

A CONCEPT AT THE EDGE OF NATIONAL AND EUROPEAN CONSTITUTIONAL LAW: DIFFERENT UNDERSTANDINGS WITHIN THE SAME REGION. CONSTITUTIONAL IDENTITY IN POLAND AND HUNGARY*

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ABSTRACT

The Polish Constitution does not expressly postulate the term of constitutional identity, however the Constitutional Tribunal of Poland has elaborated this concept in detail in its case law. This framework has been used to justify internal reforms; however, it has been mostly applied as a constitutional argument for the protection of national sovereignty within the European legal space.

Similarly, the Hungarian Constitutional Court has stated:

The constitutional identity of Hungary does not constitute the exhaustive and closed list of values, but some of its elements may be highlighted as examples, which are identical with the recently acknowledged constitutional values: the fundamental rights; the separation of powers; the republican form of state; the freedom of religion; the rule of law; parliamentarianism; equality under the law; the respect of the judicial power; and the protection of the nationalities living together with us.¹

My study aims to make a comparison between the relevant case-law of the two constitutional courts and provide some recommendations on how constitutional identity should be reconceptualized; separated more clearly from other forms of identity; and how it could fulfil its task more efficiently at the edge of the national and European legal orders with the help of European-wide standards.

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1 Ruling of the Constitutional Court of Hungary 22/2016.(XII.5.) [2017] point 65, <https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016-1.pdf> accessed 19 Mar 2022.

KEYWORDS

constitutional identity; constitutional review; law of the European Union; sovereignty; comparative constitutional law; constitutional interpretation

1. INTRODUCTION

The relationship between national constitutional frameworks and the Law of the European Union has been a uncertain matter for decades, and this discussion was intensified significantly by the accession of several Central-European countries.² Traditionally, the German Federal Constitutional Court was the primary judicial body that elaborated on the concept of national constitutional identity in-depth,³ while the European Court of Justice (hereinafter: ECJ) attempted to crystallize a framework of national identity with more or less similar content.⁴ The difference between the two approaches were the main highlights: the ECJ relied on the supremacy of EU law over even national constitutions,⁵ while the German Federal Constitutional Court identified certain elements of the German constitutional order which should not be undermined by the legal development of European integration.⁶

From 2004 onwards, new member states joined the European integration project with inherently different historical experience than the ‘old’ West-European member states: due to the almost continuous thread of sovereignty over Central-European states by neighbour empires,⁷ several constitutional scholars in these countries looked for concepts which could justify stronger protection of national legal orders within the European legal space *vis a vis* European Law. Moreover, the original, mostly economic, community had been extended to certain fields of strengthened political cooperation, and consequently, the debates around sovereignty intensified, so additional legal arguments were sought to justify different political approaches.

As part of these endeavours, constitutional identity has been explored as an important tool not only to distinguish the scope of European and national law but also to conceptualize the background of the legal differences between member states despite their clear willingness to harmonize their applicable rules on certain well-defined matters. As a result, in recent years, and especially in the Central-European countries, numerous academic contributions have been

2 P Minkinen, ‘Political Constitutionalism Versus Political Constitutional Theory: Law, Power, and Politics’ (2013) ICON 11(3), 590 <<https://doi.org/10.1093/icon/mot020>>.

3 M Poplzin, *Verfassungsidentität* (Mohr Siebeck 2018).

4 Judgement of the ECJ C-202/11 EU:C:2013:239.

5 Judgement of the ECJ C-11/70 EU:C:1970:114.

6 Judgment of Second Senate BVerfGE 30 [1970], 1; Judgment of Second Senate BVerfGE 89 [1993], 155; Judgment of Second Senate BVerfGE 134 [2014], 366; Judgement of the Second Senate 2 BvE 2/08 – 2 BvE 5/08 – 2 BvR 1010/08 – 2 BvR 1022/08 – 2 BvR 1259/08 – 2 BvR 182/09 BVerfGE 123 [2009], 267; Judgement of Second Senate BVerfGE 146 [2017], 216.

