some issues, indifferent in many others and dismissive in others. Whereas with regard to marriage and family there is a vide consensus or at least a solid majority in society, abortion can be seen as an example for an issue where there was no public support for significant change in the regulation.

The protection of unborn life is a hot topic in many countries. Hungary has reached a compromise in the early 1990s following a Constitutional Court decision that has abolished the decree regulating abortion during the communist regime[21]. According to the law in the first trimester of the pregnancy abortion following a consultation upon certain indications are not unlawful – the fetus shall be subject of constitutional protection but has subjective rights[22]. This formula has been endorsed by the Fundamental Law as the constitution maker saw no public support for strengthening the protection of the right to life. The formula adopted incorporates

[20] Article L).
[21] 64/1991. (XII. 17.) AB.
[22] Act LXXIX/1992.

the doctrine suggested be the Constitutional Court three decades ago: "Every human being shall have the right to life and human dignity; the life of the fetus shall be protected from the moment of conception"[23]. Providing protection but not recognizing rights is a kind of soft compromise aiming the satisfaction of pro-life agenda but not challenging the de facto pro-choice regulation.

7. Beyond the text-Christian culture of Hungary

The preamble of the Fundamental Law (the National Avowal) is centered on the invocation of Saint Stephen and Christian Europe[24] and makes no reference to the period preceding Statehood, that is, the Fundamental Law considers the founding of the State and not the Hungarian conquest of the Carpathian Basin its historical point of origin. Accordingly, the last sentence of the first paragraph in the preamble expressly acknowledges the role of Christianity in preserving the nation's identity. This recognition relates neither to the role of Christianity as a religion nor to the role that the Christian faith currently plays in Hungarian society but rather pertains to the determining role played by Christianity in the nation's history. There is no question that Christianity not only plays a role in preserving nationhood and that it is more than just a tradition. The tradition goes beyond the role of Christianity and Christianity is present today as well. It is important to realise that the National Avowal stops at the instrumental invocation of the Christian tradition. The National Avowal is a descriptive finding of a historical fact and does not lay down an obligation to resurrect that history. The constitutional legislator is merely recognizing a historical fact, and does so from the viewpoint of the nation as the legislating community, besides recognizing various other religious traditions of the country as well. While the importance of Christianity in history is indisputable, it cannot be stated that Christianity plays an exclusive role in today's

[23] Article II.

[24] Z.J. Tóth, *Egyes* észrevételek *az Alaptörvény* értelmezéséhez, "Polgári Szemle" 9 (2013), pp. 1–2.

world – which the preamble does not state either. The National Avowal pays tribute to religious traditions; however, the recognition of non-religious traditions is missing[25] just as any mentioning of the role that religion plays in the world or even in Hungary nowadays[26].

The first line of the National Anthem ("God bless the Hungarians"), as a motto of the Fundamental Law, is not an *invocatio Dei* in its traditional sense: The Fundamental Law is not created in the name of God (as is the case with the Swiss Constitution or the Irish Constitution, for example). Something that requires an explanation for foreigners is quite clear to Hungarians even without the use of quotation marks: the purpose of the reference preceding the normative text of the Fundamental Law is to link all of the nation's members (originally the National Anthem was written in 1823 and it became the official anthem by customary law in the late 1800s). Assuming healthy relations, although that the National Anthem contains an additional meaning for religious citizens, it does not mean that it excludes those who oppose this additional meaning or who are indifferent to this added content. János Zlinszky's notion that "the addressee of the order cannot be instructed to act on the basis of the legal text"[27] is more ironic than anything else – and it also illustrates the limits of the National Anthem's normative nature. The first sentence of the Fundamental Law has a very important symbolic significance, its legal significance is not as pronounced[28]. Although it is impossible to interpret the quoted line without knowing the context, a reference to God cannot be a goal in itself: it is a recognition of the finite nature of power – in this case, the finite

[25] A. Jakab, *Az* új *Alaptörvény keletkezése* és *gyakorlati következményei*, Budapest, HVG-Orac 2011, p. 181.

[26] For an earlier analysys of the sse: B. Schanda, *Hungary's Christian Culture as Subject of Constitutional Protection*, "Studia z Prawa Wyznaniowego" 23 (2020), pp. 55–72.

[27] J. Zlinszky, Észrevételek az új Alkotmány "húsvéti" szövegéhez. Kubovicsné dr. A. Borbély – A. Téglási – A. Virányi (eds.): *Az új Alaptörvényről – elfogadás előtt*. Az Országgyűlés Alkotmányügyi, igazságügyi és ügyrendi bizottsága, Budapest 2011, pp. 26–27.

[28] F. Horkay Hörcher, *The National Avowal*, [in:] *The Basic Law of Hungary: A First Commentary*, eds. B. Schanda, L. Csink and A. Zs. Varga, 25–46, Dublin: Clarus Press 2012, p. 25.

nature of constitutional power – which protects the people and not the God (who hardly requires such protection). This is made especially clear in the text of the postamble (which is reminiscent of the Bonn Basic Law): the expression "[…] being aware of our responsibility before God and man […]" does not mean that the State desires sacral legitimacy, but rather that it acknowledges its own limited nature and moral responsibility.

The aspect which the seventh amendment of the Fundamental Law changes therefore is the following: the seventh amendment declares that Hungary's Christian culture has to be protected (and not the Christian faith or religion).

By decreeing the protection of Hungary's Christian culture, the constitution maker intends to ensure that Christianity – or, more precisely, Hungary's Christian-based culture – is present not only as a respected element of the past but also as a present value that is to be protected. Stemming from its nature, Christianity is a universal religion that has strived for enculturation ever since the outset (with varying degrees of success). The Fundamental Law requires the protection not of Christianity (or its applicable enculturated version), but of a cultural reality. We know a number of examples from history where faith, in its transformation of individuals and its yeast-like permeation of society, creates culture. However, constitutional protection is provided not to the Christian faith, but to the culture that it has created, including the freedom to oppose that culture. It is impossible to afford constitutional protection to the Christian faith itself (as law does not protect against temptations); the most that law can do is to remind the holders of public power of their special responsibility for the common good, just as the above quoted closing sentence of the Fundamental Law does: responsibility cannot be limited to a single decision, no matter how important it may be, but it encompasses all of life.

By definition, protection assumes the existence a threat. As claimed by the supporters of the changes to the Constitution discussed above, the amendment was necessary due to processes (that remained unspecified and unnamed) taking place in Europe and

its goal was to uphold the cultural image of Europe and Hungary[29]. Neither this new addition to Article R of the Fundamental Law nor the justification specify whether the change in the continent's cultural image is due to the altered composition of the population which in turn is due to migration processes, secularization, social apostasy, or any other factor that has to be combatted according to the vision of the amendment; rather, Article R of the Fundamental Law leaves wide room for interpretation. Whether these processes can be influenced by means that constitutional law has at its disposal is another question: if societies characterized by long-standing, strong commitments (think of Belgium, Ireland, and Spain) turn against not only Christian traditions but even natural law in the area of legislation[30], is that attributable to secularization, the weakness of the Church, or the negligence of the legislator? These examples show that the will of the people may shift from behind constitutional rules, and that constitutional and legislative provisions may be altered to reflect the changed will of the popular majority in a time span of no more than one generation. We cannot forego the fact that in Western Europe, the rift regarding the protection of life, the definition of marriage, or even the symbolic use of crucifixes in public buildings is not between Muslims and Christians but rather between those who adhere to religious traditions and those who adhere to secular forces.

Culture primarily means the totality of the material and intellectual values created by humanity, the manifestation of the learning of a community or people. From an anthropological perspective, culture is the way of life of a community. Threats to our culture may come from various directions – as the wording of the Fundamental Law is quite general, it conveys a message of support for those striving to protect cultural heritage, be it the protection of a cityscape, the maintenance of cultural traditions,

[29] Motion of the Parliamentary Commission on Legislation, 14 June 2018, see: http://www.parlament.hu/irom41/00332/00332-0011.pdf (27.3.2020), [accessed on 15 October, 2021].

[30] J. Frivaldszky, *Jó kormányzás és a közjó. Politikai és jogfilozófiai szemszögből*. Budapest: Pázmány Press 2016, p. 74.

or the emphasizing of the importance of teaching the Latin language. However, a general reference is also made to the whole of the Central European way of life, which includes everything from music education through dance schools to the evaluation and protection of partnerships, forms of behavior, and virtues. It would be impossible to define the entire scope of the content of our culture the state is to protect. Whether this culture can indeed be deemed Christian or whether it would be more appropriate to talk of a Christian-rooted culture still needs clarification.

While the National Avowal acknowledges the Christian heritage, the newly added para.4 of Article R) of the Fundamental Law provides for the protection of Christian culture, noting that accepting a certain heritage not only includes the positive aspects, but it can also contain negative elements: assets and debts are inherited together. The new prescription is not about the recognition or the protection of the Christian faith or Christian religion, but about protecting the culture, a culture rooted in the faith and religion. This may seem to be a contradiction: in general, Christian culture cannot be interpreted without the Christian faith, as culture is a product of the faith. The works of Dante and Bach resonate from centuries of traditions and a deep individual conviction, and they elevate the Divine Comedy and the Passion of Saint Matthew to the level of theological works; ripping them from their roots means they can be understood only in part, not disputing the fact that performers who do not share the faith of the artists can interpret the works of Bach, Händel, and Zoltán Kodály. Such a reflection cannot be created by legislative means.

The social practice that is irreconcilable with the Christian faith enjoys exactly the very freedom that stems from Christianity. A significant part of Hungarian society, including those who consider themselves Christian, do not follow numerous moral commandments and traditions stemming from Christianity. Christian culture protects this freedom to depart from traditions as well. Contrary to religion-based legal systems (like those of countries adhering to Islamic law), religious truth does not in itself provide a basis for differentiating between lawful and illegal conduct. Only those norms can become legal norms that are rational and socially acceptable.

While providing law with a secular foundation might seem absurd in traditional, religion-based legal systems, legislators in a secular state cannot base the criminalization of murder or the regulation of economic crimes solely on the Ten Commandments.

In connection with the National Avowal, András Jakab refers to the saying previously attributed to former Prime Minister József Antall, according to which even atheists are Christians in Europe[31]. This can be said to be true from a cultural perspective: regardless of denominations, name days are celebrated all over Hungary, a tradition which has been adopted by non-Christians as well – or differently: a tradition that has been upheld even by those who have parted with religion and now hold secular views. Many official forms ask for a person's "Christian name" instead of using the neutral term "forename". The question arises whether these traditions, if they no longer convey their original meaning, are worrying specifically to devout believers; at the same time, we would not consider it fair if Saint Nicholas were to give presents only to Catholic children (ultimately, the right approach to the tradition is not from the viewpoint of Saint Nicholas, but that of the children and their interest in having equal, or rather general access to chocolate).

While the decision as to what is reconcilable with the Christian faith is a question to be decided by ecclesiastical communities and their ministers, and it is also a question of conscience, it remains up to the Constitutional Court to interpret the Fundamental Law. How can the commitment to Christian culture be interpreted? The protection of Christian culture may mean banning miniskirts, but it may also mean the freedom to wear them. Which interpretation is correct?

Can constitutional provisions be understood as goals of the State, i.e. does the State consider it to be its obligation to direct society's decisions so as to realize the values of the Christian faith? Stronger protection for human life beginning at conception; the protection of the sacred bond of marriage; the restriction of working on Sundays, of pornography, of the feeling of nostalgia for esoterica and

[31] A. Jakab, *Az új Alaptörvény keletkezése és gyakorlati következményei*, Budapest: HVG-Orac 2011, p. 180.

ancient pagan Hungarian history, and of the use of non-Christian first names; doing away with blasphemous expressions in the common terminology of the armed forces; the fight against tattoos, drug use, and gambling; strong solidarity with the most vulnerable members of society; the validation of subsidiary in the organization of society and the economy, etc.? In a number of issues there is a deep gap between Christian faith and a general social attitude. In a number of cases there is a division between the current social practices (undertaken, in all certainty, by the majority of voters) and the Christian approach (even if subconscious). The endeavors of Christian voters and politicians to have their faith manifested in the legal system and the politics of the state is legitimate; however, the reasons for validating their viewpoint have to be approachable for everyone and cannot be purely theological; Christian voters and politicians must gain majority support for their arguments by way of a democratic decision-making process.

If we consider the protection of Christian culture to be, indeed, the state's goal, we could expect the state to display active conduct to ensure that society's selection of values is in line with Christian traditions, i.e. to promote the birth and maintenance of Christian culture. Thus, in addition to the aspects of legality and expediency, all state bodies would have to weigh how a given decision can be evaluated from the aspect of Christian culture.

The wording of the Fundamental Law, however, shows that the legislator targets the protection of present social practices and not the re-creation of a pure Christian culture, even in cases where there is a gaping abyss between Christian ideals and social practices. This is also indicated by the fact that the Fundamental Law demands the protection of a specific culture (in this case: Hungary's Christian culture) and not the protection of Christian culture in general; only the latter could include turning Hungary's actual culture into a fully Christian culture. To return to the above-mentioned example, it seems that the legislator was led not by the desire to ban miniskirts (or indecent clothing in general), but to protect the right to wear

them. If the culture of Europe – and thus of Hungary – is Christian[32], the protection of cultural self-identity can only mean the protection of a Christian culture.

That faith may create culture is an experience derived from history[33]. The culture that grew from Christianity can be protected organically only together with Christianity. With its order to protect culture, the Fundamental Law and the state are only able to protect the resulting consequences. Without people actually living the faith, the fruits of that faith – the fruits of the faith of our predecessors – will be preserved for just a short while, maybe a generation or two. With its order to protect culture, the Fundamental Law protects not the tree (the Christian faith) – the protection of which could not be undertaken by the Fundamental Law – but only the fruits of that tree. The legislator has no influence over whether the tree is alive or if it is merely the skin, the visible shell of the fruit that we are protecting, ripped from the tree.

A peculiar question is whether the state can take action against those who actually voice Christian viewpoints based on theological principles or a moral basis in the interest of protecting the given culture of today. If we identify "Christian culture" with today's predominant forms of behavior and actual practices, "Christian culture" (perhaps Christian in its roots but not in its content) may actually directly oppose the authentic Christian position[34]. The Christian faith can easily lead to criticism of the existing Christian (-based) culture. The protected sphere of the freedom of religion includes the freedom of individuals, religious communities, and leaders to formulate positions on religious or moral issues, which rightfully pose a challenge to the existing cultural milieu. Outsiders

[32] The identity of Europe is defined by its Christian heritage. See Weiler 2004; Király 2006, pp. 67–72; Pünkösty 2014.

[33] Török Cs., *A kultúrák Lelke*. Budapest, Új Ember Kiadó, 2016, p. 16.

[34] An example of a sharp critique of the government proud of its pro-Christian politics could be the homily given by the President of the Hungarian Bishops' Conference András Veres condemning the expansion of the in-vitro fertilisation programs at Saint Stephen's day on August 20, 2017; https://www.magyarkurir.hu/hirek/megteresre-es-megujulasra-hivott-veres-andras-budapesten-allamalapito-szent-kiralyunk-unnepen [accessed on: 27 March 2020].

may not question the credibility of their positions, religious principles, and moral views. However, the question of whether the criticism is aimed at the renewal or destruction of the (fundamentally) Christian culture is quite important. In both cases, the freedom of criticism is protected by the right of free speech and thus by Christian culture.

