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State Structure and Subsidiarity as Cornerstones of Constitutional Identity in the European Union

Abstract of the Doctoral Thesis

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I. Research objectives

The European Union [EU] is a paradise for lawyers. The theoretical underpinnings of its *sui generis* character makes it possible to use the ’federal’ adjective as a structural attribute. The most significant challenge upon such a composition is that both participating layers might feel strong incentives to undermine the functioning of the whole system. The supranational level might tend to overstep the competences conferred on the EU, while the Member States might abandon their cooperative attitude in order to shirk their obligations. These potential phenomena highlight the importance of the different procedures of conflict resolution and the principles guaranteeing the EU’s structural integrity. One of these guarantees is the principle of subsidiarity which was introduced at the birth of the EU as a sort of counterbalance to further integration in order to protect the sovereignty of the Member States.

However, the effectiveness of the mechanisms aiming to contribute to the realisation of the subsidiarity protection is questionable. On the one hand, in the political sphere, the horizontal communication among the national parliaments seems to be slow and they have never reached a so-called ’orange mark’ since the introduction of the subsidiarity mechanism in 2009. On the other hand, court litigation has not achieved spectacular successes either. It soon became clear that the Court of Justice of the European Union [CJEU] was following a restrictive interpretation, and without further analysis, came to the conclusion, in the context of a directive, that due account was taken by the EU legislator of the principle of subsidiarity. In addition, in carrying out the tests provided for in Article 5 (3) of the Treaty on European Union [TEU], the CJEU did not undertake any quantitative or qualitative analysis.

The thesis argues that this phenomenon can be explained by the Janus-face character of the principle of subsidiarity: in the construction of the European Union the principle has been used to legitimize the actions taken on the supranational level, whereas its original philosophical meaning concentrates on the protection and the strengthening of the autonomy and identity of lower levels and communities. The core argument of the thesis is that the original conception of the subsidiarity principle, capturing its substantial requirements and therefore becoming more dominant in the political and legal argumentation, has found its central place not in its original mechanism of subsidiarity but in the concept of ’constitutional identity’, especially after the Treaty of Lisbon. Therefore, the purpose of the thesis is to

examine the use of constitutional identity as a substantive conception of the principle of subsidiarity.

II. Methodology

The focus of the thesis is to analyse the application of the concept of constitutional identity: what the actual and potential legal consequences of this conceptual construction are. In this respect, the thesis consists of two main parts having different perspectives which are followed by a third synthesizing part presenting different frameworks of interpretation. The two different perspectives focus on the Member State dimension(s), on the one hand, and the European Union's side, on the other.

The work is primarily based on the analysis of the jurisprudence and seeks to place the protection of constitutional identity within a rational conceptual framework despite the fact that the concept is regarded by many scholars as being difficult to access because of its mysterious nature and uncertain meaning. As a result, the thesis is not primarily of a theoretical nature, nor it is intended to elaborate the generic or particularly Hungarian meaning of the concept of constitutional identity. The thesis shows how the concept was elaborated in the classical constitutional theory, and then, after being re-contextualized, gained importance in the context of the EU in the practice of the constitutional courts and of the CJEU.

As far as the research on the use of this concept is concerned, the thesis reviews the different approaches of the two founding Member States, France and Germany, and the way it has been used in the domestic constitutional jurisprudence and literature. With regard to the Hungarian aspects, the purpose of the thesis is to discuss all cases of the Constitutional Court where a reference to the concept of constitutional identity was made either in the text of the decision or as part of the concurring or dissenting opinions. In addition to terminological analysis, this examination is necessarily comparative in the sense that it identifies certain patterns based on the different approaches adopted by the constitutional review mechanisms of the Member States concerning the application of the concept.

The second major part of the thesis focuses on how the need for respect for constitutional identity, such as the protection of Member States' autonomy and regulatory margin, is reflected in the jurisprudence of the CJEU. In this context, the thesis analyses all cases in which a reference to constitutional identity or its terminological variants appears in the text of a decision (judgment or order) or in a related Advocate General's Opinion. In this regard, the methodology of the thesis is primarily descriptive and illustrates the variety of case types that refer to constitutional identity. Taking the latter into consideration, the author's study visit to the General Court of the European Union where he had the opportunity to examine all the cases in which the concept of ’constitutional identity’ or ’national identity’ emerged, greatly contributed to the realization of this work. Beyond its descriptive intent, the chapter, the chapter also aims to provide terminological synthesis and critical analysis based on the hitherto accumulated case law.