7 For the conceptualization of the Central-European characteristics of the sovereignty framework please see: N Brack, R Coman, A Crespy, ‘Sovereignty Conflicts in the European Union’ (2019) *Les Cahiers du Cevipol* vol. 4, 3–30 <<https://www.cairn.info/revue-les-cahiers-du-cevipol-2019-4-page-3.htm>> accessed 31 Nov 2021.

devoted to the notion and the functions of constitutional identity.⁸

In light of the recent spread of this framework, and bearing in mind its growing importance in the contemporary constitutional discourse around Europe, in my view, we have to extend the comparative scope of this research further, and to more deeply understand what kinds of models exist in this regard.⁹ As part of a series of comparative materials on constitutional identity, the constitutional texts of the Visegrád countries have been also analysed,¹⁰ and the first steps have been made towards a comparative evaluation of the relevant constitutional case law from these countries.¹¹ The contribution of this paper to this process will be a parallel detailed assessment of some crucial Polish and Hungarian constitutional court rulings dealing with constitutional identity, and on this basis, I will argue for the necessity of European-wide judicial standards for constitutional identity to avoid arbitrary use of this instrument.

If we aim to describe the concept of constitutional identity in a particular country, in my view, six factors should be considered: the origin of the concept; the elements of constitutional identity in the legal system; the functions assigned to it; its role in outlining the relationship of European and national law; the role of the national legal traditions at the discussion; and the main concerns identified around this concept. In the following sections, I will analyse the Polish and the Hungarian concepts of constitutional identity around these six aspects, and will provide a deeper understanding of the conceptualization of this framework in these two countries with comparable situations, but somewhat different circumstances and characteristics.

2. THE ORIGINS OF TWO DIFFERENT CONSTITUTIONAL IDENTITY CONCEPTS

In the two countries examined, constitutional identity as a concept was first introduced by the Polish Constitutional Tribunal in 2010, after the issuing of several rulings outlining the scope

8 For instance, please see: E Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) *Neth J Leg Philos* vol. 2, 82–98 <<https://www.doi.org/10.5553/NJLP.000049>>; T Drinóczi, 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach' (2020) *Ger Law J* 21(2), 105–130 <<https://www.doi.org/10.1017/glj.2020.1>>; I Stumpf, 'Sovereignty, Constitutional Identity and European Law' (2020) *Hung Rev* 11(3), 35–46 <https://hungarianreview.com/article/20200515_sovereignty_constitutional_identity_and_european_law/> accessed 7 Nov 2021; M Jovanović, 'Sovereignty – Out, Constitutional Identity – In: The 'Core Areas' of Controversy of EU Membership' (2015) *Acta Jur Hung* 56, 249 <<https://doi.org/10.1556/026.2015.56.4.2>>.

9 For this purpose, I spent two weeks at the Institute for Law Studies PAS in October 2021, where I had the opportunity to consult with several Polish experts on the topic and to collect English materials from Polish authors about this matter. On these grounds, I drafted the present comparative study between the Polish and Hungarian interpretations of constitutional identity, which is still to be detailed further but might be a proper point to begin to initiate additional comparative research between the two countries and also between other countries concerned.

10 For instance: K Popławski, 'Introductory Parts to the Constitutions of Visegrad Group Countries. Their Relevance, Constitutional Identity and Relation Towards European Constitutional Identity' (2019) *Central European Papers* 7(1), 25–50 <<http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-beb43450-9f00-408b-a665-88e3610a679b>> accessed 19 Mar 2022.