With the loss of faith culture loses ground. Taking the secularization of Europe into account (including the self-secularization of churches[35]), we observe a new generation growing up for whom the Christian terminology has no meaning at all. Christmas remains to be a holiday for all but a Christmas tree does not have a stronger link to Christ than our Latin heritage has to the Romans. Preserving the Latin names for months does not remind us of the Roman Emperors over the summer. The heritage is still there but it is not a vivid one any more. Christianity was born outside of Europe but it has gained its most effective cultural and intellectual form here[36]. As Pope Benedict XVI put it: "The present culture determining Europe was also born here but this is more a culture of scientific rationalism excluding God from the common space. We do not live in Christian culture any more but in a positivist and agnostic one that has become intolerant to Christianity"[37].

The Fundamental Law does not mention the principle of state neutrality in religious or moral matters, just as it was not mentioned by the previous Constitution, either. However, the text of the Fundamental Law does not list any commitment that would exclude neutrality, and there have been no essential changes to the wording of fundamental rights from which the principle of neutrality stems (freedom of conscience and religion, the prohibition of negative discrimination). Based on the above, it cannot be argued that the

[35] The term used by Pope Benedict XVI: *Address of His Holiness Benedict XVI to Bishops of the Episcopal Conference of Brazil*; http://w2.vatican.va/content/benedict-xvi/en/speeches/2009/september/documents/hf_ben-xvi_spe_20090907_ad-limina-brasile.html [accessed on: 27 March 2020].

[36] Ratzinger, Joseph. 2005. *Benedek Európája a kultúrák válságában*. Budapest: Szent István Társulat, p. 32.

[37] See *Benedict XVI: Last testament in his own words with Peter Seewald*. Bloomsbury 2016.

Fundamental Law's stronger commitment to values would move it away from the principle of moral neutrality. Accordingly, the findings on the State's neutrality in matters of religion and morals as originally worded by the Constitutional Court of Hungary[38] continue to apply and form part of Hungary's constitutional law. The State's religious and moral neutrality was confirmed by new Acts that entered into force simultaneously to the new Fundamental Law, thus, for example, in the preamble to the Act on the Right to Freedom of Conscience and Religion[39] and the Act on the System of the National Public Education[40], which guarantees the right to an education which is neutral on matters of religion and morality. In these Acts, the legislator clearly differentiates between religious and moral neutrality and the neutrality of culture and values: The Fundamental Law stands firmly on the ground of religious neutrality while rejecting the neutrality of culture and values. The new addition to Article R of the Fundamental Law does not change this stance.

Neutrality does not mean indifference. A neutral state is not a state devoid of values and does not live in a "vacuum". A significant part of the values and the culture that provide the foundation of any statehood are determined by history and society. As a certain form of a certain community's organization in a specific historical environment, the state cannot forego and cannot avoid the existing values that surround and carry it. While refraining from taking on their identity, the State does not have to worry about granting recognition and support to the communities and institutions that promote values. Besides its neutrality, the State that is neutral in moral issues would not take heed of the religious aspects and needs of its citizens. This would unavoidably give preference over those who have no such needs. However, within the meaning of neutrality under Hungarian constitutional law, both positive and negative aspects of religious freedom are of equal value, i.e. neither

[38] Constitutional Court, decision No. 4/1993, 12 February 1993.

[39] Act CCVI/2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities.

[40] § 74 (3), Act CXC/2011 on the System of National Public Education.

can be considered the general rule to which the other merely forms an exception.

Neutrality is in no way an ideology: The state does not represent neutral morals, as, even if there were such a thing as neutral morals, the State would have to be neutral in respect of such morals, as well. The issue is much more that of organizing the coexistence of people with different faiths and morals, while aiming to minimize the burdens borne by individuals and communities stemming from these differences: nobody may end up in a position where they feel like "second-class" citizens due to their identity. Certainly, neutrality is binding upon the bodies of the State and not on its citizens.

According to further assumptions regarding the neutrality of the state on matters of morals, the state has to avoid taking a position on all issues in which there is no social consensus in order not to influence society on a given issue. However, in Hungarian constitutional law neutrality can only exist in specific cases[41]. Moreover, the principle of neutrality in constitutional law originates not from American sociological and philosophical thought but rather from German legal doctrine. Similarly to Hungary, the term was introduced to Germany by the German Constitutional Court, which stated that the state, as "a home for all citizens", must be neutral[42]. However, this neutrality in no way excludes the state resolutely siding with certain values in the areas of public ecclesiastical law, family law or tax policy.

The State's role in protecting the Christian heritage does not raise any concerns precisely at the point where heritage has become culture. The approach to tradition is hardly uniform, just as the cultural identity of the political community is not homogeneous. There is a myriad of examples to illustrate this fact, from the symbols used on the coins and bills minted by the central bank through the heraldry of municipalities to the practice of naming public areas and institutions. Even expressly religious motifs can be considered cultural traditions instead of manifestations of faith, for example

[41] P. Paczolay, *Az* állam *semlegességének mítosza?* "Politikatudományi Szemle". II. 1993/ 3, pp. 124, 135.

[42] Federal Constitutional Court (Germany), BVerfGE, pp. 12, 1, 5.

when we think of the fact that in 2007 the liberal leadership of the city of Budapest invited a priest to bless the drill used for metro line 4. This is more than just reviving the lost traditions (such as reinstating the word "saint" in the names of Budapest's hospitals), as new institutions also received similar names in a number of cases (for example, the hospital in Dunaújváros was named after Saint Pantaleon in 1991 – that is the patron Saint of the village close to the industrial city constructed in the early years of the communist regime). The decision regarding the amount and type of content that the public can accept without tension as regards the names of public areas or community institutions (including public education institutions and public service mass communication media) requires sensitivity on behalf of decision makers rather than abstract regulation. The lantern festival on Saint Martin's Day and the Nativity plays put on in municipal kindergartens seem like quaint traditions rather than the forceful spreading of religion. However, kindergarten teachers have to pay attention to whether the celebrations are uncomfortable to some parents due to their beliefs. Children must not feel discriminated against, but a situation must not arise where we expect only the members of the majority to adapt, as this leads to emptiness and not neutrality.

Just as the constitutional recognition of the historical role of Christianity is not irreconcilable with the principle of state neutrality on matters of religion, neither is the recognition of the cultural role of Christianity and the protection of culture based on Christian traditions. The protection of Hungary's Christian culture is not the same as ordering that a Christian culture be created – or re-created – but it is rather a commitment to protect a specific culture existing in Hungary nowadays. The protection of culture is a legitimate task of the state, though the state is not capable of developing and maintaining the basis of that culture: the development and safekeeping of Christian culture remains the responsibility of Christians (both individuals and communities) and not that of the state. From the other perspective: those understanding the foundations of the culture of a nation bear a special responsibility for preserving it.

The Ninth amendment if the Fundamental Law (2020) adds a right to education in accordance with the values based on the constitutional identity and Christian culture of the country (Art. XVI. (1)). This provision goes beyond the cultural commitment of the state as it provides for a value commitment. This commitment, however, is still not a religious one: the education shall be based on Christian values but not on Christian faith. Certainly Cristian values stem from faith, but the latter is beyond the scope of constitutional protection.

8. The challenge of tacit changes

The more rigid a constitutional text is; the more space may be needed for interpretation. The dispute between originalism and the constitution as a living document – primarily in the United States – is the best known example for this debate.

With flexible constitutional texts dynamic interpretation seems to have less space. Where there is no chance to change the text, the temptation to re-interpret it may be more present. What if society changes?

The Fundamental Law explicitly proclaims that it cannot be amended by a referendum. In fact, the Constitutional Court has come to the same conclusion on the previous Constitution as the text itself provided for the modus of amendments and the referendum has not been mentioned – a contrario it could not constitute a way to change the text[43].

A re-interpretation without a formal change, a changing emphasis on different provisions is always done but rarely admitted.

When a constitution becomes target of political debate (instead of being the framework of it) symbolic issues trend to be debated rather than technical details. Technical details often determine the way politics function (e.g. a majoritarian election system will produce a different political landscape than a proportionate one). Changing, debating, tackling symbolic issues, however, can move

[43] 23/1994. (IV. 29.) AB.

public opinion more than symbolic issues. Is there a reference to God in a preamble? How does the constitution refer to religious-spiritual-cultural heritage? Taking down the crucifix from the wall of a public school is a gesture to change the constitutional setting – as well as hanging it is a far-reaching gesture as well. By creating new realities (e.g. hanging the cross or taking it down) a reality is created that can hardly be changed without conflict.

Symbolic issues may vary from the very use of symbols to holidays, the definition of marriage and the family, the circumcision of rights etc. The "culture war" can easily find topics where conflicts can be created and a polarization may take place.

9. Perspectives

The identity of the Fundamental Law is determined by its value choices. The emphasis on the destiny of the nation, the vision on the human person being responsible for him- or herself as well as for the community, the emphasis on the institution of marriage and the family are characteristic features of the document. By amending these features (explicitly or in a tacit way) would change the identity of the Fundamental Law.

The success of a constitution lies in the success of a country. For failure it is not (just) the constitution to blame. Constitutional arrangements can foster or hinder stability and development. Constitutions are always also political documents. Political actors may determine the fate of a constitution. The value choices of a constitutional document depend on the tendency if these values are lived or at least respected by society or not. As long as the spirit of a constitution enjoys popular support, value choices will be upheld. Values can also survive constitutional texts not endorsing them. Constitutions may help maintaining values but cannot be expected to substitute popular support.

A constitution is a place of memory.

We are all affected by the disease of memory loss – like the dwellers of the mythical town of Macondo in the novel One Hundred Years of Solitude of Gabriel García Márquez. Dwellers discovered

that they are losing the name and notion of things. They began a heroic fight against the insomnia plague by labeling objects and providing simple descriptions to handle daily life. "At the beginning of the road in to the swamp they put up a sign that said MACONDO and another larger one on the main street that said GOD EXISTS. In all the houses keys to memorizing objects and feelings had been written."

On issues and values we still have the consensus that we are well advised to put them down. A constitution is an adequate document to safeguard the memory of the nation.

10. *De lege ferenda*

The most demanding challenges of the constitutional structure are the relation between the European Union law and the national constitution on the one hand, and the future of the characteristic value choices of the Fundamental Law on the other. Finding a functioning coexistence between the European Union law and national constitutions is more and more becoming a delicate task of constitutional courts and the EU organs, first of all the Court of Justice. Maintaining the value choices remains a subject of social realities. The protection of the identity of a constitution cannot just be based on constitutional solutions. Technical solutions safeguarding value choices may constitute defense line for a while but cannot maintain the value choices themselves. Much more a consistent policy supporting the values beyond the constitution determine the fate of them. This way the destiny of the spirit of a constitution depends on whether the social consensus (or at least majority) can be maintained or not.

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Diagnosis of the direction of changes in the catalogue of constitutional principles of the political, social and economic system and solutions on the status of an individual in the state – between constitutional identity and European integration

1. Introduction

The current situation in Europe shows that in applying the law, state authorities and international bodies strive to redefine the content of values and principles common to the European Union member states stemming from constitutional traditions based on the same source. This state of affairs requires a review of the existing catalogues of principles of the political, social and economic system of selected states, with particular emphasis on Poland and Hungary, as well as those states which play a special role in the EU and the selection of those which constitute constitutional identity. It is then necessary to show the understanding of these principles taking into account the sovereign rights of nation-states and the process of European integration.

A similar situation concerns determining the person's status in the state, including their freedoms, rights and duties. Because of the progressing constitutionalisation of international law, especially in the área of human rights protection, but also because of the dynamic interpretation of these rights, it is necessary to verify the existing catalogues of human rights contained in national constitutions and to decide to what extent the international standard in this respect

may change the approach to the constitutional system of protection based on specific axiology.

As a result, the subject of the study will be a comparative legal analysis of the catalogues of constitutional principles and their contents, which will make it possible to find their significance in the process of European integration. The study will aim to select and write down those principles which constitute the constitutional identity. In this respect, their influence on the shape of national constitutions will be presented and their manifestations in the sphere of human rights protection. An attempt will be made to answer the question about the consistency of constitutional standards with international standards and the extent of the international community's responsibility and the state for human rights. Ultimately, the research aims to show what are and what should be the directions of changes in the catalogue of constitutional principles of the political, social and economic system, as well as solutions on the status of the person in the state, which will allow the preservation of constitutional identity, and to what extent the international community and international organizations can interfere in this constitutional sphere[1].

2. General principles versus constitutional principles

Among the distinguishing features of contemporary constitutionalism after World War II is the increasing use of definitions and statements of an axiological and moral nature. What is certainly noteworthy is not so much the mere existence of such ideological and evaluative contents but the attempt to make them into legal rules, going beyond their traditional and programmatic presentation. The changes taking place in legal sciences have also had a significant impact on constitutionalism. Constitutional legal norms have been given a broad definition and have covered a wide thematic area, while technically speaking, they have diversified in structure

[1] For a study of methodology and doctrine see: J. Ellis, *General principles and comparative Law*, "The European Journal of International Law", vol. 22 No. 4/2011, pp. 949–971.

and content. For this reason, it is useful to divide constitutional principles into their different types, whether in terms of system and completeness of formulation or wording, in terms of the immediacy and effectiveness with which they can be applied, or in terms of their dependence on current state policy[2].

Legal positivism, which has had many positive effects on the development of legal science, has also given rise to quite dysfunctional consequences in its most extreme formulations. The overcoming of positivist formalism has resulted, as a reaction, in the establishment of broad constitutional aspirations and definitions, including the idea of substantive justice, which is not necessarily limited and refers to the law as a written norm of a higher order[3]. The progressive depreciation of personalist, liberal and democratic elements, the onslaught of authoritarianism and totalitarianism, and the consequent changes in the meaning of constitutional texts and some other factors have influenced the emergence of a new approach to iusnaturalism[4].

This reaction results in a certain loss of the value of the law while at the same time fostering the elevation of the Constitution to the category of the supreme norm, which it now wishes to endow with full effectiveness. This effectiveness is given in practice to broad formulations full of axiological and value-laden meaning. There are also some basic definitional references in the Constitution which provide a wide scope to the judge who determines and gives effect to norms in the face of a particular case. In this way, constitutional "values" and "principles" form a content, situated between abstract

[2] See: 1 Council of Europe (Parliamentary Assembly), The Principle of the Rule of Law, Report of the Committee on Legal Affairs and Human Rights, No. 11343 (6 July 2007).

[3] H. Frostestad Kuehl, M.A. O'Brien, *International legal research in a global community*, North Carolina 2018, pp. 85–92.

[4] See: J. Daci, *Legal Principles, Legal Values and Legal Norms: are they the same or different?*, "Academicus International Scientific Journal", No. 2/2010, pp. 109–115.

formulations and precise and unambiguous precepts, among which the ultimate meaning of the law must be found[5].

This way, recourse to general principles – specifically constitutional principles – constitutes an important chapter in legal activity. It is also partly responsible for the structural and functional functioning of the courts. The role of the judge is not only limited to enforcing the law, but in this context, he is also a creator of law, albeit to a limited extent. This perspective reaches its fullest dimension in constitutional jurisdiction. Suppose the constitutional legislator is not completely free in his function of shaping the order. If he does not have the function of replacing the creator and reformer of the Constitution, then, on the other hand. the Constitutional Court, by the nature of its function, must situate itself very close to the constitutionalist. Although it should not replace the reformer of the Constitution, the Constitutional Court is often called upon to complete its work while keeping in mind the limits of self-control, i.e. procedural rules based on the constitutional text. The European Constitutions currently in force affirm a whole series of axiological apriorisms typical of our culture, embodying those values and principles that were part of variable political programmes in the past. One of the aims guiding contemporary constitutional thought is to give normative efficacy to ideals, now encapsulated in broad formulations that take the name of 'goals', 'values' and 'principles'. What is important however, is the formulation of such a norm itself. Therefore, the area that has received the most attention in recent decades is interpretation. Here, the opposing conceptions of the constitution and even of law itself are most clearly visible. The qualification of the type of norm logically precedes its application. The legal consequences of the kind of norm applied and the technique with which it is to be used become a necessary subject of consideration when adjudicating[6].