Finally, the thesis attempts to place constitutional identity in different interpretative frameworks: what is the reason why it has appeared in connection with the EU integration process and who is ultimately entitled to decide on its dimensions (*Quis iudicabit? Quis interpretabitur?*). At this point, the thesis adopts an interdisciplinary approach in the sense that it uses literature on law and economics, political science approaches to integration theories and a few basic works on the philosophy of law and the theory of communication.

III. The Main Findings of the Research

1. The first major part of the thesis (Chapter II.1.) presents the ideas of authors who have discussed the notion of constitutional identity on a theoretical level. Among them, Michael Rosenfeld's work is the most closely related to the Habermasian constitutional patriotism. In his view, constitutional identity can be grasped within the realm of human rights patriotism which is distinct from nationalist patriotism and has universal elements. On the one hand, he considers that constitutions that guarantee human rights and stick to the principle of rule of law have a common identity. On the other hand, he thinks that constitutions can be distinguished partly on the basis of their content (e.g. federal versus unitary, presidential versus parliamentary constitutions) and partly on the basis of the context in which constitutions exist as it can have an identity-shaping effect. Within this context, constitutional identity interacts with other identities which can have positive effects. A part of this evolution

is a denial process which might produce a narrative about ourselves. According to Gary J. Jacobsohn, the experiences from the so-called disharmonic interactions allow an identity to emerge. His theory emphasizes the particularities of constitutional identities. Jacobsohn distinguishes between the constitutional text and the identity of the community covered by the text and states that there might be a great distance between social reality and the identity which appears in the text of a constitution. Finally, according to Michel Troper's theory, constitutional identity makes sense firstly in the context of the European Union. In his view, identity consists of some constitutional principles the function of which is, on the one hand, to distinguish a constitution from other ones and, on the other, to protect it as a whole. The constitutional identity of a Member States thus identifies the 'essential content' of the constitution in order to distinguish between the permissible and the unauthorized delegation of powers to the supranational level.

2. The constitutional application of the concept of constitutional identity has become the focus of interest in two different contexts: in connection with constitutional amendments and in the sphere of EU membership. The original concept emerged in constitutional theory (Chapter II.1.1.) can be traced back to Carl Schmitt who articulated the importance to protect constitutional identity. According to his claim, a constitution can only be amended in such a way that the identity of the constitution as a whole remains unchanged. Namely, the constitution amending power can only take actions within the limits set by the original constituent power.

Regarding the limitations aiming to protect the constitutional identity, both explicit and implicit restraints can be identified. The explicit tool is the so-called 'eternity clause' enacted by the authors of the constitution. However, when it comes to implicit constraints, not the constituent power but courts have a central role in determining the core of the constitution that cannot be overruled by any constitutional amendments. The most famous example of this approach is the 'basic structure doctrine' of the Supreme Court of India which, in the figurative sense of the term, was based on the 'pillars' of Indian Constitution of 1949 and excluded the constitution amendment power from rewriting its constitutional identity.

3. In connection with the reasoning presented above the thesis discusses the issue of unconstitutional constitutional amendments and the relevant case law of the Constitutional Court of Hungary (Chapter II.1.2.). The distant attitude of the Constitutional Court of

Hungary concerning the judicial review of constitutional amendments has been decisive since the establishment of the body. In Order No. 23/1994. (IV.29.) AB and Order No. 293/B/1994. AB, the court formulated the so-called 'incorporation rule' according to which the norms adopted by two-thirds majority of Members of Parliament are incorporated into the text of the constitution and the Constitutional Court has no jurisdiction to review them. After 2011, however, when the Constitutional Court was requested three times by petitioners to decide on the same dilemma, its decisions seemed to suggest that the majority of justices adopted a somewhat different attitude. This new trend in the case-law was abruptly halted by the Fourth Amendment to the Fundamental Law which explicitly limited the Constitutional Court's jurisdiction to the review of the formal constitutionality of amendments. Yet, lately, the dilemma concerning constitutional amendments was raised again in a concurring opinion to the Decision No. 22/2016. (XII. 5.) AB.

