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# CONSTITUTIONAL IDENTITY AND INTEGRATION – THE RELATIONSHIP OF THE MEMBER STATES AND THE EU

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### **Abstract**

In the process of European integration, the reference to the Community building has long been the main theme, and the Member States have adopted it in the name of the benefits they will derive from the creation of a supranational entity. However, the identities of individual Member States were not lost in this construction of a “Community of States”, because the movement from all sides was in the direction of a European supranational body in which members could recognize themselves mutually and peacefully. Recent cases happened between the EU and Member States' governments triggered the question how constitutional identity of the supranational body is important to review in respect of Member States' legislation and their national identities.

This paper analyzes the importance of constitutional identity in the EU and how it changed its scope with founding Treaties. Constitutional identities of Member States are studied through contrasting the legal sovereignty of the EU based on the legal cases. Comparatively, national identity of Member States is examined with regards to the identity of EU.

**Keywords:** Constitutional identity, national identity, sovereignty of the EU, EU legislation

### **Introduction**

European Court of Justice's Advocates General has used the concept of “constitutional identity” to define what is protected by Article 4 (2) Treaty of



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European Union (TEU), although this treaty provision refers to the national identity of member states inherent in their fundamental structures (Cloots, 2016). On the other hand, some national constitutional courts, which present themselves as the main defenders of the identity of their constitution, have pointed to Article 4 (2) of the Treaty in order to legitimize their powers to revise secondary EU legislation in line with their constitutional identity. It is no coincidence that the obligation to respect the national identity of MS was first included in the 1992 Maastricht Treaty. The Maastricht Treaty introduced the first version of the national identity clause as one of the instruments adopted at the European level to solve national constitutional problems (Faraguna, 2017).

### Constitutional identity in the EU

The predominantly US-based notion of constitutional identity as the special identity of a nation that is also expressed, determined, and formed by the constitution is the source of the definition of constitutional identity as a special, collective self-identity. In general, a nation's constitutional identity is determined and shaped by the existence of a written constitution, the substance of the constitution, and the context in which the constitution operates.<sup>1</sup>

Many of Member States' judgements have revolved around the identity of the constitutional subject. In an increasingly globalized and linked society, questions concerning this subject have become increasingly essential. Many new foundational rationales for the topic of identity have been proposed. Identity is being articulated in the constitution, rather than using national vocabulary. These issues have grown particularly pressing in Europe.

However, since the Maastricht Treaty's entry into force, the legal tools, mechanisms, and methodologies used to achieve this goal have been improved and enriched. In reality, the Maastricht Treaty marked the EU's "constitutional moment". Many of the developments brought by the Maastricht Treaty may call into question the conventional function of member states. Problems have developed in conjunction with the introduction of European citizenship, the construction of a stronger economic and monetary union, and the aspiration for a closer political unity, among these novelties. The inclusion of standards intended at preserving member states has alleviated national anxieties of



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supranational education conquering member nations. This method included the implementation of an identifying provision. The national identity clause, which was initially inserted in Article 4 of the Treaty on European Union (EU), aims to strike a balance between general principles and supranational constitutionalization (Claes & Reestman, 2015). This cycle of balancing and balancing has endured in subsequent Treaty modifications. Article F was reworded and renumbered as Article 6 (3) in the Treaty of Amsterdam, separating the acknowledgment of democratic principles as a fundamental basis in member state government from the protection of national identity.

1 Polzin, M., 2017. Constitutional Identity as a Constructed Reality and a Restless Soul. Constitutional identity in the age of global migration, German Law Journal. Vol.18., No. 07

Furthermore, and perhaps more importantly, the Treaty established the idea of subsidiarity as a new legal tool for meeting divergent European and national needs. The Lisbon Treaty, which was the most recent linguistic milestone in the history of identity discourse, introduced the most influential reformulation of the identity clause. Article 4 (2) of the EU Treaty was the first to expressly establish national constitutional identity. For the first time, the definition shifted from a narrowly defined national identity to a considerably broader one. National identity has been and continues to be an intrinsic aspect of the member states' "basic institutions, political and constitutional, including regional and local self-government".<sup>2</sup>

Furthermore, the Charter of Fundamental Rights of the European Union (CFREU), which became legally binding with the Lisbon Treaty's entry into force in 2009, established the obligation to respect "member states' national identities and the organization of their public bodies at the national, regional, and local levels."<sup>3</sup>

In short, the Lisbon Treaty has contributed significantly to the enrichment of the constitutional identity clause by reducing the provision's social and historical ties (Claes & Reestman, 2015). This alteration in the meaning of this clause has a significant impact on the case law of the European Union Court of Justice (ECJ). The national identity clause enshrined in Article F and 6



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(3) TEU was a rarely used battlefield or meeting place between the EU and Member States before the European Court of Justice in pre-Lisbon case law, but after the Lisbon Treaty was adopted, Article 4 (2) included it in the European Court's legal argumentation. For better or worse, the "constitutionalization" of national identity, which occurred textually with the shift in vocabulary in the Lisbon Treaty, increased the acceptability of identity terminology (Kumm, 2005). The Lisbon Treaty's "constitutionalization" of the EU's idea of national identity was instantly seen as a potential transformation of national identity into a battlefield or meeting point where the boundaries of EU legislation reside. Constitutional identity of Member States versus the legal sovereignty of the EU National identity is inextricably linked to the nation-constitutional state's identity, which revolves around what could be called the "hard content" of national constitutions. Because European law

2 Article 4(2) of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 3a, Dec. 13, 2007, 2007 O.J. (C 306)

3 Charter of Fundamental Rights of the European Union preamble, 2010 O.J. (C 83) 2

has an undeniable influence on national constitutions, national courts believe that this core of inviolable substance might be opposed to European law in the shape of national identity, which must also be maintained in accordance with Article 4 of TEU. In practice, European constitutional literature has taken this route, concluding that national constitutions (and their solid core) form the cornerstone of the European Constitution and European order.