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[5] M. Kohen, B. Schramm, *General Principles of Law*, [in:] *Oxford Bibliographies in International Law*, ed. A. Carty, New York 2013, available at: https://bit.ly/2BwybtD [accessed on: 11 September 2021].

[6] M. García Canales, *Principios generales y principios constitucionales*, "Revista de Estudios Políticos (Nueva Época)", No. 64/1989, pp. 131–162; A. Kozłowski, *Systematicity of general principles of* (*international*) *law – an outline*, "Polish Yearbook of International Law" 37/2017, pp. 225–234; See: M. Dordeska, *General*

3. The axiology of the Constitution and the European legal area

Law is a dual structure but enriched by a third factor in the form of fundamental human values, i.e. justice, order and humanism, which are not something outside the law, but in a sense, remain within the law thanks to it[7]. A norm is always created and applied based on certain values, and even the cessation of its validity also derives from certain values[8]. Law cannot be made without values. Neither can it be created based on false values. That is why the axiology of law is necessary for national law, mainly constitutional and international law. All this concludes that studying values and addressing the subject of legal axiology is required for the European legal space to define its specific character, not only through a geographical prism but above all, through the prism of the values it protects. Representing the European legal space and the related analysis of its axiological dimension and the context of legal regulations is an increasingly frequent subject of legal studies. The most frequently discussed areas include the matter of values on the grounds of the European Union. Less often, this issue is considered in international law, within the framework of individual organizations[9].

However, when considering the area of the European legal space as an object of research, one should consider regulations within the EU and other subjects of international law established and

Principles of Law Recognized by Civilized Nations (*1922–2018*): *the evolution of the third source of international law through the jurisprudence of the Permanent Court of International Justice and the International Court of Justice*, series: "Queen Mary Studies in International Law" vol. 39, Leiden 2020.

[7] F. Longchamps, *Z problemów poznania prawa*, Wrocław 1968, p. 13.

[8] J. Zimmermann, *Przedmowa*, [in:] *Aksjologia prawa administracyjnego*, ed. J. Zimmermann , Warszawa 2017, p. 19.

[9] More: A. von Bogdandy, *Founding Principles of EU Law. A Theoretical and Doctrinal Sketch*, "Revus", No. 12/2010, p. 35–56; J.G. Apple, *What are General Principles of International Law?, American Society of International Law and the International Judicial Academy*, Jul/Aug 2007, vol. 2, iss. 2 available at: http://www.judicialmonitor.org/archive_0707/generalprinciples.html [accessed on: 21 September 2021].

operating within its framework[10]. The "European area" should not be approached geographically by identifying it with the continent but by analysing the cultural area. The historical and cultural roots of Europe facilitate our research since the values underlying European civilisation are also those to be studied within the legal system. The analysis of European legal culture allows us to see many historical,

[10] The concept of European legal space is not only an attribute of the science of international law in terms of comparative legal studies of national systems against the background of legal systems created by international organisations. A multitude of terms used synonymously, where it is difficult to find broader analyses in which the authors would suggest a similar understanding and approach to this concept, e.g. general European legal space, European legal order, European system of law, European international law, European system of law or European architecture. In foreign literature, on the other hand, one may encounter the following terms: European legal space, European legal area, law of the European area, European legal system or European law. When studying the practice of using particular terms referring to the European legal space, it is difficult not to notice a kind of freedom in their use, which, in addition, often has no justification in the context of defining (naming) described (national or international) legal systems. The analysed views are mainly based on enumerations pointing to entities that create legal norms in Europe, thus shaping the European legal space. In a narrower sense, lawyers and commentators propose to capture the European legal space as ‚the national legal orders of European states' or as ‚the EU law system'. In a broader sense, it is proposed to be defined as: 1) the legal norms created by the EU and the CoE (so-called European law in the broader sense); 2) the legal systems of European governmental international organisations in conjunction with the legal norms of other international actors operating in Europe – in this view, it is collectively the law of European international organisations, namely the EU, the CoE, the OSCE and other European international structures, namely: European Economic Area, European Free Trade Association and the United Nations Economic Commission for Europe; 3) another concept of defining the European legal space in a broader sense can be constructed in a manner analogous to the above, with the additional element entering into it that besides the legal orders of European governmental international organisations and other international structures operating within Europe, the legal systems of European states are also taken into account; 4) the broadest definition spectrum includes the classification of many different legal orders, not only international or European, namely: the national legal orders of European states, the legal order of the EU, the system of the CoE, the OSCE and other international structures operating within Europe, as well as the international norms adopted by European states as part of their membership in other organisations or institutions, e.g. This is the widest extent of the legal ‚mosaic' that cuts across legal systems, national and international, including strictly international ones.

sociological and ideological differences and even contrasts between the states of this space[11]. From a geographical point of view, the European legal area has a relative character of so-called Europeanness in this dimension. The search for a non-geographical basis for a common European legal space for states is confirmed in the legal and organisational sphere of the subjects of international law. This foundation is certainly a peculiar axiological order, expressed in values protected by law, which determines the directions of development of states[12].

Characterising the European legal space through the prism of values has even more justification than the geographical context. It makes it possible to emphasise that the European legal space is a space of values. In this view, it is not only a geographical, geopolitical or geoeconomic space, but it is- above all- an axiological area. Referring to the geographical criterion, however, it should be noted that the strict understanding of continental borders blurs from understanding of the European legal space as an exclusively European space. As a result, there is a wider territorial extension of its axiological values, representing and protecting, and applying geographically outside Europe. And although the states of the European legal space have different interests, resources, capacities, cultural heritage, international influences and other factors, the legal culture of individual European states is reciprocal. The values of the legal culture of individual European states permeate each other. The result is that the members of the European legal space are united by a catalogue of common rights and obligations and shared values[13].

[11] It should be borne in mind that the OSCE is an international organisation which also includes states not located on the European continent (e.g. the USA or Asian states such as Mongolia, Uzbekistan and Armenia).

[12] See: X. Groussot, L. Pech, G.T. Petursson, *The reach of fundamental rights on member state action after Lisbon*, [in:] *The protection of fundamental rights in the EU after Lisbon*, eds. S. de Vries, U. Bernitz, S. Weatherill, Oxford, Portland, Oregon 2013, pp. 97–118.

[13] K. Lane Scheppele, D. Vladimirovich Kochenov, B. Grabowska-Moroz, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, "Yearbook of European Law" vol. 39/2020, pp. 3–121.

The specificity of the legal norms created in Europe by states and international organisations means that these norms function autonomously and often overlap. In addition to shared values, the study also covers those elements that make up the regional diversity of normative systems, the legal output of regional international organisations and cultural differences between regions on a global scale. Europe's identity is extremely rich, both socially and culturally, including legal culture in its broadest sense. Legal culture is a unique phenomenon. It encompasses a catalogue of values whose axiological determinants are, on the one hand, shared and, on the other, often based on political, social and cultural differences[14].

Every specific law system implements a particular system of values, which protects and multiplies these values. Such values rationalize and legitimize the law and provide a criterion for its evaluation, thus constituting the law's axiological basis. In a narrower sense, this general examination is transformed into a detailed theory of values, which enters into individual scientific disciplines, including law and its fields. Therefore, it is also considered important for legal sciences to search for and analyse the values that underlie existing law and acts of its application. With this approach, a field called the axiology of law has developed, and in a more precise sense, the axiology of individual branches of law. The axiology of law is the science of values established in law (e.g. social justice, equal opportunities, solidarity, freedom, etc.). It consists of a set of values relativised to evaluative values, implicitly or explicitly contained in a given system of law, as well as principles and evaluations to which the system of law refers. Such a set is called the moral basis of the law. The catalogue of values on which the axiological justification of norms is based varies but is correspondingly specific to each

[14] A value is a social or individual "desired state" (position, determinants). (position, determinants), while L. Wittgenstein specifies the notion of value indicating that value is a "state of affairs" that is required or desired, pointing here to values: e.g. moral, religious, philosophical, cultural, political, social or individual (personal). W. Lang assumes that "value" is an attribute given to a certain subject as a result of a positive assessment of this subject, made on the basis of a certain standard of assessment.

discipline of law. Therefore, studying the legal space means establishing the axiological reason of legal norms in this law system[15].

From an axiological point of view, the law is a set of values formed into normative language. Hence, the European legal space is constituted by a set of legal norms whose *raison d'être* is the realization of values by state entities and international organizations, established based on legal norms due to a common consensus on the need to protect these values. The European legal space results from legal cooperation between states on the protection of the most important values of law and a common legal culture resulting from axiological compromise. Economic processes, the integration of the European states, the development of political, social and cultural relations have created the need to strive for a common firmament of legal axiology, which can be defined as the legal axiology of the European legal space. It is based on common historical experiences, social and cultural values and the political, in principle, unity of the European continent from the perspective of the objectives[16].

The EU legal order is characterised by constitutional pluralism, based on respect for the 'national identities of the Member States, 'inherent in their fundamental political and constitutional structures' (Article 4(2) TEU). In turn, Article 2 TEU lists the rule of law alongside the core values on which the Union's political system is founded, such as respect for human dignity, freedom, democracy,

[15] See: M.C. Bassiouni, *A Functional Approach to "General Principles of International Law"*, "Michigan Journal of International Law", No. 768/1990, available at: https://repository.law.umich.edu/mjil/vol11/iss3/3 [accessed on: 12 September 2021].

[16] See: The preamble to the Treaty on European Union states that the parties to this agreement draw inspiration from ,the cultural, religious and humanist inheritance of Europe, from which have grown the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'. According to the preamble, the Member States reaffirm their "attachment to the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law". This means that Member States base their constitutions on these values. At the same time, the Treaty recognises that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union's law" (Article 6(3)).

equality and human rights. The importance of the values enshrined in this article guides the interpretation and application of the law in all areas of European Union competence[17]. It is also important to interpret and apply the Charter of Fundamental Rights since any particularisation of the content of any fundamental right may never be made in contravention of the values listed in Article 2 TEU[18]. The concept of the rule of law enshrined in this catalogue is necessary for functioning all the other listed values[19].

The culture of a given society may be divided into material culture and non-material culture, which includes spiritual creations handed down from generation to generation. On the one hand, it is created by the system of social values functioning in the society, protected by social, legal, moral norms and, on the other hand, by widely understood social awareness in the form of human views on

[17] More about values in EU law: E. Herlin-Karnell, *EU values and the shaping of the international legal context*, [in:] *The European Union's Shaping of the International Legal Order*, eds. D. Kochenov, F. Amtenbrink, Cambridge 2013, pp. 89–107.

[18] In Opinion No. 2/13 of 18 December 2014 on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Court of Justice of the EU states in relation to Article 2 of the Treaty "… each Member State shares with all the other Member States and recognises that they share with it a set of common values on which the EU is based, in accordance with Article 2 TEU. This premise presupposes and justifies the existence of mutual trust between Member States that these values will be recognised and thus that EU law implementing them will be respected" (§ 168).

[19] According to the interpretation of this provision, it is reasonable to conclude that the risk of a breakdown of the rule of law constitutes a threat to the other values protected in the system of the EU law. Thus, the values enumerated in Article 2 TEU cannot be restricted on the grounds of national identity as enshrined in Article 4(2) TEU, respect for which dictates that its connection with the main political and constitutional structures of a Member State must be taken into account; A. Arnull, *What is a General Principle of EU Law?*, [in:] *Prohibition of Abuse of Law. A New General Principle of EU Law?*, Studies of the Oxford Institute of European and Comparative Law, eds. R. De La Feria, S. Vogenauer, Oxford, Portland 2011, pp. 7–24; A. Schnettger, *Article 4*(2) *TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 9–38.

the surrounding world. Law is a part of intangible culture. Therefore legal culture is also a part of the culture of a given society[20].

The norms of law are an essential element of all norms binding in the state and shaping the social order, and every society functions within the framework of legal culture. The behaviour of the addressees of the law towards legal norms is closely related to the state of legal consciousness of the individual, and one of the most important elements of legal consciousness is the readiness to behave in a certain way towards the law, i.e. having the right attitude towards the law. Law influences culture, and culture influences law. Law is the most important component of culture and, at the same time, the most important cultural factor[21]. Researchers and commentators on law indicate that European legal culture is

[20] See: E. Hancox, *The Relationship Between the Charter and General Principles: Looking Back and Looking Forward*, "Cambridge Yearbook of European Legal Studies", No. 22/2020, pp. 233–257.

[21] To quote from I. Wrońska, *An Axiology of the European Legal Space*, "Forum Prawnicze", No. 6(62)/2020, pp. 3–16: In the literature, the concept of legal culture is defined in different ways. A. Kojder defines it as a set of normative patterns of behaviour and values connected with these norms, which are socially accepted, assimilated and transmitted by means of conceptual symbols, either within one generation or from one generation to another, i.e. when this transmission between law and culture has the features of certain permanence. In K. Pałecki's definition the author emphasizes the set of socially performed symbolic actions, realizing patterns of symbolic actions contained in law. Whereas in the views of S. Russocki legal culture is a set of intertwined attitudes and behaviours – both individual and collective – and their effects in relation to the law, i.e. all obligations, rules and norms imposed, equipped with an appropriate sanction and systematically enforced by an appropriate body of a given community, and resulting from the system of values shared by this community. In the opinion of J. Kurczewski points out that legal culture includes expectations of individuals towards the law and the judiciary, their legal intuitions and beliefs about their rights and obligations, as well as patterns of conduct in which these rights and obligations are realised. A broader understanding of legal culture is presented by S. Pilipiec, who emphasises that legal culture consists, on the one hand, of the legal order, including the system of binding law, divided into branches of law, and, on the other hand, of the legal feeling, the most important element of which is legal awareness, i.e. the totality of knowledge about the law, a set of affective evaluations of the law, attitudes towards the law and postulates for changes in the existing legal system.

characterised by three constant, cumulative elements: personalism, legalism and intellectualism[22].

4. The catalogue of constitutional principles in European countries

The rule of law is one of many principles that, taken together, are considered to form the basis of the EU's political system and are common to the EU Member States. An analysis of the 'common features' concerning the three dominant constitutional traditions in Europe (England, Germany and France) shows that these common features are strong enough to constitute an identifiable common denominator. The rule of law can therefore be accurately described as a 'common principle'.

Notwithstanding the naturally different terms used to convey the concept of "the rule of law" in other languages, EU law presents the rule of law as a principle common to the EU Member States. When we analyse what the rule of law entails in the most influential national legal traditions in Europe – the British, German and French traditions – it is possible to outline some divergences between these national understandings. Yet, the importance of these divergences should not be overstated. Firstly, some degree of disagreement, in reality, persist within any legal system regarding the precise meaning, scope of application and normative impact of the rule of law. Secondly, these disagreements are, for the most part, theoretical, and quite remarkably, national scholarly debates are conducted on largely identical terms. Last but not least, national understandings have now largely converged. There is an identifiable consensus concerning the core meaning, scope and impact of the rule of law as a constitutional principle, especially if the approach is grounded in positive law[23].

[22] More: I. Wrońska, *An Axiology of the European Legal Space*, "Forum Prawnicze", No. 6(62)/2020, pp. 3–16.