Contrary to the well-established case law, the thesis argues on the one hand that Article I paragraph (3) of the Fundamental Law could be interpreted as a cornerstone of the existing constitutional system serving as the ultimate boundary for the constitution amendment power as it cannot be emptied completely. This is also in line with the requirement of 'coherent interpretation'. On the other hand, despite the Fourth Amendment of the Fundamental Law, the thesis maintains that the Constitutional Court has a room for manoeuvre in interpreting (qualifying) the review of certain issues as being a question of formal or substantive constitutionality. Thus, for example, the Constitutional Court came to the conclusion – in the framework of the review of formal constitutionality – that the Transitional Provisions to the Fundamental were not transitory in their character. However, it is questionable whether this conclusion could be reached without the consideration of the issue of substantive constitutionality.

4. Chapter II.2. discusses the emergence of constitutional identity in the context of the EU. The starting point in this regard is that the issue of constitutional identity is rooted in a different perception of the principle of primacy, a cornerstone of EU law. It was only a matter of time before the problem arose as to what would happen if there was a conflict between a national constitution and EU law. The CJEU, in the *Internationale Handelsgesellschaft* case, stated that the application of constitutional rules cannot diminish the uniform and effective application of EU law. This is the absolute conception of the principle of primacy that the constitutional courts of the Member States sought to counterbalance with its relative

conception. One of the tests developed for this purpose is the protection of constitutional identity.

5. Nevertheless, Chapter II.2.1. shows that the Member States' constitutional courts have developed different interpretations of the concept of constitutional identity. The idea to protect constitutional identity first appeared in the French jurisprudence which works with an open, fundamentally integration-friendly identity. A key segment of this approach is to keep the elements of identity completely as obscure as possible. In addition, the French constitutional identity is relative in nature, and its violation can be remedied at any time by amending the constitution. Therefore, instead of a rigidly formulated concept of constitutional identity, the political decision-making, the acceptance by the sovereign state is emphasized.In addition, French constitutional identity refers to special national features which accentuates the particularities of the French constitutional identity (X = Y, *idem, équivalance, Gleichheit, sameness*). Consequently, according to the literature, the French constitutional identity is primarily the state's identity.

In contrast, the German concept is an essentially more closed structure from which a strong defensive strategy could emerge. The infringement of German constitutional identity under no circumstances can be remedied since it is embodied by specific provisions of the *Grundgesetz* enumerated in the eternity clause which are, thus, inaccessible even to the constitution amending power. The German Federal Constitutional Court, therefore, called its identity test an absolute barrier to EU law and this concept of identity actually means the identity of the German Fundamental Law. The German eternity clause has generic elements, such as the respect for human dignity, which emphasize the temporal nature of the German constitutional identity (X = X, *ipse, ipséité, Selbstheit, selfhood*) consisted of commonly shared democratic standards which are expected to be respected by the EU institutions as well.

6. Although Christoph Grabenwarter described the relationship between constitutional law and EU law as a *fait accompli*, that is to say which has already been clarified in relation to the new Member States, unexpected new constitutional reservations appear in both old and new Member States without any modifications of the founding treaties. This phenomenon can be labelled as the 'awakening of the constitutional courts' who feel urged to protect the statehood and the constitutional law of the Member States. In fact, the constitutional courts of the Member States faced a kind of loss of authority in the deepening integration which might

have triggered a kind of ‘counter-revolution’ against the ‘silent revolution’ of the European legal order. Apart from the issue of constitutional identity, this includes the Czech Constitutional Court's *Landtova* decision on the Slovak pensions and the Danish Supreme Court's *Ajos* decision on age discrimination which found that some specific judgements of the CJEU were *ultra vires*. However, with regard to post-communist Member States, Wojciech Sadurski considers their joining to the ‘*Solange* story’ a democracy paradox as the EU membership in these countries is indeed intended to guarantee human rights and democracy, while the various reservations are now being made against EU law on the very same basis.