11 V Miháliková, 'National and Constitutional Identity in the Case-Law of Constitutional Courts of the Visegrad Group' (2020) *Stud Iurid Cass* 8(1), 38–50 <<https://doi.org/10.33542/SIC2020-1-04>>.

of the country's sovereignty.¹² In this particular case, the Tribunal reviewed the constitutionality of the Lisbon Treaty and the additional limitations on Poland's sovereignty provided by this new treaty.¹³ By contrast, the Hungarian Constitutional Court relied on this concept six years later, when at the request of the government it interpreted the provisions of the Fundamental Law on Hungary's participation in European integration. The common point is that both countries implemented this conceptual framework in their constitutional discourse in order to reconsider the relationship between the European and national legal orders, but regarding the further circumstances, the closer context of the two implementations was inherently different.

In Poland, the primary issue was a legal challenge that has also been heard by numerous other constitutional courts in the European Union. The constitutionality of the Lisbon Treaty was debated in several member states,¹⁴ but ultimately, its constitutionality has been upheld by all judicial bodies that have dealt with the matter. Nevertheless, this was probably the first moment in Central Europe when the necessity of explicit legal limitations on European integration was seriously considered.¹⁵ The Polish Constitutional Tribunal recognised that constitutional identity, which had been mentioned several times by the German Federal Constitutional Court as including the unamendable principles of the German Basic Law,¹⁶ might be the proper tool for Poland to also determine those key principles of the Polish constitutional framework which should be vested by a supreme legal character over the other constitutional articles and also over EU law. However, although the Polish Constitutional Tribunal provided a list of principles and values which should be understood as the components of Poland's constitutional identity, it failed to determine the exact

12 Please see the following cases of the Polish Constitutional Tribunal of 24 February 1997, K 19/96 (1997) OTK 6; of 5 January 1999, K 27/98 (1999) OTK 1; of 28 April 1999, K 3/99 (1999) OTK 73; of 12 January 2000, P 11/98 (2000) OTK 3; of 10 July 2000, SK 12/99 (2000) OTK 143; of 8 May 2000, SK 22/99 (2000) OTK 107; of 28 June 2000, K 25/99 (2000) OTK 141; of 5 June 2001, K 18/00 (2001) OTK 118; of 29 November 2001, P 8/01 (2001) OTK 268; of 19 February 2003, P 11/02 (2003) OTK-A 12; of 27 May 2003, K 11/03 (2003) OTK-A 43; of 28 January 2003, K 2/02 (2003) OTK-A 4; of 21 April 2004, K 33/03 (2004) OTK-A 31; of 27 April 2004, P 16/03 (2004) OTK-A 36; of 31 May 2004, K 15/04 (2004) OTK-A 47; of 12 January 2005, K 24/04 (2005) OTK-A 3; of 31 January 2005, P 9/04 (2005) OTK-A 9; of 27 April 2005, P 1/05 (2005) OTK-A 42; of 22 June 2005, K 18/04 (2005) OTK-A 49; of 30 May 2005, P 14/04 (2005) OTK-A 47; of 19 December, P 37/05 (2006) OTK-A 177; of 2 July 2007, K 41/05 (2007) OTK-A 72; of 17 July 2007, P 16/06 (2007) OTK-A 79; of 7 November 2007, K 18/06 (2007) OTK-A 122; of 12 February 2008, P 62/07 (2008) OTK-A 17; of 10 July 2008, P 15/08 (2008) OTK-A 105; of 15 December 2008, P 57/07 (2008) OTK-A 178; of 18 February 2009, KP 3/08 (2009) OTK-A 9; of 16 July 2009, KP 4/08 (2009) OTK-A 112; of 28 October 2009, KP 3/09 (2009) OTK-A 138; of 13 April 2010, P 35/09 (2010) OTK-A 39; of 1 June 2010, P 38/09 (2010) OTK-A 53; of 15 July 2010, K 63/07 (2010) OTK-A 60; of 1 December 2010, SK 50/07 (2010) OTK-A 130.