[23] More: R. Gosalbo-Bono, *The significance of the rule of law and its implications for the European Union and the United States*, University of Pittsburgh law review,

In the British tradition, general principles of the constitution result from judicial decisions determining the rights of private persons in particular cases brought before the Courts. So that people's actions should be governed by legal norms regularly passed as opposed to arbitrary norms, the equal subjection of all legal persons to the law of the land and equal access to a system of ordinary courts. In other words, the rule of law entails the traditional principles of legality and equality before the law. At a minimum, the statutory reference to the rule of law seems to oblige British courts to take this defining principle into account. Although the extent of its justiciability remains controversial, the rule of law, as an "overarching principle of constitutional law," must necessarily inform the interpretation of all legal norms and may be relied upon by the judiciary to derive more concrete legal principles to assist it in its mission of interpreting statutes as well as scrutinizing and eventually invalidating governmental actions. To a large extent, British courts have already answered this call as they have been, since the mid-nineties, that its scope today is wider by far than could be accommodated under narrow conception; it contains both procedural and substantive content. Not unlike Britain, where no statute authoritatively and explicitly referred to the rule of law as a principle of the British Constitution, the French Constitution continues to lack any express reference to the principle of *Etat de droit*, a term commonly used nowadays as the equivalent of the English rule of law[24].

The meaning and scope of the French *Etat de droit* is reminiscent of the *Rechtsstaat* principle post-1949. French positive law does not offer any definition. Still, France can now be described as an *Etat de droit* because its legal order guarantees that all public

No. 72(2)/2010, pp. 231–271; G. Palombella, *The Rule of Law and its Core*, [in:] *Relocating the rule of law*, eds. G. Palombella, N. Walker, Oxford 2009, pp. 17–42.

[24] A. Auersperger Matić, *Two Concepts of the Rule of Law*, "Zbornik znanstvenih razprav" vol. 79/2019 – Perspectives on European Union Law, pp. 9–34; C.E. Parau, *Core Principles of the Traditional British Constitutions*, Department of Politics and International Relations University Oxford, pp. 17–24, available at: https://www. politics. ox. ac. uk/materials/Core_Principles_of_the_British_Constitutions. Pdf [accessed on: 20 September 2021].

authorities, including the Legislature, acting under the control of a judge who ensures that these authorities respect the entirety of the formal and substantive rules stated in the Constitution, which is itself located at the top of the internal hierarchy of norms. This understanding undeniably recalls the meaning and scope of the *Rechtsstaat* principle under the Basic Law. There is, however, a difference between Germany and France. Rather than reinterpreting the initial concept of *Etat de droit*, which was largely similar to the positivistic *Rechtsstaat* pre-1949, an additional idea was used in France to mark the shift towards the establishment of an increasingly "constitutionalized" legal system. Regardless of these semantic variations, the meaning, scope and normative impact of the principles of *Etat de droit* and *Rechtsstaat* seem to have largely converged. Both redefine the nature and purpose of their respective polities and regulate, through formal and substantive requirements, the definition and implementation of state policies with the view of guaranteeing better compliance with the basic values (liberty, equality, dignity, etc.) on which the national constitutional order is based[25].

In Germany, the *Rechtsstaat* emerged as a central constitutional principle, with both formal and substantive components. The whole politico-legal system is said to be based and to which all state activity must conform. However, unlike federalism and democracy, which are all explicitly guaranteed as basic institutional principles at the heart of the German constitutional order, the *Rechtsstaat* is not explicitly referred to as a principle binding on the Federal Republic but rather as one binding on the *Länder*. Yet, it seems reasonable to interpret this provision as necessarily implying that the federal state itself is governed by the principle of the rule of law. As for its substantive elements is that this principle is also understood as encompassing the principle of fundamental rights protection. Hence the *Rechtsstaat* does not merely operate as a constitutional principle that must inform the creation, interpretation and application of all legal norms; it can also fulfill a gap-filling function and offer a justification for dynamic judicial interpretation. These legal uses of the *Rechtsstaat* principle are quite remarkable considering – a trait

[25] *Ibidem*.

shared with the English rule of law – the lack of any definition in positive law[26]. The open-ended nature of the German *Rechtsstaat* has not precluded it from being borrowed by most of the new democracies in Central and Eastern Europe following the end of the cold war and before that, by the drafters of the Portuguese and Spanish democratic constitutions of 1976 and 1982. Before it became an overarching principle of German constitutionalism, the concept of *Rechtsstaat* also heavily influenced European legal doctrine in countries such as Italy (*Stato di diritto*), France (*Etat de droit*) and Spain (*Estado de derecho*)[27].

Interest in the concept of the rule of law in the study of international law has significantly increased in recent years. However, traditionally, it has not been studied with such intensity and conscientiousness as against the background of domestic law. The reason for this is probably the specificity of international law itself, which is definitely more than the domestic law of states, politicised and less centralised in terms of its creation and application. Nor, however, does the international community itself – an association of states – resemble that extent a human society governed by law; for most of the modern era, it was rather a collection of individuals, functioning separately and in an unconnected manner, who for historical reasons had to live together in uneasy cohabitation. Under these conditions, it is more difficult to realise the typical functions of law as a regulator of the behaviour of the subjects of social relations – and it is, therefore, more difficult to speak of the "rule of law"[28].

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[26] More: A. Jakab, *Dos paradigmas encontrados del pensamiento constitucional en Europa: Austria y Alemania*, "Revista española de derecho constitucional", No. 88/2010, pp. 131–162.

[27] More: project Unity and Diversity in National Understandings of the Rule of Law in the EU Work Package Leaders: Laurent Pech Joelle Grogan, Unity and Diversity in National Understandings of the Rule of Law in the EU Work Package 7 – Deliverable 1, available at: www.reconnect-europe.eu [accessed on: 8 September2021]; J.R. Silkenat, J.E. Hickey Jr., P.D. Barenboim eds., *The Legal Doctrines of the Rule of Law and the Legal State* (*Rechtsstaat*), Heidelberg – New York, Dordrecht, London 2014, series: Ius Gentium: Comparative Perspectives on Law and Justice, vol. 38, pp. 3–154.

[28] M. Pilich, *Praworządność – perspektywa prawa międzynarodowego*, [in:] *Przyszłość Europy opartej na rządach prawa*, Studia i analizy Sądu Najwyższego.

The rule of law is one of several constitutional principles which, taken together, can be regarded as the basis of all national legal systems in Europe. It is also the principle on which organisations such as the Council of Europe and the EU are based. Its presence in the constitutions of the member states of both these organisations demonstrates that it can be regarded as one of the fundamental features of the European constitutional heritage. Despite differences as to the meaning of the rule of law or the scope of its application, the legal understanding of the rule of law is to a large extent convergent, especially as to the fundamental importance of the rule of law, its constituent elements and its relation to the other basic principles of contemporary Western constitutionalism, i.e. democracy and respect for human rights[29].

The absence of a comprehensive, transversal and authoritative document offering a clear and exhaustive explanation of what the rule of law precisely entails favour the adoption of the unconvincing or the undemanding rule of law policies and monitoring of countries. Furthermore, this situation also negatively impacts the EU's normative leadership and effectiveness as an international standard-setter. Accordingly, it is recommended that the EU starts working on publishing a single document comprehensively setting out what its foundational principles entail. The EU should refine the analytical framework it relies on to assess and monitor countries' adherence to the rule of law, devise its policies and actions, and measure their effectiveness. The EU should also consider clarifying the minimum legal requirements any country which seeks to

Materiały Naukowe, t. VIII, Warszawa 2019, p. 105; J. Sarrión Esteve, *El retorno de los límites constitucionales a la primacía: a propósito del reciente rugido del guardian de la constitución alemana*, "Revista de derecho constitucional europeo", No. 34/2020, p. 5.

[29] F. Mauri, *The Contribution of the Venice Commission to the Strengthening of the Rule of Law in Europe.* Law. Université Côte d'Azur; Università degli studi di Milano – Bicocca, 2021, pp. 15–114, available at: https://tel.archives-ouvertes.fr/tel-03369681/document [accessed on 9 September 2021]; V. Bílková, *The Council of Europe and the Rule of Law – The Venice Commission*, [in:] *70 Years of Human Rights and the Rule of Law in Europe*, Schriften zur Europäischen Integration und Internationalen Wirtschaftsordnung, Volume 55, eds. S. Kadelbach, R. Hofmann, Baden-Baden 2021, pp. 115–138.

trade or, more generally, cooperates with it must meet in terms of the law on the books and the law in practice, and may also consider adopting different requirements[30].

5. The status of the individual in the State: constitutional and international context

Regardless of the general degree of analogy or dissimilarity between constitutional and international law, national rights statutes and international human rights law undoubtedly perform the same basic function of setting limits on what governments can do to people within their jurisdiction. Indeed, in liberal states that actively enforce constitutional norms, international human rights law tends to impose similar restrictions on the same governments. Thus, apart from the source, the main difference between the two is the constitutional 'something' in international human rights law. From the similarity in function and content, it can be inferred that international human rights law is primarily relevant in and addressed to illiberal or non-western states[31].

European standards for the protection of human rights clarify the legal nature of the various values included in the catalogue of axioms of the European legal space, particularly the rule of law and democracy, which are the preconditions for the legal protection of individual rights and freedoms. The catalogue of values in the acquis of the European legal area should be read comprehensively, but human dignity should always come first. It is precisely to this value that other values mentioned in legal norms are subordinated, although they should be treated as complementary.

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[30] L. Pech, *Rule of law as a guiding principle of the European Union's external action*, "Cleer working papers" 3/2012, p. 48; N. Hedling, *A Practical Guide to Constitution Building: Principles and Cross-cutting Themes*, Stockholm 2011, especially part 1: The role of constitutional principles, pp. 5–8.

[31] S. Gardbaum, *Human Rights and International Constitutionalism*, [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, eds. J. Dunoff, J. Trachtman, Cambridge, UCLA School of Law Research Paper, No. 08-01/2009, pp. 233–257.

The axiological foundations of the European legal space, resulting from its legal culture, thus determine the scope of implementation of the so-called postulate of the rational legislator. There should always be a set of values in the background of each legal institution. A common axiological basis protects these values, leading to an increase in the rationality and functionality of law in the European legal space. Its absence would render the law-making process incomprehensible, irrational and haphazard, and would proceed according to the requirements of changing political conditions and the needs of the moment[32].

The axiological values of the European legal space, by promoting the rule of law and democracy, realise the idea of good law, understood as a just and effective tool for regulating relations in society and as the art of applying what is good and just (*ars boni et equi*), which has guided European legislation since the beginning of Western civilisation. It is evidenced by the fact that, among the criteria for verifying the quality of the law, a distinction is made between those that testify to its coherence, stability, effectiveness and transparency and those that emphasise its axiological justification in universally recognised and respected values. The axiological social legitimacy of the law is achieved by reminding the subjects of its social values, such as justice and security, the law and its rationality. The concept of good law includes values that positively justify the legal order as just and the law as of right. One of its elements is justice sensu stricto, emanating from the principle of equality, which considers the principle of proportionality for the protection of social groups requiring additional legal protection, e.g. women, the disabled, children. Thus, justice as an overriding value determines the shape of the law. Another element is purposefulness, which determines and creates the content of the law, understood as an expression of its substantive content. The individual values and goals of the law are

[32] See: S. Weatherill, *From Myth to Reality: The EU's 'New Legal Order' and the Place of General Principles Within It*, [in:] *General principles of law: European and comparative perspectives*, series: Studies of the Oxford Institute of European and Comparative Law, vol. 23, eds. S. Vogenauer, S. Weatherill, Portland, Oregon 2017, pp. 21–38.

created and determined both by the will of the legislator and in the ethical, social and cultural values of society. To this catalogue of characteristics of a good law should be added the criterion of legal security, understood as predictability and certainty of the law while emphasising that it constitutes an absolute value[33].

The categories and boundaries of values that the European legal space creates and respects are determined by the universal constitutional values of European states, which define both the European constitutional identity and the constitutional identity of European states. Constitutionalism functioning in the states of the European legal space realises the idea of good law regardless of how it is defined. The values of the European legal space guide the development of legislation, the interpretation of legal rules, and the law's application, thus fostering the formation of coherent legal order.

States in many parts of the world regularly amend and write completely new constitutions in some cases. It may happen for a variety of reasons. For example, it may reflect a desire to redefine the separation of political powers hoping that the constitution will be more democratic, have better checks and balances and be more responsive to the electorate's wishes. It may also be a desire to update an existing constitution to better respond to political, economic or social changes in society. Constitutional amendments may also be undertaken after a period of conflict to establish a new constitutional order and provide a vision for moving forward to create a more just society. Whatever the reason, a key element of any constitutional reform is to ensure that human rights and fundamental freedoms are promoted, respected and protected[34].

Does the constitution guarantee the human rights of people in the country? Do public authorities act in accordance with the constitution? These questions reflect the central place that the constitution

[33] See: M. O'Boyle, M. Lafferty, *General principles and constitutions as sources of human rights Law*, [in:] *The Oxford Handbook of International Human Rights Law*, ed. D. Shelton, Oxford 2013, pp. 194–221.

[34] S. Gardbaum, *Human Rights and International Constitutionalism*, [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, eds. J. Dunoff, J. Trachtman, Cambridge, UCLA School of Law Research Paper, No. 08-01/2009, pp. 233–257.

holds in the lives of a country's citizens. Human rights are at the center of the constitutional order of the modern state, not only defining the relationship between individuals, groups and the state but also permeating state structures, decision-making and oversight processes. Consequently, the Bill of Rights is an integral part of the modern constitution. At the same time, gaps in the implementation of human rights at the national level are often rooted in deficiencies in constitutional law. The relationship between human rights and a democratic constitutional order begins with the process leading to the adoption of a constitution or constitutional reform. Such a process promises successful results if it is based on the broad participation of all sectors of society. Participants should be able to freely express their views and communicate without hindrance from those in power. Their ideas and opinions must be dealt with through clear procedures, provided that those responsible for overseeing the process are fair and impartial[35].

International human rights standards should not only provide general guidance to national legislators. Still, they should also be seen as a yardstick for evaluating legal, political and practical solutions adopted at the national level. The State has to: ensure that domestic law at all levels complies with international human rights standards; be guided by non-binding international human rights instruments adopted by competent bodies of the international community. Does this mean that all international human rights standards should be directly reflected in the Constitution? It would be a difficult objective to achieve. Neither international law in general nor human rights treaties, in particular, specify precisely how international human rights standards are reflected in domestic law. It is up to each country to decide how to align its laws with these standards. The reality that some rights articulated by international instruments may be reflected in the constitution and otherwise

[35] D. Melkonyan, *Concept of the Rule of Law in the Case-Law of the European Court of Human Rights*, [in:] *Materials of conference devoted to 80th of the Faculty of Law of the Yerevan State University*, eds. G. Ghazinyan and others, Yerevan 2014, pp. 339–349.

expressed in legislation is recognised in the provisions of human rights instruments.

As with constitution-making in general, giving content and form to rights is a sovereign decision of the state and its citizens. There is no single master plan for rights that can be used as a definitive yardstick. However, the principle of state sovereignty does not abrogate the obligations under human rights treaties ratified by the state. Moreover, the inclusion of internationally recognised human rights in the Constitution contributes to the adoption of international instruments and helps develop a common human rights culture. These two interrelated factors bring a high degree of commonality in the elaboration of rights. Even though the form may vary considerably, there are many similarities in the content of many recently adopted rights.

Modern laws, in defining the subjects of rights, are guided by the principle underlying international law. They thus serve to protect all persons under the jurisdiction of the state, whether citizens or non-citizens. Technically speaking, constitutions usually operate with terms such as 'everyone', 'all' or 'every person', instead of 'every citizen' or 'citizens'. As in international instruments, some political rights may be reserved only for citizens of a state.