7. Regarding the case law of Constitutional Court of Hungary the thesis in Chapter II.2.2. introduces two ‘theoretical matrices’ in order to grasp the idea of constitutional identity in a rational framework. This modelling is based on the fact that the basic documents of the coexistent national and EU legal regimes are protected and authentically interpreted by different judicial forums. Based on this, two theoretical constructs can be outlined: the first theoretical matrix examines that a domestic acts of law must meet two standards, the Fundamental Law and EU law. The thesis identifies the situation as a problematic area of this set-up when the Constitutional Court declares a Hungarian law constitutional while it is contrary to EU law. The thesis claims that such a situation is to be avoided on the basis of the constitutional command contained in Article E). In contrast, the second theoretical matrix models the conformity of EU legislative acts with the EU Treaties and the constitutions of the Member States. In this respect, the problematic theoretical scenario is when an EU legislative act complies with EU law but is contrary to the constitutional norms of a Member State. This is the problematic area where constitutional courts have expressed their constitutional reservations which reflect the so-called relative conception of the primacy of EU law.

Based on these aspects, Chapter II.2.2.1. states that the attitude of the Constitutional Court of Hungary towards EU law was basically to keep its distance: it was neither willing to use it as a yardstick in the review of domestic legislation (which might raise the problematic scenario of the first theoretical matrix); nor it intended to interpret EU law autonomously (which could raise the problematic scenario of the second theoretical matrix). Nevertheless, Decision No. 22/2016. (XII. 5.) AB seems to be a turning point as it listed three tests. However, the divergent directions of the concurring opinions support the conclusion that this decision has left several questions open. For example, the decision does not deal with the possibility of initiating a preliminary ruling procedure, although a paragraph of the majority opinion states

that the Constitutional Court continues to abstain from the autonomous interpretation of EU law and the formulated tests can only be used in its dialogue with the CJEU. Together with this, Chapter II.2.2.2. analyzes the case law of the Constitutional Court and finds that the court is increasingly addressing EU law issues in its rulings. What is more, it also has committed itself in the holding of Decision No. 2/2019. (III. 5.) AB to an EU-compatible interpretation of the Fundamental Law which can be considered as an attempt to take the edge of the Decision No. 22/2016. (XII. 5.) AB.

8. Despite the different approaches, the protection of sovereign statehood can be identified as a common denominator in the German, French and Hungarian practice. Indeed, the wording of the various constitutional reservations in each case involve that even if the validity of individual legislative acts of the EU cannot be touched, their applicability may in certain circumstances be denied within a Member State. The constitutional reservations thus constitute a final control which is intended to show that the Member States are ultimately in charge of the application of EU law and, in spite of the delegated powers, sovereignty and *Kompetenz-Kompetenz* remain at Member State level. However, these reservations are formulated primarily as a theoretical possibility. The French Constitutional Council counterbalances its strong commitment to the protection of sovereignty with declaring the implementation of EU law a constitutional requirement. Also, the Federal Constitutional Court of Germany has continuously narrowed the criteria of the application of the established tests and they are - almost/practically impossible to use. In this context, the decision of the Federal Constitutional Court in December 2015 which halted the implementation of an individual act based on EU legislation questioning the principle of mutual trust *vis-à-vis* other Member States of the EU was a novelty. At the same time, it is clear from the decisions of the German Federal Constitutional Court that it sees itself as an active participant of the European constitutional space: it puts utmost emphasis on the protection of democracy, while, under the label of cooperative constitutionalism, channels its constitutional reservations into the preliminary ruling procedure.

9. Another major part of the work discusses the European dimensions of constitutional identity (Chapter III). From the perspective of the EU, the requirement to respect the national identities was first introduced by the Maastricht Treaty and it is currently enshrined in Article 4 paragraph (2) TEU. In the vast majority of the works of mainstream literature, on the one hand, and in the jurisprudence of the national constitutional courts and the CJEU and in the

opinions of the Advocate Generals, on the other, this requirement is considered to be equivalent for the obligation to respect the constitutional identity. Concerning the use of the term ‘constitutional identity’ and its related concepts (national identity, constitutional organization and constitutional specificity), the enactment of the Lisbon Treaty represents a turning-point. This is well illustrated by the growing body of literature and the case law statistics: before Lisbon, there were only four cases related to the issue of identity, while after Lisbon, nineteen cases have already been rendered. However, the whole picture includes seven other cases before Lisbon in which the Opinion of the Advocate General thematically addressed the issue of identity, whereas after Lisbon, there are twenty-one similar cases.