This persistence, however, appears to conceal the inherent frailty of Member State's constitutional identity. Indeed, while diverse legal rules regarding the European and international bodies have influenced national constitutions, this does not imply that national constitutions form the basis of the European legal order. According to the judgement of the Court of Justice on the Costa v ENEL case, the EEC Treaty has formed its own legal system, which has become an integral part of the legal systems of the Member States, and the community law takes priority over national law (Costa v. ENEL, 1964). The incorporation of provisions derived from the community, and more broadly the wording and spirit



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of the treaty, into the laws of each member state makes it impossible for the states to give precedence to a unilateral and subsequent measure over a legal system agreed on a reciprocal basis. As a result, such a measure cannot be incompatible with that legal system. The treaty's law, as an independent source of law, could not be overruled by domestic legal provisions, however phrased, without losing its identity as community law and putting the community's legal foundation into question.

The Court stated as early as the *Costa v. ENEL* decision (1964), outlining a generic procedure: "Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves and that the transfer by the states from their domestic legal system to the community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights."<sup>4</sup>

As a result, the foundation of European law is not national constitutions, but rather the general will of the member states to establish a lasting common legal order. This basic choice, which is better known as the legal sovereignty of the European system, underpins the power and rule of European law. This principle of constructing a "general order" that would eventually become a "community of law" was expressed by the European Court of Justice in decisions that are now so well-known

4 See Court of Justice, Judgment of 15 July 1964, C-6/64 (*Costa v. E.N.E.L.*) that just mentioning their names is enough to understand how weak national constitutional courts' positions as restrictions or opposition to European law are (Mangiameli, 2013).

However, the European Court of Justice (ECJ) repeatedly stated:

"Fundamental rights are part of the general principles of the law that the Court safeguards and, in this, it inspires to the common constitutional traditions of member States and to the treaties on fundamental rights signed by them, among them especial significance is to be given to the European Court of Human Rights (ECHR)."

This is not to say that European law is limited by fundamental rights or ideals enshrined in national constitutions. Indeed, the European order's zone of legal sovereignty is expanding precisely because it is accompanied with the



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possibility of compensation for damages caused to each natural or legal person by the failure to apply European law (Mangiameli, 2013).

The identity of Member States and the identity of the EU

The issue of national identity has now transcended national constitutions. The failure of the 2001 Constitutional Treaty, in particular, encouraged certain member states to assert veto rights outside of the Treaties' institutional framework, which did not apply to every member country, as two referendums in Ireland demonstrated. On a political level, the MS's veto-wielding character runs counter to European identity and undermines the Union's purpose: no legal superiority is secure when faced with the threat of unilateral disruption of long-running European agreement discussions.

The topic of the MS's identity in respect to the EU's identity has now become a contentious subject; it is not simply a constitutional and legal matter, but also a political one. The political significance of fundamental concepts relating to identity, as well as the weight that constitutional judges place on non-legal variables in defining the concept of national identity, are central to their discussion. The fact that some constitutional judges oppose the principle of European law primacy and declare that in some cases, the MS may refuse to apply European law when it conflicts with national identity clearly indicates that the EU appears to have emerged from an integration process marked by the evolution of European law. And it has entered a period where integration is mostly driven by each member state's political identity, implying that European integration has not only halted in some areas, but has also possibly reached the final political limit for all, or at least some, member countries.

To this point, the disregard for all those symbolic and formal elements of European democratic growth, such as the reference to European citizens as subjects represented in the European Parliament (Mangiameli, 2013), the earlier interpretation of the Treaty, according to which the citizens of the Union are peoples of the MS, and the conclusion that the European Parliament is not the representative body of a single sovereign European people (TEU, 2007). National identity, in the political meaning of the phrase, pulls the EU apart in order to safeguard the EU's identity and state sovereignty. As a result, the EU



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has devolved into a basic “by-product,” a simple regional organization operating under international law and utterly subservient to its MS’s will.

There is a deep political divide in Europe that signals the demise of the federal idea, and one of the most important elements in this regard can be found in the decision made to address the economic and euro crises: the Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union.

If this does not appear to be federal coercion at first look, we are surely dealing with advanced kinds of federal enforcement that go far beyond the federal government’s possible “pressure” on a constituent state, which the US Supreme Court finds constitutionally appropriate. As a result, it’s unclear what overall benefit or federal advancement MS has gained in exchange for this surrender of sovereignty. The question is whether the constituent treaties truly constitute a progression at the European level within the context of European economic policy, as it does with federal states or federal directives.

### **Conclusion**

By concluding it can be noted that the Member States’ (national) identity delimits European competences and the integration process due to the fact that essential inviolable cores of their constitution can be in conflict with European law. However, the European integration process and the basis of the European order’s legal sovereignty began with the Member States’ common will to give life to a common legal framework, not with their national constitutions. After all, we are discussing the very identities that two global wars bestowed to us in the previous century.

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