Traditionally, rights related to the conduct of public affairs fall into this category. In the same context, some constitutions also list as purely civil rights the freedom to form political parties and the right to information about the activities of public authorities. However, it should be noted that increasingly, constitutions or electoral laws allow non-citizens who have been legally resident in the country for a certain period to participate in local elections or referendums. Other rights usually classified as political rights belong to every individual, including freedom of expression and freedom of assembly. Other rights that various constitutions grant only to citizens include rights related to citizenship, such as the right to obtain a national passport and protection while abroad, the right to vote in national elections, the right to seek national public office, the prohibition of expulsion and the ban on extradition.

In terms of function, age, content and structure, there are similarities between national and international bills of rights. The most

obvious differences seem to relate to legal status and methods of enforcement. Still, an examination of the former leads us to ask: what, if anything, is constitutional about the main international human rights instruments? Undoubtedly, they have a basic constitutional function, setting limits on how governments treat people within their jurisdiction. At a more detailed level, there are plausible arguments that fulfil at least some of the conditions for international constitutional law, especially those relating to constitutional authority and entrenchment.

Moreover, there is an ongoing process of implicit constitutionalisation both in the human rights system itself and in international law as a whole. However, in both cases, it is limited by the still important role of state consent and the inability of human rights to bind international organisations. These developments in the human rights system in combination have contributed to the development and promotion of global constitutionalism. This point suggests one reason why the international human rights system is not simply a replica of national sets of rights – or a substitute for them where they are lacking – because significantly externalising limitations brings constitutionalism to a new stage in its historical development. International human rights law also functions to enshrine and clarify a distinct normative basis for protecting fundamental rights as rights of human beings rather than as rights of citizens.

Not only must the state protect rights, but it must do so in a way that highlights the fact that it is obliged to do so. Internationalism provides the institutional tools that enable the state to do so. On the other hand, constitutionalism is also necessary because the value of rights depends on enjoyment. To facilitate and enhance the enjoyment of those rights, politics need to participate in dictating what those rights are active. If citizens are alienated from the process of determining what rights are and what their importance is, they are less likely to exercise them actively. This solution challenges a tradition that is based on a strict hierarchy between international law and state law. This conflict is a constant and welcome feature of the legal world. The quest to resolve this conflict – the quest to realise

an ordered harmony – may ultimately undermine the legitimacy of the constitutional and international order[36].

In terms of function, age, content and structure, there are significant similarities between national and international bills of rights. The most obvious differences seem to relate to legal status and methods of enforcement. They undoubtedly have a basic constitutional function, setting limits on how governments treat people within their jurisdiction. There are plausible arguments at a more detailed level that they fulfill at least some of the conditions for recognition as international constitutional law, especially those relating to constitutional authority and entitlement. Moreover, there is an ongoing process of implicit constitutionalisation both in the human rights system itself and in international law as a whole. However, in both cases, it is limited by the still important role of state consent and the inability of human rights to bind international organisations. These developments in the human rights system in combination have contributed to the development and promotion of global constitutionalism. This last point suggests one reason why the international human rights system is not simply a replica of national sets of rights – or a substitute for them where they are lacking – because, by significantly externalising limitations, it brings constitutionalism to a new stage in its historical development. International human rights law is also designed to perpetuate and clarify a distinct normative basis for protecting fundamental rights as rights of human beings rather than civil rights. Whether or not the International Bill of Rights evolves into a more unqualified constitutional charter, this is inherent[37].

Law must contribute to creating ambitious state demands while leaving sufficient freedom for states to become responsible for determining the content of rights. Law's impartial approach to rights would relinquish any global responsibility for standards of justice.

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[36] M. O'Boyle, M. Lafferty, *General principles and constitutions as sources of human rights Law*, [in:] *The Oxford Handbook of International Human Rights Law*, ed. D. Shelton, Oxford 2013, pp. 194–221.

[37] More: S. Gardbaum, *Human Rights as International Constitutional Rights*, "European Journal of International Law", vol. 19, iss. 4/2008, pp. 749–768.

In contrast, strict, all-encompassing oversight would take away states' freedom of action and undermine the willingness and readiness to exercise rights. Internationalism is the institutional embodiment of the vision that states are obliged to protect human rights and that this obligation must be publicly recognized. Not only must the state protect rights, but it must do so in a way that underlines the fact that it is obliged to do so. Internationalism provides the institutional tools that enable the state to do so.

On the other hand, constitutionalism is also necessary because the value of rights depends on enjoyment. To facilitate and enhance the enjoyment of those rights, politics need to participate in actively dictating those rights. This solution challenges a tradition that is based on a strict hierarchy between international law and state law. Such parity implies constant tension and conflict between international norms and state norms. This conflict is a constant and desirable feature of the legal world. The quest to resolve this conflict, to realise an ordered harmony, can ultimately undermine the legitimacy of the constitutional and international order[38].

6. Constitutional identity and the constitutional principles

The issue of "constitutional identity" is a topic that emerges in contemporary constitutional democracies in the context of constitutional changes. It has already attracted multilayered approaches, but its legal conceptualization is still underexposed. Based on regional European jurisprudence and doctrinal works, "constitutional identity" in a legal context is suggested to be viewed as the "identity of the constitution." The identity of the constitution is found among provisions of constitutional texts and related jurisprudence that specifically and exclusively feature a status that was constituted during the constitution-making process and shaped by either formal or

[38] See: E. Benvenisti, A. Harel, *Embracing the tension between national and international human rights law: The case for discordant parity*, "Journal of Constitutional Law" vol. 15, iss. 1/2017, pp. 36–59.

informal constitutional amendments. The legally applicable "identity of the constitution" comprises those articles that can be employed vis-à-vis the EU law and unconstitutional amendments and are arguably intended to be applied in the face of international human rights obligations[39]. Today, it seems that the very content of the identity of the constitution of a particular Member State may be shaped and preserved through active and cooperative dialogue between the supranational and national courts if there is an inclination to find uniqueness in a community based on common legal traditions and values. Another way of determining the content of "constitutional identity" is to demonstrate that uniqueness fiercely[40].

It seems that the key to answering the many questions related to determining the relationship between universal values and national legal identity is the understanding of the proportionality principle. It seems that, concerning the law of a qualitative measure component, its substantive criterion is legal values. In different cases, legal traditions can differ significantly[41].

Proportionality in constitutional law presupposes finding a balance between universal principles and national values, collective and individual rights, and uniform constitutional standards and state sovereignty. It is provided with moral content since a human being is inseparable from ethical principles. To constitutional law, the content of the proportionality principle is constitutional values in their practical implementation. The implementation of the principles and

[39] T. Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach*, "German Law Journal", No. 21/2020, pp. 105–130.

[40] M. Rosenfeld, *Constitutional Identity, The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2021, pp. 756–776; T.T. Koncewicz, *Constitutional Identity in the European legal space and the comity of circumspect constitutional courts*, "Gdańskie Studia Prawnicze", No. 1/2015, pp. 212–214.

[41] D.A. Pashentsev, *Constitutional Proportionality in the Post-Non-Classical Scientific Paradigm and Modern Practice*, "Herald of the Russian Academy of Sciences" vol. 91, No. 3/2021, pp. 390–391; E. Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, "Netherlands Journal of Legal Philosophy", No. 45(2)/2016, pp. 82–98.

norms of the constitution is carried out by legal subjects who bring the peculiarities of national legal consciousness into this process[42].

When we talk about constitutional identity, it is necessary to consider both the legal and the actual constitution. It appears that the national constitutional identity can manifest itself not only in the legal but also in the actual constitution, which includes, along with the written norms, the practice of their application, a number of customs, as well as the official interpretation given to these norms by the Constitutional Court. The analysis of each of them will help formulate and substantiate the concept of proportionality concerning a specific legal situation[43].

The understanding of presented constitutional proportionality assumes that the borrowing of foreign legal experience and the recognition of supranational court decisions should be carried out, taking into account the values of the national Constitution. Foreign norms can gain the right to exist in the legal system if they successfully pass the constitutional filter and are recognized as not contradicting the Constitution and the basic democratic values and fundamental human rights that form its basis. Therefore, it is necessary to develop an effective system for assessing foreign norms, decisions, and principles, which will be based on the need to preserve national identity, including legal, considering the principle of justice and the values inherent in the domestic cultural

[42] A.L Young, G. De Búrca, *Proportionality*, [in:] *General principles of law: European and comparative perspectives*, series: Studies of the Oxford Institute of European and Comparative Law, vol. 23, eds. S. Vogenauer, S. Weatherill, Portland, Oregon 2017, pp. 133–144.

[43] See: Y. Sanchez, *Origins and Presentation of the Proportionality Principle in French Case Law*, [in:] *General principles of law: European and comparative perspectives*, series: Studies of the Oxford Institute of European and Comparative Law, vol. 23, eds. S. Vogenauer, S. Weatherill, Portland, Oregon 2017, pp. 195–220; G. Martinico, M. Simoncini, *An Italian Perspective on the Principle of Proportionality*, [in:] *General principles of law: European and comparative perspectives*, series: Studies of the Oxford Institute of European and Comparative Law, v. 23, eds. S. Vogenauer, S. Weatherill, Portland, Oregon 2017, pp. 221–242; H. Krunke, *The Application of Proportionality in Denmark in the Light of European Legal Integration*, [in:] *General principles of law: European and comparative perspectives*, series: Studies of the Oxford Institute of European and Comparative Law, vol. 23, eds. S. Vogenauer, S. Weatherill, Portland, Oregon 2017, pp. 243–252.

tradition. An important role in such a system is to be played by the Constitutional Court, which can help preserve the constitutional identity and identify and implement the principle of constitutional proportionality in each specific case[44].

Suppose the interpretations of the Constitutional Court are based on the domestic constitutional and legal doctrine. In that case, they will become an important factor in the subsequent practical implementation of the norms of the Constitution. They will serve as the basis for preserving the national legal tradition and constitutional identity its basis. At the same time, not a single judicial body should make decisions solely based on quantitative indicators without using value guidelines in its activity. The necessary conditions for using such guidelines, which have both legal and moral content, exist today[45].

After the constitutional reform, all decisions of international courts and the provisions of all international treaties signed by the country must pass the proportionality test. In general terms, it assumes answers to some questions of a fundamental nature. It is necessary to determine to what extent the proposed innovations have a universal character, to what time they correspond to national legal traditions and established values, and the Constitution's spirit and content. The answer to these difficult questions is impossible without relying on legal doctrine. Scientists were using modern scientific methodology, can reveal the criteria of the universal law, identify the value content of the national legal tradition and its relationship with the spirit of the Constitution, and formulate measures for constitutional proportionality[46].

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[44] G.J. Jacobsohn, *Constitutional Identity*, "The Review of Politics", No. 68/2006, pp. 361–397.

[45] See: C. Calliess, A. Schnettger, *The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 348–371.

[46] C. Redgwell, *General Principles of International Law*, [in:] *General principles of law: European and comparative perspectives*, series: Studies of the Oxford Institute of European and Comparative Law, vol. 23, eds. S. Vogenauer, S. Weatherill, Portland, Oregon 2017, pp. 5–20.

Thus, the question about the content of constitutional proportionality and the search for its optimal forms assumes special significance in conditions when humanity is on the verge of a new era. The transitional period entails the exacerbation of existing and the emergence of new contradictions of both ontological and axiological nature. The development trends of the globalizing world lead to the unification of the world perception and the formation of standard, impersonal ideals and the corresponding patterns of behavior. At the same time, the imposition of new, historically and mentally alien behavioral patterns triggers destructive processes in the national culture and comes into conflict with the existing legal tradition. The negative impact that a person experiences as a central, key element of the legal system negatively affects the entire system and, as a result, the state. The protective mechanism that makes it possible to preserve the value-based core of the national legal tradition and political and legal culture allows the actualization of the constitutional proportionality principle in its modern sense. Constitutional proportionality presupposes the use of the principle of justice, which, in turn, is impossible without relying on the system of basic values. In this case, constitutional proportionality will become the basis of legal coevolution as a complex interaction and functional unity of all structural parts of the legal system in the face of modern global challenges[47].

[47] G. Lienbacher, M. Lukan, *Constitutional Identity in Austria: Basic Principles and Identity beyond the Abolition of the Nobility*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 41–58; E. Cloots, *Constitutional Identity in Belgium: A Thing of Mystery*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 59–84; D. Kosař, L. Vyhnánek, *Constitutional Identity in the Czech Republic: A New Twist on an Old Fashioned Idea?*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 85–113; H. Krunke, *Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 114–133; F.-X. Millet, *Constitutional Identity in France: Vices and – Above All – Virtues*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 134–152; C. Calliess, *Constitutional Identity in Germany:*

7. Summary

The axiology of the European legal area is a category associated with civilisation, expressing an affirmation of the rule of law, democracy, human rights, freedom, including dignity and the common good. It further reflects the aspiration to make these values a reality. The European legal area owes its identity to the diversity of international and constitutional arrangements, reflecting various historical experiences and traditions contributing to culture. The democratic essence of the European legal area is not determined by the uniformity of states' systemic solutions but by their conformity with the values reflecting the legal tradition legitimising state authority in a democratic system. The cornerstone of this system is the principle of separation of powers, which is co-extensive with the guarantee of

One for Three or Three in One?, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 153–181; E. Daly, *Constitutional Identity in Ireland: National and Popular Sovereignty as Checks on European Integration*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 182–200; F. Fabbrini, O. Pollicino, *Constitutional Identity in Italy: Institutional Disagreements at a Time of Political Change*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 201–221; E. Hirsch Ballin, *Constitutional Identity in the Netherlands: Sailing with Others*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 222–242; A. Śledzińska-Simon, M. Ziółkowski, *Constitutional Identity in Poland: Is the Emperor Putting On the Old Clothes of Sovereignty?*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 243–267; J. Martín y Pérez de Nanclares, *Constitutional Identity in Spain: Commitment to European Integration without Giving Up the Essence of the Constitution*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 268–283; P. Craig, *Constitutional Identity in the United Kingdom: An Evolving Concept*, [in:] *Constitutional Identity in a Europe of Multilevel Constitutionalism*, eds. C. Calliess, G. Van der Schyff, Cambridge 2019, pp. 284–302; G. van der Schyff, *EU Member State Constitutional Identity: A Comparison of Germany and the Netherlands as Polar Opposites*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht", No. 76/2016, pp. 167–191.

human rights, which confirm the inherent and inalienable dignity of the individual[48].

In contrast to the American view, which considers constitutional comparative futile, the European Union law explicitly relies on comparative as a fundamental matter of general principles of the EU law. The case-law of the Court of Justice of the European Union contains constitutional-legal comparisons that are relevant. Comparative efforts lead to better law. Answers will provide a better understanding of the potential and limitations of comparative constitutionalism. Comparing constitutions seems an obvious approach, representing a simple human problem-solving strategy of using previous experience to deal with a given problem. In even more general terms, it stems from human curiosity.

Nevertheless, public and constitutional law, in particular, has not been a precursor to comparative law. Public law seems less confined to a given territory than in former times – not only in Europe. Comparative law can increase the effectiveness and authority of a given legal order by looking at it from a different perspective. It also helps better to understand the nature of law in a country and to improve it further. Comparing legal orders results in better law. A rather sobering reality counters this justification of comparative law. In this reality, comparative constitutional law is a growing issue, but it is still not high on the agenda of courts and other legal actors. There is a dissonance between the perception that there should be more comparisons and how courts and other legal actors respond to this perception, considering engaging more in comparisons as a task for the future.