10. Based on the cases discussed in the thesis, several conclusions can be drawn concerning the interpretation of the identity clause in Luxembourg. First of all, the general attitude of the CJEU can be characterised as a sort of reluctance toward the interpretation of the identity clause. It is well illustrated by the fact that the CJEU has so far refused to answer the most concerning questions articulated by national constitutional courts related to the identity conflict (e.g. *M.A.S.*, *Weiss* case). As a further result of the reluctance, it can be observed that the reasoning of many judgments is based on a different legal basis (e.g. the public interest in the *Sayn-Wittgenstein* case), where the reference to the identity clause plays only a secondary role. Nevertheless, as a new direction against this restraint, a new function has been added to Article 4 paragraph (2) TEU in the *Moreira* case in June 2019, as the CJEU interpreted a provision of a directive in the light of the identity clause. In addition, in the *Digibet* case, Article 4 paragraph (2) TEU was confronted with the principle of primacy as confirmed in the *Winner Wetten* case, and the CJEU decided to resolve the conflict in favour of the former.

11. In addition, the prominent role of the AGs, who interpret the identity clause ever more frequently, is worth being stressed. They often quote the identity clause as having a purely decorative function, such as in the opinion in *Freitag* appearing in a footnote, while the opinions released in *RegioPost*, *Gavril Covaci*, or *Dzivev and Others* contain a brief reference only. In other cases, however, the Advocate Generals address creatively the possible interpretation of the identity clause. In this regard, they are in a position to contribute to the further development of EU law without pronouncing any final verdict, and as such, working as ‘in-house think-tanks’ of the CJEU, they increasingly focus on the various potential meanings of Article 4 paragraph (2) TEU. Among them, Advocate General Maduro, Bot and Kokott can be mentioned as those who dealt with the issue of the EU identity clause in the

most significant or, one may say, most sensitive matters. Besides them, in one of her most recent opinions in April 2019, Advocate General Sharpston raised that the discriminatory treatment in a section of a directive contested by the Czech Republic is in fact justified by the protection of Switzerland's constitutional identity (C-482/17), while Switzerland actually is not even a Member State of the EU.

As regards the creative interpretations, Advocate Generals' Opinions have highlighted, for example, that Article 17 of the Treaty on the Functioning of the European Union [TFEU], that is to say, national church law (*Congregación de Escuelas Pías Provincia Betania*) and employee participation rights (*Erzberger*) might enjoy the protection of the constitutional identity of Member States, and Kokott interpreted the obligation to respect constitutional identity also in the context of the subsidiarity test. In her view, the emergence of a violation of constitutional identity would strengthen the criteria of the subsidiarity test which foresees the emergence of a substantive subsidiarity test that coincides with the main hypothesis of the thesis (C-358/14).

12. It should be noted that despite the CJEU's reluctance to interpret the identity clause, the reference to constitutional identity has proved to be a successful strategy many times. It was relatively soon made clear in the case of the teaching staff in Luxembourg (C-473/93) that the CJEU would accept the protection of constitutional identity as a legitimate aim for limiting EU law. In that specific case the reference to identity was not successful in the end but other cases, whether explicitly or implicitly, ended with the victory of the constitutional demands of the Member States. Among the 'explicit' successes are the importance of the constitutional tradition in the Gibraltar case, the importance of local government associations in the *Remondis* case, the constitutional prohibition of titles of nobility in *Sayn-Wittgenstein* or the protection of the national language in the *Vardyn* case. Out of the 'implicit' successes, first and foremost the *M.A.S.* case should be highlighted in which the CJEU overruled its previous decision due to an argument based on the protection of the Italian constitutional identity. Among the pre-Lisbon cases it is worth mentioning the *Cristiano Marrosu* case concerning the public service features of the Italian Constitution, the *La Rioja* case with regard to the characteristics of the Spanish governmental organization and the *Rottmann* case concerning the competence of the Member States to withdraw someone's nationality. Among the post-Lisbon cases the *Tjebbes* case on the determination of the composition of the national community, the *Samira Achbita* case on the admissibility of the French principle of legality,

the protection of the linguistic diversity of the EU on EU job applications (C-566/10) and the issue of the revocation of *Brexit* have to be highlighted where the argument related to constitutional identity was essentially absorbed by the reference to the much stronger sovereign right.