13 Judgement of Polish Constitutional Tribunal of 10 November 2010, K 32/09 (2010) OTK-A 108.

14 'Amongst others: Ruling of the Czech Constitutional Court on the constitutionality of the Lisbon Treaty', <https://www.cvce.eu/content/publication/2013/10/22/c746a974-58eb-4907-b022-c9f486b6c3d2/publishable_en.pdf> accessed 6 Oct 2021; the ruling of the German Second Senate, 2 BvE 2/08 – 2 BvE 5/08 – 2 BvR 1010/08 – 2 BvR 1022/08 – 2 BvR 1259/08 – 2 BvR 182/09 [2009]; Ruling of the Hungarian Constitutional Court, 143/2010. (VII.14.) (2010) ABH 698.

15 W Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' (2011) ERA Forum vol. 12, 97–204, <<https://www.doi.org/10.1007/s12027-011-0206-z>>.

16 B Bakó, 'The Zaublehrhling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review in Hungary' (2018) ZaöRV vol. 78, 863–902, <https://www.zaovr.de/78_2018/78_2018_4_a_863_902.pdf> accessed 2 Feb 2022>.

source of constitutional identities, such as the unamendable constitutional provisions in Germany.¹⁷ Without this, it is a hard task to attribute any normative character to constitutional identity, since it comprises just a set of principles and values selected on unknown grounds. In the first years, constitutional identity was used as a legal concept in the case-law of the Polish Tribunal, however, it has gradually become politicised, especially after 2015, when a constitutional crisis occurred in the country,¹⁸ in the recently published abortion judgment, or the latest ruling concerning the alleged conflict between the founding treaties of the European Union and the Constitution of Poland.¹⁹

In Hungary, the first to use constitutional identity as an argument were a dissenting and concurring opinion,²⁰ while the majority reasoning first relied on this concept in 2016. At that time, the Hungarian Government had requested the abstract interpretation of Art. E) (2) of the Fundamental Law of Hungary²¹ to decide whether so-called migration quotas could have binding force for Hungary. The Constitutional Court made an international comparison, which has been criticised by several scholars: according to the contesting views, the cases mentioned were arbitrarily selected for the sake of favouring the governmental motion.²² The reasoning detailed the term of constitutional identity and used it as an argument for the protection of national sovereignty *vis a vis* the supremacy of EU law. The reasoning provided a list of the main elements of constitutional identity,²³ but this enumeration is not exhaustive, and the Constitutional Court shall define on a case-by-case basis the content of constitutional identity as a set of constitutionally provided values.²⁴

17 S Dudzik, N Póltorak, 'The Court of the Last Word. Competences of the Polish Constitutional Tribunal in the Review of European Law' (2012) Yearb Pol Eur Stud vol. 15, 225–258, <<http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.cejsh-e4e3acc9-c00c-44ea-ae46-0b38fad00a88>> accessed 19 Mar 2022.

18 Commission Working Document of 20 July 2021, 2021 Rule of Law Report: Country Chapter on the rule of law situation in Poland SWD(2021)722 final, <https://ec.europa.eu/info/sites/default/files/2021_rorl_country_chapter_poland_en.pdf> accessed 9 Oct 2021>.

19 Judgement of Polish Constitutional Tribunal of 7 October 2021, K 3/21 (2021) OTK-A 65.

20 The ruling of the Hungarian Constitutional Court, 23/2015.(VII.7.) [2015] ABH 548 dissenting opinion of Justice Varga Zs., 83–98; and ruling of the Hungarian Constitutional Court, 3130/2016.(VI.29.) [2016] ABV 16 concurring opinion of Justice Varga Zs., 19–33.

21 Art. E(2) of the Fundamental Law of Hungary (prior to the Ninth Amendment, adopted on 15 December 2020) CDL-REF(2021)046, <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2021\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)046-e)> accessed 20 Mar 2022, reads as follows: 'With a view to participating in the European Union as a Member State and based on an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure'.