Nevertheless, comparative law will remain a challenge because of the resource issue in general and the language issue. Contextualising the legal culture of comparative results is also extremely demanding. Added to this are the risks associated with comparative law, e.g. superficiality, misunderstanding a foreign legal order, being too

[48] More: J. Sarrión Esteve, *Los límites a la integración europea en la doctrina constitucional*, Granada 2020.

anecdotal and insufficiently systematic, and the chance of detecting only familiar patterns in any legal order[49].

The basic argument is that principles and 'general principles of law', two often overlooked categories of norms, are particularly useful tools for strengthening constitutional processes. Although often confused, principles and general principles are distinct and play different roles in the architecture of the international legal system. Renewed attention to and debate about norms beyond treaties and customs is crucial for strengthening the systemic features of international law. First, general principles of law can give substance to the notion of the international community and the international community's role in international norm-making. Second, the legal framework for the judicial resolution of international disputes can become more robust by using principles and general principles of law. In trying to redesign or reconceptualise the system, constitutionalists have failed to engage with it. However, the popularity of the constitutionalism debate provides an opportunity to re-examine the constituent norms of the system and consider their potential to strengthen constitutional processes in international law[50].

Based on the analysis conducted, the following *de lege ferenda* postulates should be put forward:

– in the catalogue of constitutional principles, unchangeable values should be singled out, i.e., meta-values that would determine the scope of permissible constitutional changes. Their binding force should be greater and the possibility of interpretation (also by courts) limited;

[49] See: F.C. Mayer, *Constitutional comparativism in action. The example of general principles of EU law and how they are made – a German perspective*, "International Journal of Constitutional Law", vol. 11, iss. 4/2013, pp. 1003–1020.

[50] More: C. Eggett, *The Role of Principles and General Principles in the 'Constitutional Processes' of International Law*, "Netherlands International Law Review" No. 66(2)/2019, pp. 197–217; W. Sadurski, *European Constitutional Identity?*, EUI LAW, No. 33/2006. European University Institute Research Repository: http://cadmus.iue.it/dspace/bitstream/1814/6391/3/LAW2006-33.pdf [accessed on: 12 September 2021]; W. Sadurski, *European Constitutional Identity?*, Sydney Law School Research Paper, No. 37/2006 available at: https://ssrn.com/abstract=939674 or http://dx.doi.org/10.2139/ssrn.939674 [accessed on: 12 September 2021].

- the remaining constitutional principles do not have to be explicitly named and singled out in a closed catalogue;
- the only court with the right to interpret them is the constitutional court;
- it is worth introducing the so-called operational principles, which would be specific to particular European cultural circles (not necessarily overlapping with the state). They would constitute the basis for interpreting the law in the spirit of constitutional identity;
- Constitutional identity should be shaped solely based on meta-principles. The remaining principles should serve interpretation;
- the catalogue of principles in Article 2 TEU should be redefined, which includes the so-called common values, raising more and more doubts as to their interpretation and applicability;
- at treaty level, the limits of the activity of the Court of Justice of the EU to the constitutions of the EU Member States must be clearly defined;
- it should be made clear that the interpretation of Member States' constitutions by the Court of Justice of the EU does not have binding force;
- the understanding of constitutional principles derived by the Court of Justice of the EU cannot determine constitutional changes;
- fundamental principles, i.e. common good, dignity, subsidiarity, proportionality, the rule of law should be interpreted by their constitutional identity
- Constitutional principles should not be inserted in the EU law, in particular in provisions having binding force. They should be found in constitutional provisions;
- dignity should be the only common point of departure for fundamental rights;
- the hierarchical structure of the human rights protection system should be redefined, identifying national law as the first and fundamental protection;

- the national system of human rights protection must derive from the constitutional standard and form part of the constitutional identity;
- constitutional identity must be indicated as the limit of interference by international human rights bodies;
- the activity of international organisations established for the protection of human rights must not force a change in the constitutional standards of a democratic state.

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Analysis of the directions of changes in the constitutional system of the sources of law – between primacy of the constitution and the principle of supremacy of the law of the European Union

1. Introduction

The process of European integration has influenced the expansion of the catalogue of sources of law to be applied in a European Union member state. This circumstance has not always been harmonized with the constitutional shape of the system of sources of law. The need to decide the relationship between sources of law established by the national legislator and sources of law from other law centres is a challenge in the interpretation and application of the Constitution. It also has a practical dimension, because the answer to the question of which sources of law should be applied determines the way in which public authorities behave in the specific cases.

It is of particular importance to find to what extent the principle of primacy of the law of the European Union may lead to the omission of the application of the constitution, and what the role and significance of the principle of supremacy of the constitution in the process of European integration is.

In order to give answers to the above questions, it is necessary to analyze the constitutional solutions of the European Union states with regard to the relationship between the supremacy of the constitution and the principle of primacy. In particular, it is necessary to find whether in other states there exists an equivalent to Article 8(1)

of the Polish Constitution, which states that "the Constitution is the supreme law of the Republic of Poland", and if so, whether the meaning of such a solution is the same as the one adopted by the Polish Constitutional Court.

Furthermore, it is necessary to consider the consequences of the adoption of the principle of constitutional supremacy for European integration, including its impact on the possibility of making constitutional changes to achieve the goals of integration. In this context, it is also important to refer to the notion of constitutional identity as a limit to the modification of the constitutional system of the state by amending the constitution or interpreting constitutional institutions in connection with membership in an international organization, including an integration-type organization.

2. National law versus international law and European Union law – systemic issues

To be able to operate, state organisations require legal regulations as carriers of rules determining at least the most essential elements of the state. Both at the level of internal law of a given state and at the level of interstate relations, maximum legal certainty[1] is required at all times. Individual legal standards, above all, those set under legal provisions and legal acts which include them, are not autonomous but rather variously interrelated elements. It may be assumed that the said relations shape the system of law (in a broader sense) which, given European conditions, captures three major regimes (systems): national (internal) law, international (public) law, and supranational European law (the law of the European Union/ the EU law)[2].

[1] However, one needs to bear in mind exceptional situations, where it is recommended to leave more room for interpretation.

[2] See: K. Walczuk, *Umowy międzynarodowe i prawo europejskie w konstytucyjnej hierarchii źródeł prawa*, [in:] E. Kozierska, P. Sadowski, A. Szymański (eds.), *Pacta sunt servanda – nierealny projekt czy gwarancja ładu społecznego i prawnego?*, Kraków 2015, p. 247. See also: K. Walczuk, *The hierarchy of Polish state security laws from the perspective of European integration*, [in:] P. Sobczyk

One of the characteristic features of the system of law is its hierarchical organisation, above all, in terms of the title issue of the hierarchy of the sources of law. The more specific it is, the less doubts it would raise during law application. This is especially true about commonly binding law, although relations between the legal standards that are not generally binding are also of importance, to the entire system as well (to the system of law as such). In the national systems of law based on constitutions fundamentally provided in writing, it is the constitution which determines the hierarchy of the sources of law[3]. This is the case of, for example, Poland[4]. The principle of the supremacy of the Constitution is set out in Article 8(1) of the Polish Constitution. It is an exceptional formulation. The supremacy of the Constitution in other states is rather derived from the provisions ordering the authorities to act on the basis and within the limits of the law or from the provisions shaping the system of constitutional judicature. Meanwhile, Article 8(1) of the Constitution is an important determinant of the legal system in Poland[5]. The Polish Constitutional Tribunal emphasises that the Constitution's principle of supremacy has the nature of a systemic principle and is directly related to the concept of a democratic state of law. In order to secure the primacy of the Constitution over other normative acts, and thus for the realisation of constitutional values, principles and norms, the legislator has provided strong guarantees (i.e., established the Constitutional Tribunal, equipping it with the competence to control the constitutionality of the normative acts)[6].

(ed.), *Security and Globalization in the Context of European Integration. Legal Aspects*, Hamburg 2017, p. 55.

[3] See: K. Walczuk, *Akty prawa obronnego w konstytucyjnej hierarchii źródeł prawa*, [in:] M. Czuryk, W. Kitler (eds.), Prawo obronne Rzeczypospolitej Polskiej w zarysie, Warszawa 2014, p. 73.

[4] In the case of Poland, the hierarchy of the sources of law is laid down in the Constitution of the Republic of Poland of 2nd April 1997 (Journal of Laws No. 78, Item 483 as amended), hereinafter also referred to as CRP.

[5] See: A. Syryt, *Oddziaływanie prawa międzynarodowego na sądownictwo konstytucyjne w Polsce – perspektywa konstytucyjna*, Warszawa 2019, p. 39 and cited litarature.

[6] See: judgment of 30 June 2009, K 14/07, OTK ZU No. 6/A/2009, item 87; A. Syryt, *op. cit.*, pp. 39–40.

In terms of every sovereign state, regulations included in their internal laws are naturally most important. Although, without a doubt, they will always depend on, or often even be directly shaped by, international public law regulations. For instance, upon entering the European Union under international agreements, the EU Member States became largely bound by EU law[7], mainly to the extent set out therein.

Kazimierz Działocha pointed out that the Constitution also had its external aspect as a fundamental law of the Republic of Poland. As the introduction says, the creators of the Constitution, aware of the need to cooperate with all countries for the good of the Human Family, opened the Constitution to the international community. Of fundamental significance here is Article 9, containing the constitutional imperative to observe international law. This author has also stressed that Poland's accession to the EU changes the perspective on the principle of the supreme legal force of the Constitution (its supremacy) but does not constitute a questioning of it[8].

A consolidated rule holds that the standards of international law have legal consequences for international relations, in particular, for interstate relations (and the relations between various entities). As a rule, they thereby regulate the external relations of individual states. However, the objective of some international law standards is to develop internal relations or situations of states mainly in such manner that international regulations become effective. Notwithstanding the above, typically, they do not have a direct regulatory impact on the said relations or situations. Formally speaking, they remain interstate regulations[9]. These remarks are valid also with respect to international agreements (treaties) shaping the UE.

In this context, it appears requisite to adopt a position that the monistic Kelsen's concept of the primacy of international law over internal (national) law and excluding *de facto* the principle of state

[7] K. Walczuk, *Umowy międzynarodowe*…, p. 247.

[8] K. Działocha, *Komentarz do art. 8*, [in:] L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. 1, Warszawa 2016, pp. 259, 282.

[9] See: K. Walczuk, *Akty prawa obronnego*…, p. 77. See also: W. Góralczyk, *Prawo międzynarodowe publiczne w zarysie*, Warszawa 2000, pp. 18, 22–23.

sovereignty may not be considered a correct one[10]. More understanding, though, should be presented to the monistic concept of the so-called Bologna school which recognised the primary of internal law[11].

Though, the most fundamental here will be the principle of *pacta sunt servanda*, of Roman-provenance and subsequently related to H. Grotius[12] and J.J. Rousseau[13], which implies the duty of states entering into international agreements to create adequate legal conditions for their implementation[14]. Here, one may observe the undeniable impact of international law on internal legal systems, having an effect on, amongst other things, the changes in the constitutional system of the sources of law mentioned in the title.

Basically, therefore, the state may not rely on its internal law – including constitutional law[15] – wishing to evade international commitments[16]. However, the ability to rely on internal regulations, if a legal basis of entering into an international agreement, including the competence to conclude treaties, is found to be unlawful, remains an open point[17]. This is because the *nemo plus iuris in aluim transferre potest quam ipse habet* rule specifically transposed

[10] See: K. Walczuk, *Akty prawa obronnego…*, p. 77. W. Góralczyk, *op. cit.*, p. 33.

[11] K. Walczuk, *The constitutional principle of the sovereignty of Nation and State in contrast to the jurisdiction of the International Court of Justice – an outline of relation on the example of Poland*, [in:] *Medzinárodný súdny dvor: slovenská a česká teória a prax. Zborník príspevkov z V. slovensko-českého medzinárodnoprávneho sympózia. Kúpele Nimnica 28–29. septembra 2012*, Bratislava 2012, p. 74; *idem*, *Akty prawa obronnego…*, p. 77. Otherwise W. Góralczyk, *op. cit*., p. 33.

[12] See: D. Makiłła, *Pacta sunt servanda – grocjuszowski koncept prawnonaturalnego ładu w społeczeństwie*, [in:] E. Kozierska, P. Sadowski, A. Szymański (eds.), *Pacta sunt servanda – nierealny projekt czy gwarancja ładu społecznego i prawnego?*, Kraków 2015, pp. 47–58.

[13] See: E. Sokalska, *Pacta sunt servanda jako gwarancja ładu społecznego w demokracji liberalnej* (*fundamenty doktrynalne*, [in:] E. Kozierska, P. Sadowski, A. Szymański (eds.), *Pacta sunt servanda – nierealny projekt czy gwarancja ładu społecznego i prawnego?*, Kraków 2015, pp. 89–92.

[14] See: e.g. *Permanent Court of International Justice*, series B, No. 10, p. 20.

[15] See: e.g. *Permanent Court of International Justice*, series A/B, No. 44, p. 24.

[16] See: W. Góralczyk, *op. cit*., p. 35. J. Kranz, *Suwerenność państwa i prawo międzynarodowe*, [in:] W.J. Wołpiuk (ed.), *Spór o suwerenność*, Warszawa 2001, p. 105.

[17] See: e.g. Article 46 *Vienna Convention on the Law of Treaties* 1969.

to international (and EU) law remains valid[18]. This remark is of particular importance when some representatives of the doctrine and practice refer to an alleged primacy of European law over the fundamental laws of the states, even when the said most significant national acts clearly demonstrate that they take precedence over any statute law.

What is more, in a state where the legislative framework is well-established, emanated e.g. by a constitution deemed to be an expression of state's sovereignty[19], we are facing a precisely defined system of the sources of commonly binding law, the characteristic feature of which is the above mentioned hierarchisation. Most often, in a hierarchy of the sources of law, such as in the case of the Polish realia, international agreements do not come first, although due to their nature they often prevail over national legal acts, even constitutional ones (with certain reservations, such as a ratification or an endorsement, or a confirmation, in Poland, Germany, France etc.)[20].

Notwithstanding the above, in the Polish or Slovak legal systems there is a constitutional principle favouring international law. *Expressis verbis* it is expressed in Article 9 of the Constitution of the Republic of Poland, reading as follows: "The Republic of Poland shall respect international law binding upon it" and Article 1(2) of the Constitution of the Republic of Slovakia[21] reading: "The Republic of Slovakia shall recognise and observe the universal principles of international law, international agreements binding upon it, and other international obligations." Importantly, the wordings of both provisions determine to largely the same extent (although in various manners) not only international agreements but the entire international law.

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[18] See: K. Walczuk, *The constitutional principle…*, p. 74; *idem*, *Akty prawa obronnego…*, p. 78.

[19] See: K. Klíma, *Suverenita – ústavní význam*, [in:] K. Klíma a kol., *Encyklopedie ústavního práva*, Praha 2007, p. 628.

[20] See: K. Walczuk, *The constitutional principle…*, p. 74; *idem*, *Akty prawa obronnego…*, p. 78.

[21] Ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky z 1. septembra 1992, further referred to as CRS.

The foundation of the EU law is primary (original) law composed of, above all, the founding Treaties, which are nothing else than international agreements[22]. Therefore, the position and the meaning of the EU legislation in national law will be broadly similar to international public law. The foundation treaties of international organisations, and such organisations would include (in practice) the EU, under Polish conditions are subject to ratification upon a previous consent to ratify expressed in an act (statute) as indicated in Article 91(3) of CRP, "If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws". Other Treaties included in the EU primary law – the European Union Treaty together with amending treaties and accession treaties – are recognised as international agreements[23].