13. Nevertheless, the reference to Article 4 paragraph (2) TEU was not accepted on several occasions. One reason for this may be that concepts of identity under national and EU law may be different, or that Member States may only attempt to present an issue as a matter of constitutional identity. However, according to Advocate General Maduro in the *Michaniki* case, the protection provided in Article 4 paragraph (2) TEU should not mean that all constitutional rules are indiscriminately recognized since in that case national constitutions would become instruments that enable Member States to exempt themselves from EU legal obligations in specific areas. And accordingly, the reference to constitutional identity in the following cases was not convincing in substance: in the absence of detention facilities (*Bero and Bouzalmate* cases), in relation to the pension rights of part-time British judges (*O'Brien* case), in the correct implementation of the Water Framework Directive (C-51/12), concerning the resettlement of lawyers under EU law (*Torresi* case), regarding the Spanish gift and inheritance taxes and duties (C-127/12) and the recognition of the right of free movement of same-sex couples (*Coman* case).

14. In addition, another, perhaps even more significant reason for rejecting possible identity-based references is the different methodological approach of the Member States and the CJEU (*Egenberger, Samira Achbita* case). Thus, while Member States often refer to the clause as an absolute limit to the scope of EU law, the CJEU takes into account the invoked identity-based argument as part of the proportionality test which is not always successful. Thus, for example, the restriction based on the nationality condition of the notarial posts in Luxembourg (C-51/08) and the language condition of contracts in the case of *Anton Las* proved disproportionate.

15. A special group of cases are those in which Member States or other litigants invoke the protection of constitutional identity for procedural reasons. As such, as an argument for admissibility appeared the reference to constitutional identity in a case against legal acts of the Eurojust (C-160/03) and in a case where the judicial character of the *Umweltsenat* (an independent environmental tribunal) was at stake (C-205/08). In addition, the identity

clause appeared as an argument to challenge the evidences brought by the Commission on the correction procedure for German suckler cows (C-344/01). Lately, the reference to constitutional identity was made in favour of *locus standi* in several actions for annulment. This was cited in Nord Pas de Calais (T-267/08), Northern Ireland (T-453/10) Brussels Capital Region (T-178/18).

16. On the basis of the foregoing, certain areas that fall within the concept of identity can be detected and those typically include cultural elements, issues of state organization, constitutional principles and values of paramount importance, and fundamental rights. Typical topics within these broad categories are territorial and municipal issues, name issues, protection of the national language, denial of citizenship, questions about the European Arrest Warrant, the concept of marriage, church regulation and specific constitutional principles such as civil service or the secularism.

17. There is a particular phenomenon with regard to fundamental rights. While in the beginning the violation of constitutional identity was mainly formulated in fundamental rights terms, which also contributed to the deepening of the EU's integration, in recent case law the violation of constitutional identity has been invoked even against fundamental rights. Yves Bot, for example, in the *Melloni* case stated in his opinion that the protection of fundamental rights must not be confused with jeopardizing national identity or, more specifically, the constitutional order of a Member State. Accordingly, in the name-related matters the applicants relied on their personal identity, that is, their privacy and ultimately their right to human dignity against the Member State argumentation based on constitutional identity. Furthermore, the *A v. Udlændingeog Integrationsministeriet* and *Coman* cases have to be mentioned in which the constitutional identity clause was also invoked against the applicants' family and private life. However, in the latter case the CJEU's 'remark' regarding fundamental rights might have a special importance as it points out that a national identity element aiming to undermine EU law can only be successful if it also complies with the Charter of Fundamental Rights. This meant in that specific case that on the basis of the Charter, as interpreted in the light of the European Convention of Human Rights, family life was extended to same-sex couples too. The thesis argues that it follows from the short *obiter dictum* observation in the CJEU's ruling that Article 4 paragraph (2) TEU cannot be invoked if the constitutional identity element intended to be protected is contrary to the human rights enshrined in Article 2 TEU.

18. In order for the CJEU to address the issue of identity in a meaningful way, it is necessary that the parties to the proceedings articulate their position on that matter. The importance of national governments and national judges, including constitutional judges, in this regard is not negligible, and this is also linked to the type of proceedings before the CJEU. Thus, in the case of infringement proceedings, the reference to Article 4 paragraph (2) TEU seems to be a plausible argument since the governments can invoke the identity clause as a defensive argument. In the case of an action for annulment, the situation is similar, but from the opposite side: the validity of an EU act can be challenged by the applicant on the ground of breaching the identity clause. In addition, preliminary ruling procedures are of particular importance, since they provide a forum for judicial dialogue between the national courts and the CJEU in the framework of which the issues are formulated as legal arguments channelled into a reasoned discourse.