22 N Chronowski, A Vincze, 'Önazonosság és európai integráció – az Alkotmánybíróság az identitáskeresés útján' [Self-identity and European integration – the Constitutional Court looking for identity] (2017) Jogtud Köz vol. 3, 117 <<http://real.mtak.hu/id/eprint/100617>> accessed 19 Mar 2022.

23 'The constitutional identity of Hungary does not constitute the exhaustive and closed list of values, but some of its elements may be highlighted as examples, which are identical with the recently acknowledged constitutional values: the fundamental rights; the separation of powers; the republican form of state; the freedom of religion; the rule of law; parliamentarian; equality under the law; the respect of the judicial power; and the protection of the nationalities living together with us. Amongst others, these are such achievements of our historical constitution, on which the Hungarian legal system relies.' Ruling of the Hungarian Constitutional Court, 22/2016.(XII.5.) [2017] point 65, <https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016-1.pdf> accessed 19 Mar 2022.

24 Ibid., point 66.

So, similarly to the Polish implementation, the Hungarian definition is still too vague, only the aforementioned exemplificative enumeration has been provided for those elements of the constitutional framework which shall be seen as sources of constitutional identity. Moreover, the Hungarian Fundamental Law prescribes the duty of all state authorities to interpret the Fundamental Law in the light of its purpose, of the National Avowal as a preamble to the Fundamental Law, and the achievements of the historical constitution of Hungary.²⁵ And this is again a point where the Hungarian implementation differs from the Polish one. The Hungarian concept is closely linked to the still ongoing discourse on the role of historical traditions in the current constitutional framework, which dates back to the enactment of the Fundamental Law in 2011.

Art. (R) (3) of the Fundamental Law of Hungary prescribed that the provisions of the Fundamental Law shall be interpreted amongst others in light of the achievements of the historical constitution of Hungary.²⁶ This provision highlighted the relevance of Hungarian constitutional traditions as elaborated until 1944, and generated discussion on Hungary's constitutional specialities within the European legal space.²⁷ As will be detailed later, the concept of constitutional identity has been attached to an already existing set of constitutional reasoning and scholarship in the country, therefore the context of the Hungarian implementation-oriented it towards a historically more deeply rooted approach.

Moreover, the Hungarian introduction of constitutional identity was a legal answer to a particular political situation, when the so-called quota referendum was legally unsuccessful, but the vast majority of the votes cast supported the governmental policies.²⁸ Less than fifty percent of voters took part in the referendum, so the validity threshold had not been met,²⁹ but more than 90 percent of the votes cast opposed the acceptance of migration quotas. The proposed amendment of the Fundamental Law for the rejection of migration quotas was not enacted by Parliament due to the lack of a two-thirds governmental parliamentary majority during that period, so in this situation, the Government looked for other legal means to exclude the allocation of refugees to the country on the grounds of the planned quota system, and constitutional identity was one of the legal tools chosen to further this purpose.

Apart from the lack of a coherent definition, a further similarity between the two countries should be underlined: there was an important borderline in the development of the constitutional case law in both countries.³⁰ In Poland, since the constitutional crisis started in 2015, the Constitutional Tribunal has been reluctant to cite earlier jurisprudence,³¹ and the interpretation of

25 Ruling of the Hungarian Constitutional Court, 19/2019.(VI.18.) [2019], <https://hunconcourt.hu/uploads/sites/3/2019/12/19_2019_eng_final.pdf> accessed 19 Mar 2022.

26 Article R(3) of the Fundamental Law of Hungary of 25 April 2011, <<https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54412e794>> accessed 19 Mar 2022.

27 L Csink, 'Az Alaptörvény identitása – Honnan hová?' [The identity of the Fundamental Law: from where to where?] (2015) *Acta Univ Szeged vol. 78*, 134–141 <http://acta.bibl.u-szeged.hu/45269/1/juridpol_078_134-141.pdf> accessed 19 Mar 2022.