Therefore, given the provenience of European law (the EU law), they also should be treated as international law[24], in particular, when it is not *expressis verbis* specified in constitutional regulations regarding the sources of (commonly binding) law. Above all, in the case of constitutional regulations, such as Polish ones, the specification of "supranational law"[25] (basically only as an idea/concept) is inconclusive. What is more, claiming – for instance, on the basis of the above cited provisions – that either Polish or Slovak Constitution

[22] See Article 2 of the Vienna Convention of the Law of Treaties of 23 May 1969. See also: A. Wróbel, *Komentarz do art. 1*, [in:] *idem* (ed.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz Lex*, Warszawa 2012, pp. 148–149, where the author draws attention to the emancipation of Community law and then EU law, although he also notices permanent bonds between the EU law and international public law. See also: K. Walczuk, *Akty…*, p. 79; L. Garlicki, *Komentarz do art. 188*, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej Komentarz*, vol. V, Warszawa 2007.

[23] See also: E. Skibińska, *Wprowadzenie*, [in:] *Prawo Unii Europejskiej*, Warszawa 2012, pp. X and XVI.

[24] Seemingly also reckoned by Z. Brodecki, O. Hołub-Śniadach, *Prawo państw członkowskich en block*, [in:] S. Dudzik, N. Półtorak (eds.), *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, Warszawa 2013, p. 23.

[25] Compare A.M. Nogal, *Ponad prawem narodowym. Konstytucyjne idee Europy*, Warszawa 2009, pp. 85–112.

mandates national law's interpretation (including interpretation of the Constitution itself) to be favourably disposed to international law, would be too far-fetching[26]. Such an approach would wrongly suggest that international law – the broadly understood law – has primacy over the Constitution. The Constitution Tribunal (CT) in its judgment of 11 May 2005 also clearly held that interpretation of international law may not lead to results contrary to those expressly laid down by constitutional standards (case ref. K 18/04)[27].

One ought not to forget that national constitutions allow sovereignty to be at least partially limited for the benefit of external entities. For example, in Article 90(1), the Polish Constitution allows, by virtue of international agreements, the competencies of organs of the State authority in relation to certain matters be delegated to an international organisation or an international body. The delegation of competence "in certain matters" is understood as a prohibition of the delegation of the entirety of the competencies of a given authority; the delegation of competences in the entirety of the matters in a given area; and as a prohibition of the delegation of competences in the core of the matters which determine the competence of a given authority of the state. Therefore, it is necessary both to define precisely the fields and indicate the scope of the competencies to be transferred. There is no basis for the assumption that to meet this requirement; it would suffice to retain in a few cases, even if only for the sake of appearances, the competencies of constitutional authorities. The concerns of the applicants in this direction, as expressed at the hearing, are not justified. Actions as a result of which the transfer of competencies would undermine the sense of existence or functioning of any of the organs of the Republic would moreover remain in clear conflict with Constitution's Article 8(1)[28].

[26] This is what S. Pawłowski does with reference to Polish regulations, *Prawo międzynarodowe a prawo krajowe*, [in:] A. Szmyt (ed.), *Leksykon prawa konstytucyjnego. 100 podstawowych pojęć*, Warszawa 2010, p. 412.

[27] See also: Judgments of the Polish Constitutional Tribunal of 30 June 2009, K 14/07. Judgments of the Polish Constitutional Tribunal available at: http://otk.trybunal.gov.pl/orzeczenia/ [accessed on: 30.09.2021].

[28] See: judgment of 11 May 2005, K 18/04, OTK ZU No. 5/A/2005, item 49.

However, in this case we are dealing with a specific procedure of adopting an international agreement. A statute granting consent for ratification of such agreement is passed by the Sejm[29] by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate[30] by a two-thirds majority vote in the presence of at least half of the statutory number of Senators (Article 90(2) CRP). Moreover, granting of consent for ratification of such agreement may also be passed by a nationwide referendum (Article 90(3) CRP). Any resolution in respect of selection of the procedure for granting of consent for ratification is taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies (Article 90(4) CRP). In accordance with Article 125 of the Polish Constitution, a nationwide referendum may be held by the Sejm by an absolute majority vote in the presence of at least half of the statutory number of Deputies or the President of the Republic with the consent of the Senate given by an absolute majority vote taken in the presence of at least half of the statutory number of Senators. The decision to take such step may bring about some serious consequences because, if over half of those entitled to vote participates in the referendum, its result is binding.

Polish constitutional regulations are an example of a regulation which does not account for the EU's exceptionality. They treat it, in accordance with the reality, as a form of an international organisation. From the formal point of view, it raises no doubts. Nonetheless, in some countries, especially in those that have been a part of the European Union or its former structures for a long time, or in the states where a change in the foundation law is not that complicated, the EU clearly stands out from among other international organisations. One example of the last approach is found in Slovak regulations.

In accordance with Art. 7 of the Slovak Constitution the Slovak Republic may, by its own discretion, enter into a state union with other states. A constitutional law, which shall be confirmed by

[29] Lower House of the Polish Parliament.
[30] Upper House of the Polish Parliament.

a referendum, shall decide on the entry into a state union, or on the secession from such union (para 1). The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Art. 120, para. 2 of Slovak Constitution[31] (para 2). The validity of international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which a membership of the Slovak Republic in international organizations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary and international treaties which directly confer rights or impose duties on natural persons or legal persons, require the approval of the National Council of the Slovak Republic before ratification (para 4). And although paragraph 4 does not mention the European Union directly, there is no doubt that this provision also applies to it. Moreover, international treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws (para 5).

The ultimate provision confirms an obvious fact that once an individual state joins an international organisation, it renounces some of its sovereignty. However, oftentimes we can observe either unfamiliarity with or questioning of the position of the European

[31] "If laid down by a law, the Government shall also be authorized to issue regulations on the implementation of the Europe Agreement Establishing an Association between the European Communities and their Member States on the one hand, and the Slovak Republic on the other, and on execution of international treaties according to Art. 7, para. 2".

legal acts in the hierarchy of laws binding in a given state. This might stem from the fact that, inter alia, the process of development of the EU law is incomplete[32], which is why its effect on interpretation of national regulations at various levels may not be absolutely specific. Not least because the diversity of the national legislative systems of the individual EU member states, which are often different (in ways not infringing any rules binding upon them) in terms of the position of international and European legal acts[33].

One characteristics feature which demonstrates the distinction between the status of international agreements and the EU law across the national legal systems may be various methods of promulgation of legal acts belonging to both groups. In the Polish legal system, international agreements ratified upon prior consent granted by statute (see Article 89(1) CRP) are officially announced following procedures required for statutes (thus, inter alia, they are published in the Journal of Laws – *Dziennik Ustaw*). The rules for publishing other international agreements are specified in Chapter 5 of the Act on International Agreements of 2000[34] (AIA). Whereas, publication of international agreements other than ratified upon prior consent granted by statute is ordered by the President of the Republic of Poland at the request of the Minister for Foreign Affairs (Article 18(2) AIA)[35].

In Poland, international agreements which are not published in the Journal of Laws are promulgated without delay together with any related government statements and, if a translation is needed, along a relevant translation into the Polish language, in the Journal

[32] K. Walczuk, *Akty…*, p. 79.

[33] See: e.g. the remarks, varying to some extent from the Polish background, made in: W. Hakenberg, *Prawo europejskie*, Warszawa 2012, p. 23.

[34] Act on International Agreements of 14 April 2000 (Journal of Laws of 2020, item 127).

[35] See: K. Walczuk, *Akty…*, p. 82. In addition, one can note that publication of an international agreement is seen as a category of public administration, not civil-law, acts. See the judgement of the Supreme Administrative Court of 29 May 2003 (case ref. II SAB 419/2002). See also the judgement's gloss: E. Łętowska, "Orzecznictwo Sądów Polskich", No. 7–8/2004, p. 394.

of Laws of the Republic of Poland *Monitor Polski*[36] (Article 18(3) AIA). Nonetheless, in exceptional cases the Prime Minister at the request of the Minister managing the government administration department responsible for the issues related to a certain international agreement may, given the important interest of the state, waive the obligation to publish the agreement in *Monitor Polski* (Article 18(4) AIA). However, pursuant to the confirmation included in the Act on publication of normative acts and some other legal acts[37], the principles and method of publication of normative acts and some EU legal acts and the principles and method of issuing the Official Journal of the European Union is specified by the EU legislation (Article 1(3)).

The considerations presented above indicate that the nature of international law and the EU law binding upon the contracting parties has a common source. The EU regulations, analogously to international agreements (or, more broadly speaking, to international public law), obtain influence on the constitutional (internal/national) system of the sources of law of the individual Member States. Nonetheless, the general status of the standards of international and the EU law does not prejudge their primacy over constitutional standards of individual states. Thus, it is critical to further discuss other issues.

The priority guaranteed – by Article 91 Paragraph 2 of the Constitution to the application of international agreements ratified based on statutory authorisation or adopted by way of a nationwide referendum on authorisation (Article 90 Paragraph 3), including agreements on the transfer of competencies "in certain matters" – over the provisions of laws that cannot be co-applied – does not lead directly (and to any extent) to the recognition of equal precedence of such agreements over the provisions of the Constitution. The Constitution, therefore, remains – under its special power – the "supreme law of the Republic of Poland" to all international agreements binding

[36] Constituting presumably the gazette for the publication of acts of a lower status than those published in the Journal of Laws.

[37] Act on publication of normative acts and some other legal acts of 20 July 2000 (Journal of Laws of 2019, item 1461).

the Republic of Poland. It also applies to ratified international agreements on the transfer of competence "in certain matters". By the supremacy of legal force, resulting from Article 8(1) of the Constitution, it enjoys priority of validity and application within the territory of the Republic of Poland[38].

3. Sovereignty of the state and sovereignty of the nation from the perspective of the direction of changes in the constitutional system of the sources of law

The points raised may include issues related to sovereignty of the states[39] – the subjects of international law (which international organisations are necessarily deprived of) and the position and subjectivity of the sovereign wielding power in individual countries.

Principally, in law, a sovereignty can be understood in two ways. As:

1. internal, sometimes referred to as absolute authority, and
2. external, sometimes called self-authority.

In the first case, it shall mean the possibility of own and unbound forming of the state's internal situation by the sovereign. Depending on the form of the state's organisation, the political system in force, a sovereign shall be an individual (e.g. monarchy or its counterparts) or a collective entity of a narrow (e.g. oligarchy and its counterparts) or a wide scope (e.g. democracy and its counterparts). On the other hand, the external sovereignty is in case of an independent and unbound forming of the state's international situation by the sovereign[40].

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[38] See: judgment of 11 May 2005, K 18/04.

[39] See per analogiam: K. Wójtowicz, *Suwerenność w procesie integracji europejskiej*, [in:] W.J. Wołpiuk (ed.), *Spór o suwerenność*, Warszawa 2001, p. 174.

[40] K. Walczuk, *The constitutional principle*..., p. 75. See also: K. Walczuk, *Zasada suwerenności Narodu*, [in:] M. Bożek, M. Karpiuk, J. Kostrubiec, K. Walczuk, *Zasady ustroju politycznego państwa*, Poznań 2012, p. 105; P. Uziębło, *Suwerenność ludu* (*narodu*), [in:] A. Szmyt (ed.), *Leksykon prawa konstytucyjnego. 100 podstawowych pojęć*, Warszawa 2010, p. 584; E. Ehrlich, *Prawo narodów*,

When a more detailed approach to the issue is applied, we may distinguish 5 main characteristic features of sovereignty: its primary nature, permanence, self-rule (autonomy), absolute authority and absoluteness. The primary nature of sovereignty implies that it does not stem from any other authority, neither state nor out-of-state one. This, in turn, is associated with yet another feature – permanence, which shows that sovereignty is not subject to time limits. It is said that this attribute is not lost in the event of changes in government systems, in governments themselves, or of (individual) systemic elements. The above mentioned independence of the sovereign from external power (mainly out-of-state) is referred to as self-rule (autonomy). However, this attribute, especially at present, and above all in the perspective of the membership of Poland, Hungary and other European Union states, is not absolute in nature. Nevertheless, it is associated with the state's ability to autonomously shape its international status. Absolute authority, on the other hand, is sovereign's independence from external entities (operating within the state), expressed, amongst other things, by independence in the shaping of one's internal situation. Absolute authority is related to a presumption of multi-faceted competencies of a sovereign authority. The said competencies cover all areas of life. Absolute authority applies to territorial authority, i.e. the power to take all actions specific to the state within the national borders and to the exercise of national functions, and to authority over humans read as a bond between the state and the subjects underlying specific duties of the subjects towards the state, irrespective of subjects presence in the territory of the said state at any given time[41]. The last feature, absoluteness, is the most controversial one. It involves the inability of effective self-limitation of the sovereign with respect to internal relations. It is sovereign's independence from internal legal regulations, even in the case of regulations introduced by the sovereign[42].

Kraków 1947, p. 104; P. Winczorek, *Konstytucja RP a prawo wspólnotowe*, "Państwo i Prawo", No. 11/2004, p. 6.

[41] See: B. Banaszak, *Prawo konstytucyjne*, Warszawa 2010, p. 264; *idem*, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, p. 41.

[42] K. Walczuk, *The constitutional principle…*, pp. 75–76.

The majority of the states protect their sovereignty, also with the application of constitutional regulations[43]. Even if they allow individual elements typical of state sovereignty to be limited, here, above all, self-rule (autonomy), they usually do not accept their complete renouncement. Systemic national regulations specify the entity in which authority in a given state is vested. For instance, in Article 4(1), the Constitution of RP *expressis verbis* reads that "Supreme power in the Republic of Poland shall be vested in the Nation". This demonstrates that the top authority in Poland belongs to a specific and designated by the law (thus, not necessarily natural, such as ethnic) community; an internal community rather than officials or other representatives of an international organisation or representatives of external structures or other nations.

The wording of the presented provision shows that the description of the sovereign adopted in Poland differs from definitions adopted by the majority of contemporary democracies. The sovereign is the "Nation", not the "Citizens" as in the case of Slovakia[44] (Slov. *od občanov*) or "the People", as indicated by the Czech[45] (Czech *Lid*) and Hungarian (Hung. *nép*) Constitutions[46]. It seems that the definition of the sovereign in specific constitutions (not only in those specified herein) is a result of vicissitudes of history. However, it is not only a language phenomenon. In some cases, it may bring about some serious consequences. In particular, at the level of relations between citizenship and nationality.

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[43] See: W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa 2014, p. 502.

[44] Article 2(1) of the Slovak Constitution.

[45] Article 2(1) of the Czech Constitution. Ústava České republiky ze dne 16. prosince 1992 ústavní zákon č. 1/1993 Sb. ve znění ústavního zákona č. 347/1997 Sb., 300/2000 Sb., 448/2001 Sb., 395/2001 Sb., 515/2002 Sb., 319/2009 Sb., 71/2012 Sb. a 98/2013 Sb.

[46] Article B (3) of the Basic Law of Hungary; Magyarország Alaptörvénye Magyar Közlöny 2011. április 25 43. szám. In Poland, the Hungarian term *nép* tends to be incorrectly translated into the "nation" – see J. Snopek (transl.), Ustawa Zasadnicza Węgier z dnia 25 kwietnia 2011 r. (Basic Law of Hungary of 25 April 2011), [in:] W. Staśkiewicz (ed.), *Konstytucje państw Unii Europejskiej*, Warszawa 2011, p. 820.