In the case of references for a preliminary ruling, it is primarily the requesting court that can expose the violation of constitutional identity. From among the referring courts constitutional courts are of particular importance. That is why it is not by accident that in some of the cases the CJEU (*M.A.S., Weiss*) chose the technique of remaining silent, and in other cases, where appropriate, gave decisive importance to the interpretations given by the constitutional courts (e.g. in the case of Italian civil service). For example, in *Ilonka Wittgenstein*, it is not so convincing that the republican of government was the reason why the CJEU found the total ban on titles of nobility proportionate. It surely contributed to this conclusion that the CJEU did not want to go against the previously delivered decision of the constitutional court. In addition, constitutional courts are particularly important for another reason as the *M.A.S.* case proves: if constitutional courts are best placed to elaborate the Member States' constitutional identity with the highest level of expertise, then the constitutional courts can provide the most convincing arguments when it comes to dialogue with the CJEU as to why it should accept the reference to Article 4 paragraph (2) TEU. For this dialogue to work smoothly it would be necessary to institutionalize the opportunity to express their opinion, e.g. through allowing national constitutional courts to submit observations to the CJEU, and *vice versa*: to make possible for the CJEU to seek clarification from the constitutional courts on specific cases where national constitutional issues arise.

19. The success of the invocation of the protection of constitutional identity can also be approached from the perspective of the potential legal consequences of the different procedures. In successful infringement proceedings, a successful appeal may result in not being condemned by the CJEU for breach of EU law. In contrast, the stake is greater in the annulment procedures, especially if a Member State wishes to achieve the annulment of a regulation or a directive applicable to every Member States. This would mean that the constitutional objection of a single Member State would, as a veto, affect all other Member States. In fact, this would mean the re-smuggling of the so-called 'Luxembourg compromise' of 1966 against an EU legislative act that was maybe adopted under ordinary legislative procedure against the will of the petitioner Member States. In such a case, perhaps the most adequate solution would be the prohibition of the application of the impugned EU legislative act in a given Member State, however, it would lead to further fragmentation of the unity of EU law.

20. Furthermore, the importance of preliminary ruling procedures should especially be stressed given the fact that most of the successful invocations of the protection of constitutional identity can be detected in this procedure. Here, the issue of constitutional identity can gain importance in two ways. On the one hand, it could theoretically justify a lower level of protection, that is to say, derogation, while respecting the principle of proportionality, in accordance with Article 52 (1) of the Charter of Fundamental Rights. In this regard, however, the uncertainty of the CJEU may come to the fore once again: while the national judge is typically entitled to carry out the proportionality test – as one already learned from the *Omega* case that it is best placed to evaluate the national environment and to interpret national law, including constitutional rules –, there are some cases where the CJEU itself has determined whether a restriction based on constitutional identity has been proportionate (e.g. *Sayn-Wittgenstein*).

On the other hand, as a result of the preliminary ruling procedure, the identity clause may provide a higher level of protection within the margin of appreciation of the Member States in accordance with Article 53 of the Charter. However, the *Melloni* case which focused on the possibility of a higher level of protection of fundamental rights by the different Member States was indeed a major example to the contrary. The CJEU's response was the trinity of primacy, unity and effectiveness, given that Member States had taken harmonization measures in a certain area and had adopted clear and precise rules which, as one could learn,

precluded the approach laid down in Article 53 of the Charter. The decision of the German Federal Constitutional Court of December 2015 interpreting the right to human dignity as an element of the constitutional identity can be regarded as response to this ruling of the Luxembourg judges, which actually pushed the CJEU to correct the *Melloni* doctrine in its judgment of April 2016 delivered in the *Aranyosi and Căldăraru* case.

21. The final chapter of the thesis examines who has the final say on the invocation of constitutional identity and what horizons of interpretation this concept may have. First of all, chapter IV.1. emphasizes the constitutional perspective of the Member States which puts constitutional courts in a central role. This was already specifically mentioned by the German Constitutional Court when it stated in the OMT appeal order that the protection of constitutional identity was exclusively its own responsibility. Such a conception of identity in the Member States is most akin to the sword of Damocles which is constantly hanging in the background: the devastation that would result from its usage would amount to the destruction of the unity of the EU legal order. Therefore, besides the symbolic importance of constitutional reservations, this emphasizes their deterrent effect meaning that constitutional courts are ultimately ready to intervene. A good example for signalling this intention was the decision of the German Constitutional Court in 2015 as a response to the *Melloni* doctrine. Although that ruling remained 'blunt' in a sense that it did not declare an EU act inapplicable, only an individual act, but this modest effect could signal the seriousness of the position of the Federal Constitutional Court. In this context, I believe that the concept of constitutional identity is nothing more than the term '*Tû-Tû'* in Alf Ross's classical writing, which, even if it has no specific designation or has an uncertain content, has the function to protect a national margin of action.