28 V Kéri, Z Pozsár-Szentmiklósy, 'Az Alkotmánybíróság határozata az Alaptörvény E) cikkének értelmezéséről' [The ruling of the Constitutional Court from the interpretation of Article E) of the Fundamental Law] (2017) *JeMa vol. 1–2*, 5–15 <<https://jema.hu/article.php?c=469>> accessed 19 Mar 2022.

29 Art. 8. (4) of the Fundamental Law of Hungary.

30 V Miháliková (2020) 8.

31 S Biernat, M Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context' in A Albi, S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C Asser Press 2019) 773, <https://doi.org/10.1007/978-94-6265-273-6_16>.

constitutional identity has been changed. In the meantime, the Fourth Amendment to the Fundamental Law of Hungary stipulated³² that the rulings of the Hungarian Constitutional Court issued under the previous Constitution of the country shall lose their effect. The Constitutional Court held in one of its rulings that the former ruling should be cited unless the Fundamental Law significantly reconsiders the context of the subject.³³ However, in the reality, cases before 2011 are rarely mentioned in reasoning, just as parts of the historical development. But it is also noteworthy that several recent rulings of the Constitutional Court repeat key sentences from old judgments,³⁴ maintaining at least the perception of case law's continuous development in Hungary.

In Hungary, despite several criticisms addressed at its recent composition and case law, the formal legitimacy of the Constitutional Court has not been questioned, and it is generally acknowledged that this body is authorized to elaborate on the detailed interpretation of constitutional identity. This is not currently the case in Poland, where the legitimacy or even the legality of the current Constitutional Tribunal or at least of some constitutional judges has been questioned by several domestic and international counterparts.³⁵ One should not expect a body with questionable recognition to develop a concept which should represent some minimum legal points of consent for the whole society.

The cursory glance at these two implementations highlights the lack of a unitary European discussion on constitutional identity. Due to the lack of a clear European definition or at least standard on this legal instrument, each member state faced this issue under different circumstances, which determined the functions assigned to constitutional identity. If constitutional identity emanates from diverse backgrounds in each member state, it will be hard to apply this concept as a term of European law.

3. THE ELEMENTS OF CONSTITUTIONAL IDENTITY IN POLAND AND HUNGARY

In Poland and Hungary, despite some clear differences, the structure of the two constitutional identity frameworks is inherently similar, therefore, similar doubts may be raised regarding the explicit content of constitutional identity. To clarify the shortcomings in this regard, firstly, the key sentences of the Polish Lisbon Treaty judgment should be cited:

The Constitutional Tribunal shares the view expressed in the legal scholarship that the competences of the sovereign state, under the prohibition of conferral to international organisations, constitutes the constitutional identity, and thus reflects the values the Constitution is based on. Therefore, constitutional identity is a concept which determines the scope of “excluding – from the competence to confer competences – the matters which constitute [...] the heart of the matter, i.e., are fundamental to the basis of the political system of a given state”, the conferral of which would not be possible pursuant to Article 90 of the Constitution. Regardless of the difficulties related to setting a detailed catalogue of inalienable competencies, the following should be included among the matters under the complete prohibition of the conferral: decisions specifying the fundamental principles of the

32 Art. 19(2) of the Fourth Amendment of the Fundamental Law.

33 The ruling of the Hungarian Constitutional Court, 13/2013.(VI.17.) [2013] ABH.

34 At first the cited old sentences are expressly mentioned in justifications of new rulings; but once an old statement has been repeated by recent case law, subsequent reasonings will refer to these recent repeats of the old statements instead of the original rulings based on the previous Constitution of Hungary.

35 P Tuleja, 'The Polish Constitutional Tribunal' in A von Bogdandy, P Huber, C Grabenwarter (eds), *The Max Planck Handbooks in European Public Law. Vol 3: Constitutional Adjudication: Institutions* (Oxford University Press 2020) 619–672, <<https://www.doi.org/10.1093/oso/9780198726418.003.0012>>.

Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state under rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power of the people and the bicameral Polish Parliament to amend the Constitution and the competence to determine competences.³⁶

The Polish Constitutional Tribunal aimed to identify a standard for reasonably narrowing the scope of constitutional identity and clarifying its meaning. The main argument from the body was the declaration of equivalence between the unalienable competencies of the sovereign Polish State under Art. 90 of the Polish Constitution³⁷ and its constitutional identity. However, despite this commendable step towards constructing a coherent framework, the Tribunal managed only to provide an exemplificative enumeration of certain elements, which should form part of constitutional identity. However, the list remains open-ended, and it is up to the interpretation to confer an unalienable character on further principles and values to extend the scope of constitutional identity. Moreover, this approach does not consider that due to its aforementioned ambiguity, constitutional identity should be elaborated jointly by national constitutional courts and by the ECJ³⁸, as confirmed several times by the ECJ and national constitutional courts.

The relevant argumentation of the Hungarian Constitutional Court faces similar shortcomings, as demonstrated by the following crucial sentences:

The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, based on the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law.³⁹

The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us. These are, among others, the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon.⁴⁰

The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall

36 Judgement of the Polish Constitutional Tribunal, K 32/09.

37 Article 90. of The Constitution of Poland (Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483) stipulates: 'The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters'.

38 E Cloots (2016) 82.

39 The Ruling of the Hungarian Constitutional Court, 22/2016.(XII.5.), point 64.

40 Ibid., point 65.

remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases.⁴¹

Sovereignty is at the heart of the Hungarian reasoning, and the inalienable competencies of the Hungarian sovereign are mentioned, but the collection of these is not understood as the equivalent of constitutional identity like in Poland.⁴² Instead, the Constitutional Court nominated two explicit sources of constitutional identity: the National Avowal, and the achievements of the historical Constitution, however, the second category is itself still overbroad. Nevertheless, the ruling provides the entire Fundamental Law as the potential basis of constitutional identity, undoubtedly too vague a background for this concept. Constitutional identity as a normative idea should describe those core provisions or clauses of the constitution, which shall be over‘ordinary’ constitutional provisions, and which should constitute substantial restrictions on constitutional amendments⁴³ as well as on the limitation of sovereignty. By contrast, the Hungarian definition just provides a list of evidently crucial constitutional principles and values without constructing any coherent framework of interpretation behind them.

There are huge uncertainties around the elements of constitutional identity in Poland and Hungary, and this is again explained by the lack of any common sense about the standards behind constitutional identity. The content of this concept cannot be the same in all member states, since the uniqueness of each country should be reflected, however, at least the key formal and substantial principles should be agreed, possibly during a future amendment of the founding treaties of the European Union, which should be borne in mind during the national conceptualizations of constitutional identity.

4. THE FUNCTIONS OF CONSTITUTIONAL IDENTITY IN POLAND AND HUNGARY

The special character of constitutional identity is well reflected by the functions assigned to it. According to the model of Anna Śledzińska-Simon, constitutional identity has an individual, a relational, and a collective aspect, and all of these are used in both Poland and Hungary.⁴⁴ The individual and the collective aspects are the strongest, and the highlights are slightly different depending on the exact circumstances of the two countries.

The individual aspect of constitutional identity describes those elements of a constitutional framework that provides its speciality *vis a vis* other national legal systems. The characteristics identified under this aspect shall also form the basis of the relational and the collective aspects, while it should restrict the constitution-amending power’s room for manoeuvre. Regarding this second point, both the Polish and the Hungarian Constitutional Court have consistently rejected substantial review of constitutional amendments and opened a review only on formal

41 The ruling of the Hungarian Constitutional Court, 22/2016.(XII. 5.), point 67.

42 Ibid., point 60.

43 T. Drinóczi, ‘Újra az alkotmányozó, az alkotmánymódosító hatalomról és az alkotmányellenes alkotmánymódosításról – az Alaptörvény alapján’ [Again the constitution-making power, from the constitution-amending power and from unconstitutional constitutional amendments on the ground of the Fundamental Law] (2015) *Jogtud Köz* 790(7-8), 362 <<https://matarka.hu/klikk.php?cikkmutat=2250631&mutat=http://real-j.mtak.hu/1901/32/jk1578.pdf>> accessed 19 Mar 2022.