It is worth noting that in Poland, for example, it is clearly assumed that superior authority not only "derives from the Nation" or is "exercised for the good of the Nation" but it "shall be vested in the Nation". In the Hungarian Basic Law, it was determined differently: "The source of all authority is the people" (Article B(3), as in the Czech Constitution: "The people is the source " (Article 2(1)) and the Constitution of Slovakia: "State authority is derived from the citizens" (Article 2(1)). The Polish approach to the question of the sovereign explicitly shows that the Nation is not only the source of authority but it is also its subject – the subject which holds power[47]. Thus, authority is to be exercised not only for the benefit of the Nation but also with the Nation's participation to the greatest extent possible[48].

The principle of sovereignty of the Nation is closely related to the principle of a democratic state and, above all, the principle of the democratic rule of law binding, e.g. under the Polish, Hungarian or Slovak law (Article 2 of the Constitution of RP, Article B(1) of the Hungarian Basic Law, Article 1(1) of the Constitution of Slovakia, respectively). The Nation or the people (or citizens) gifted with sovereignty is an indispensable element of every form of democracy, insofar as it is not the facade-like so-called "people's democracy" experienced by the countries of the Central and Eastern Europe[49].

It is assumed that sovereignty of the state captures not only some factual status (what is) when the state has independence of authority, but also the rights of the state to acquire and maintain sovereign power (what can or even should be) supported by the standards

[47] K. Walczuk, *The constitutional principle*…, p. 76. See also: Z. Witkowski, *Zasada suwerenności Narodu*, [in:] *idem* (ed.), *Prawo konstytucyjne*, Toruń 2009, p. 63; P. Sarnecki, *Podmiot suwerenności*, [in:] *idem* (ed.), *Prawo konstytucyjne RP*, Warszawa 2008, p. 178 and to some extent M. Granat, *Prawo konstytucyjne. Pytania i odpowiedzi*, Warszawa 2019, pp. 91–100; M. Zubik, *Prawo konstytucyjne współczesnej Polski*, Warszawa 2020, p. 45.

[48] See: K. Walczuk, *Zasada suwerenności Narodu*…, p. 107; M. Gulczyński, R. Zaradny, *System polityczny Rzeczypospolitej Polskiej*, Wrocław 2000, p. 91. K. Walczuk, *Zasada suwerenności Narodu*…, p. 107.

[49] See: K. Walczuk, *Zasada suwerenności Narodu*…, p. 107; *idem*, *The constitutional principle*…, p. 77.

of international law[50]. Therefore, even when a given state, under democratic decisions, allows its independence to be limited, as it derives from the assumptions of international law, the state should aim at maintaining sovereignty or, potentially, to acquire or regain it. Nonetheless, as observed by J. Symonides, "whether or not a state is sovereign or not refers to the facts, not to law"[51]. The remark seems to be particularly valid when discussing the relations between the EU as a special international organisation and its Member States.

Against this background, often in the doctrine of international public law, or recently also of European law, one may come across an a priori limitation of the scope of sovereignty by recognising that it involves state's independence but within the limits laid down (only) by international, alternatively European, law[52]. It is difficult, however, to find the approach correct because *de facto* it would mean that one assumes that sovereignty as such is limited (not that there is a factual possibility of its limitation). Whereas the statement that "limitations of competencies arising under international law may not be treated as a limitation of state's sovereignty for this would contradict the idea of the law"[53] should be described as illogical[54].

Other analogous opinions found on the basis of constitutional law should also be critically examined. It cannot be accepted, for example, that "from the perspective of nation's sovereignty, the participation in the EU structures may be understood not as a loss of sovereignty (as it used to be on the grounds of the traditional

[50] See: W.J. Wołpiuk, *Niepodległość i suwerenność. Dystynkcje pojęciowe*, [in:] W.J. Wołpiuk (ed.), *Spór o suwerenność*, Warszawa 2001, p. 95; L. Antonowicz, *Podręcznik prawa międzynarodowego*, Warszawa 1998, p. 39; K. Walczuk, *The constitutional principle*..., p. 77.

[51] R. Bierzanek, J. Jakubowski, J. Symonides, *Prawo międzynarodowe i stosunki międzynarodowe*, Warszawa 1980, p. 133.

[52] It seems that against the Polish theory background, one of the forefathers of the approach could be W. Czapliński, [in:] *Raz jeszcze o problemie ciągłości i identyczności państwa polskiego*, "Państwo i Prawo", No. 9/1999, p. 86. Although the author himself admitted that it was incorrect to assume that limited sovereignty could exist. See W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa 1999, p. 112.

[53] J. Kranz, *op. cit*., p. 109.

[54] K. Walczuk, *The constitutional principle*..., p. 78.

approach to the rule) but rather as an expressions of state's ability to take decisions about itself and as a manifestation of the acquisition of impact on the areas of relations in which the state used to absent"[55] and that "the traditional understanding of sovereignty of the nation must be redefined given the conditions of European integration"[56]. Breaking a thermometer does not make the fever go away. Therefore, adjusting the definition of sovereignty to new circumstances will not make the state or the sovereign possess sovereignty, despite its partial loss, or transition e.g. for the benefit of the EU. The "classic definition of sovereignty" suffices to describe the reality, also the one related to the functioning of the EU.

4. The *nemo plus iuris in aluim transferre potest quam ipse habet* rule versus European integration

In terms of an assessment of the impact of European integration on the structure and operations of the legal systems of the Member States, above all the states accessing the EU over the period of the last 20 years, it is vital to set the limits of permissibility of intervention of out-of-state (Community, European, international, supranational) legal standards in internal law and the hierarchy of law binding upon a given state, leading to constitutional changes in the systems of law sources. Countries joining international or Community organisations, such as the EU, do so not only on the basis of international law (public, Community, European) but also in accordance with their internal laws which, inter alia, set forth those empowered to enter into international commitments and the modalities of such entering. Therefore, the *nemo dat quod non habet* rule could be the applicable one here. Another valid principle is the previously mentioned *nemo plus iuris in aluim transferre potest quam ipse habet*, which originally referred to (and still refers to) the issues

[55] M. Granat, *Prawo konstytucyjne…*, p. 94. See also the judgement of the Polish Constitutional Tribunal of 11 May 2005 (case ref. K 18/04).

[56] W. Jedlecka, *O konieczności redefinicji pojęcia suwerenności w kontekście integracji europejskiej*, "Przegląd Prawa i Administracji", vol. 95 (2013), p. 49.

in the area of civil law (regarding possession and ownership)[57]. Its sense and meaning, however, traverse legal-civil regulations.

The rule means that one cannot transfer to another more rights than they have. As far as the development of international relations is concerned, it should always be examined whether an entity entering into commitments, establishing relations, forwarding powers etc. is empowered to do so at all or to a specific extent. A concrete example may be a situation where broadly understood EU bodies[58] and politicians active on the national and the European (Union) political scene, as well as representatives of the doctrine and the practice of law, more than once associated with certain political fractions, try to demonstrate superiority of Community law over any national law, including constitutional.

In the case of e.g. Poland, the application of the *nemo plus iuris* rule may suffice to demonstrate the unreasonableness of any claims showing primacy of the EU regulations over the Constitution of RP. In the Constitution of the Republic of Poland binding at the time of Poland's accession, there is a provision expressly stating that "The Constitution shall be the supreme law of the Republic of Poland" (Article 8(1) CRP) and, at the same time, constitutional provisions do not authorise any entity other than the one indicated in Chapter XII CRP[59] regarding amending the Constitution of RP, including but not limited to the methods of making Constitutional amendments, it is clear that without a change to the Constitution – explicitly laying down that, for example, the EU law has primacy over it, or authorising some entities to generally state that fact, or in specific cases – it is not possible to claim primacy of any statute law over the Polish

[57] See and compare: K. Amielańczyk, *O rzymskim pochodzeniu zasady nemo plus iuris… i jej aktualności we współczesnym prawie polskim*, [in:] W. Witkowski (ed.), *W kręgu historii i współczesności polskiego prawa. Księga jubileuszowa dedykowana profesorowi Arturowi Korobowiczowi*, Lublin 2008, pp. 503–517.

[58] See: *Metody interakcji sądowych w sprawach dotyczących europejskich praw podstawowych*, Warszawa 2014, pp. 78, 100.

[59] Article 235(1) "A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic".

Constitution. If neither the President of RP, the Prime Minister, the Council of Ministers, nor any other person has been equipped with the right to recognise superiority of Community law over the Polish Constitution, in accordance with the *nemo plus iuris* rule, such right could not be transferred, even by the fact of accessing EU, onto EU bodies (including college-type bodies and elected bodies) or Community courts (tribunals). An analogous situation may be observed in the majority of the EU Member States.

In such case, interpretations of provisions regarding contractual obligations of states entering international agreements, above all, elements not derived from the agreements but from internal regulations, e.g. international community, change nothing. It is groundless to discuss some far-fetched issued when the dividing point may be set already at the beginning. In addition, one of the characteristic features of international agreements is, indeed, their contractual nature, which means that all contracting parties must verify their powers to enter into commitments.

Therefore, we should welcome the statements which hold that EU "has no right to grant itself competencies, i.e. it does not an attribute referred to in literature as *kompetenz-kompetenz*. This attribute is typical of sovereign states and held only by the states. The EU competencies are, thus, derivative – secondary to the competencies delegated to it by the Member States"[60].

5. Hierarchy of the sources of law as illustrated by the case of Poland and selected states

Hierarchism of law is not open to discussion. However, it is not specified correctly or in a manner which would raise no doubts. Even when the hierarchical structure is beyond theoretical doubt, also due to the clarity of the basic laws of individual states of the legal acts constituting e.g. the EU, practical interests of individual groups or entities bring about hierarchy distortions that largely exceed

[60] M. Granat, *Prawo konstytucyjne*…, p. 94. See also the judgement of the Polish Constitutional Tribunal of 24 November 2010 (case ref. K 32/09).

natural and authorised changes. One should note that doubts are largely not an effect of unclear legal regulations but rather a result of political (or ideological-political) actions on the national, community (European) and international level.

We need to reiterate that not every EU legal act in the hierarchy of the sources of law commonly binding upon all the EU Member States would have primacy over national legal acts, above all those of statutory nature. Only those acts which were granted primacy under the founding Treaties will hold it. What is more, not all EU acts of law are commonly binding. Some do not even have binding authority (such as recommendations or opinions)[61]. These remarks continue to be valid with respect to all EU Member States.

Typically, only the primary law of the EU and the EU derivative law acts set forth therein would have precedence over statutory legal acts. In case of systemic regulations which do not specify the EU law, it seems correct for the purposes of law hierarchisation to qualify as international agreements not only original EU law but also those legal acts based upon it which were adopted before EU accession (e.g. in the case of the Visegrad Group countries it is before 1 May 2004) for they constituted integral elements of the accession Treaty[62].

Although one can observe e.g. Polish constitutional law opening to the EU law[63], it should be noted that the current Polish constitutional regulation does not provide grounds for any EU legal act to be granted primacy over CRP[64]. Thus, CRP remains the highest

[61] See: K. Walczuk, *Akty…*, p. 79.

[62] See: M. Bogusz, *Źródła prawa administracyjnego*, [in:] E. Bojanowski, K. Żukowski (eds.), *Leksykon prawa administracyjnego. 100 podstawowych pojęć*, Warszawa 2009, p. 574; K. Walczuk, *Akty…*, p. 80.

[63] See: J. Szymanek, *O potrzebie euro-nowelizacji Konstytucji RP*, "Studia Prawnicze" 2010, No. 1, p. 11; Z. Brodecki, O. Hołub-Śniadach, *op. cit*., pp. 21–22.

[64] See: e.g. L. Garlicki, *Konstytucyjne źródła prawa administracyjnego*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), System Prawa Administracyjnego, vol. 2, *Konstytucyjne podstawy funkcjonowania administracji publicznej*, Warszawa 2012, p. 87. See also judgements of the Polish Constitutional Tribunal of 11 May 2005 (case ref. K 18/04) and of 27 April 2005 (case ref. P 1/05).

legal acts of the Republic of Poland[65], irrespective of the standpoint of the European Court of Justice[66].

The foregoing considerations confirm the existence of ambiguities. They, however, may be unequivocally solved on the basis of the principles binding in the legal systems of individual states, including Poland.

The aforesaid findings indicate that by and large, if we quote in detail the EU legal acts, the hierarchy of the sources of law commonly applicable in Poland is as follows:

1. *RP Constitution*;
2. International agreements ratified with a pre-approval for their ratification expressed in the form of a statute or on the basis of a nationwide referendum carried out pursuant to article 125 of the *RP Constitution* and agreements deemed to be such under article 241 point 1 of the *RP Constitution*, and also the EU primary legislation and (generally binding) derivative law made before 1 May 2004;
3. Law made by an international organization ratified by the Republic of Poland if it derives from the treaty founding that organisation;
4. Statutes and statutory instruments;
5. Ratified international agreements that do not require a pre-approval for their ratification in the form of a statute;
6. Orders;
7. Local legislation[67].

[65] Article 8 of the Constitution of RP. Also see S. Biernat, *Prawo Unii Europejskiej a prawo państw członkowskich*, [in:] J. Barcz (ed.), *Prawo Unii Europejskiej. Zagadnienia systemowe*, Warszawa 2003, pp. 234–242; K. Kowalik-Bańczyk, *Tożsamość narodowa – dopuszczalny wyjątek od zasady prymatu?*, [in:] S. Dudzik, N. Półtorak (eds.), *op. cit.*, p. 30.

[66] See and compare Z. Brodecki, O. Hołub-Śniadach, *op. cit.*, p. 22; J. Barcz, *Glosa do wyroku TK z dnia 11 maja 2005 r.*, "Kwartalnik Prawa Publicznego", No. 4/2005, p. 169.

[67] K. Walczuk, *Akty…*, s. 80.

6. Conclusions

One of the effects of European integration is broadening of the catalogue of the sources of law binding in the EU Member States. Still, the process does not always respect the constitutional systems of the sources of law. Upon an analysis of the foregoing, it can be concluded that contrary to the claims pushed by e.g. EU institutions and judiciary, Member State's accession to the EU entails neither devolution of all state competencies to this international organisation, nor renunciation of sovereignty by both the individual states and their sovereigns. The Member States and the EU have committed themselves to follow the principles guiding international relations, including the *pacta sunt servanda* rule. We ought to emphasise that any concluded agreements are binding not only upon the states accessing the EU, but also upon the EU itself, as clearly demonstrated by the general principles of international treaty law, present since the EU beginnings, and by agreements themselves – those pacts which are binding due to their compliant conclusion. Generally, the state may not rely on its internal law – including constitutional law – when it wishes to evade international commitments which had been effectively entered into. Analogously, another party (the other parties) to the agreement are bound thereby and may not arbitrarily bring up e.g. changes in the interpretation of contractual provisions, justifying any such intent with circumstances, evolution, or an integration process etc. Against this background, we ought to refer to the *nemo dat quod non habet* and *nemo plus iuris…* rule, above all, against the alleged supremacy of the European law over states' constitutions raised by some representatives of the doctrine and practice, even when said constitutions clearly demonstrate their supremacy over any statute law, including international law, and which includes – given its origin – the EU law, especially when it is not *expressis verbis* specified in the constitutional regulations regarding the sources of law. States access the EU not only on the basis of international (public, Community, European) law, but also in accordance with their internal laws that, *inter alia*, specify who is empowered to enter into international commitments and according to what modalities. Therefore, the general status of the standards of

international and EU law does not prejudge its primacy over constitutional standards of individual states. Indeed, it is with the help of constitutional regulations (marking the "constitutional identity") that the majority of the states protect their sovereignty. National systemic regulations specify the entity in which authority in a given state (sovereign) is vested. This may be, e.g. the Nation, the People or the Citizens. It is often associated with the rule of a democratic state of law. In view of the above, the EU has no right to grant competencies to itself, and the scope of its competencies is a result of what the Member States have transferred to it.

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