However, when relying on the term, the constitutional courts of the Member States must be aware that they cannot interpret the concept of constitutional identity too broadly and cannot claim for whatever that it belongs to the sphere of constitutional identity. First of all, the common values of Article 2 TEU are to be considered as an absolute limit to constitutional needs because otherwise it would not have been possible to become a Member State of the EU. In addition, constitutional courts of the Member States shall keep in mind a danger lately formulated in the literature. It is populism which is considered as the spirit of the age. Within the latter framework the misuse of constitutional identity might lead to the creation of a sham constitutional reality (so-called 'simulacrums').

22. Chapter IV.1. points out that the principle of primacy and effectiveness must also apply to Article 4 paragraph (2) TEU. As a result, it is not the national law *versus* EU law formula which is actually present in the proceedings before the CJEU but the various aspects of EU law itself. Consequently, the notion of constitutional identity in Article 4 paragraph (2) TEU is an embodiment of the idea of 'cooperative constitutionalism' that allows the various constitutional claims to be weighed against each other. To demonstrate this, the thesis attempts to interpret the construction of the EU as three principle-agent problems concluding that in the current state of integration both the Member States and the EU institutions are simultaneously acting as each other's principals and agents. In order to reduce the agency problems various regulatory and governance strategies can be used. From among them the CJEU procedures are of particular importance since the founding treaties entrusted the CJEU with the task to settle the situation in both directions. Within this framework, the TEU provision on the protection of constitutional identity can be interpreted as a new legal standard which seeks to reduce the difficulties arising from the principal-agent situation by formulating an equilibrant requirement against the idea of an ever closer Union. In this construction, the legal procedures concerning the protection of constitutional identity have the function of a valve which promises real success as evidenced by the fact that the CJEU accepted the protection of national constitutional claims as a legitimate aim and Member States could many times rely on Article 4 paragraph (2) TEU with success.

In this sense, in my view, this is a workable standard of EU law that can be interpreted in the context of the exit-voice-loyalty trinity formulated by Albert O. Hirschman. In the case of membership in an international organization, there are strong arguments for not giving up our membership but for creating various channels so that the organization we deem dysfunctional can be remedied and our personal interests expressed and, where possible, asserted. Accordingly, even though the voice strategy requires a great deal of energy and direct action, there may be an even higher cost of exiting, or it might even happen that there is no alternative organization to turn to. Creating a voice option can thus be a particularly obvious solution if there is no effective exit strategy and, ultimately, the function of loyalty has to be taken into account, too, as it always pushes in the direction of delaying the exit. This loyalty *vis-à-vis* the EU is not the loyalty clause enshrined in Article 4 paragraph (3) TEU but a European affection, or if you like, a sense of European identity. This is expressed in the constitutions of the Member States which formulate the contribution to the peaceful

coexistence of Europe, or even more strongly, the creation of a European unity as a state objective.

23. Finally, Chapter IV.3. attempts to reconcile the previous two opposing positions. The starting point of this idea is that one can reasonably assume that in the present state of European integration the hierarchical approach based on the Kelsenian tradition offers little success. Proof of this is the way constitutional courts 'get to grips' with EU law as they find it difficult to incorporate into their national legal systems and the fact that each court considers itself to be the main forum in its field. This approach leads to a fragile structure that can only work if each forum respects the other. The approach that EU membership requires is called heterarchical instead of the hierarchical which demands a horizontal, polycentric cooperation between institutions. For this to work, it is necessary to set aside the 'legal egos', to be open to understand each other's arguments and to respect each other's decisions. This assumes also that constitutional pluralism or constitutional empathy should prevail which implies that sometimes the constitutional courts and sometimes the CJEU have to cede to their counterparts.

IV. Publications

1. Publications in English

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2. Publications in Hungarian

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