44 A Śledzińska-Simon, ‘Constitutional Identity in 3D: A Model of Individual, Relational, and Collective Self and Its Application in Poland’ (2015) *ICON* 13(1), 124 <<https://doi.org/10.1093/icon/mov007>>.

grounds.⁴⁵ Consequently, constitutional identity is not utilised as a substantial standard for the scrutiny of constitutional amendments. Nevertheless, especially in Hungary, where the role of historical traditions is closely linked to the discussion on constitutional identity, the constitutional uniqueness of the country is highlighted.

Regarding the relational aspect, constitutional identity shall secure for the state that it has equal status in its diplomatic relations with foreign countries, and its sovereignty should be respected in cases of international cooperation.⁴⁶ Despite the fact that constitutional identity is sometimes cited as a legal argument in bilateral interstate relations, the role of this concept is usually not crucial in the field of international law.⁴⁷

Under the collective aspect, the constitutional identity of member states determines the national authorities' room for manoeuvre within the European legal space, as a community of equal and sovereign legal entities.⁴⁸ At this point, the inherent ambiguity of constitutional identity should be highlighted again: member states should preserve their unique character but should also conclude agreements in certain fields to establish unitary regulation within the whole community.⁴⁹ The shortcomings regarding the European and national dimensions of constitutional identity will be conceptualized elsewhere; here the judicial bodies' role in expressing national sovereignty should be highlighted. When constitutional identity was introduced in Poland and Hungary, mainly the governmental margin of movement was addressed, however, especially in Poland after the beginning of the constitutional crisis, the status of the Polish judiciary has been a controversial matter at the international level. Several international organisations expressed their concerns, while the ECJ, as well as the European Court of Human rights, have several times declared the incompatibility of the Polish judicial reforms with European Law and with the European Convention on Human Rights.⁵⁰ The uncertainty around constitutional identity is demonstrated excellently by the fact that the current Polish government relies on constitutional identity when it rejects the competencies of European and international actors to interfere; while opponents of the recent judicial reforms consider that the constitutional identity of Poland should primarily prevent the government from conducting such measures which may undermine the independence and the legitimacy of the judiciary.⁵¹

Despite the intense relevant debates also taking place in Hungary,⁵² this context of controversies around the status of the judiciary has less weight, however, the planned reorganisation of the Hungarian administrative judiciary was heavily criticized by a wide range of international

45 The ruling on the Hungarian Constitutional Court, 61/2011.(VII.13.) [2011] ABH 290.

46 Judgement of the ECJ C-364/10 EU:C:2012:630.

47 E Várnay, 'Az Európai Bíróság ítélete a Magyarország kontra Szlovákia ügyben' [The judgement of the European Court of Justice in the case Hungary v. Slovakia.] (2013) *JeMa* vol. 4, 84.

48 L Trócsányi, 'Nemzeti alkotmányok, európai integráció és alkotmányos identitás' [National constitutions, European integration and constitutional identity] (2017) *Acta Univ Szeged* vol. 1, 319 <http://acta.bibl.u-szeged.hu/45281/1/juridpol_078_319-328.pdf> accessed 19 Mar 2022.

49 A von Bogdandy, 'The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe' (2005) *ICON* vol. 2–3, 295 <<https://www.doi.org/10.1093/icon/moi021>>.

50 SWD(2021) 722 final.

51 D Miąsik, M Szwarc, 'Effectiveness of EU Directives in National Courts – Judicial Dialogue Continues: The Court of Justice's Judgment in C-545/17 Pawlak' (2019) *PYIL* vol. 39, 267–284, <<https://doi.org/10.24425/pyil.2020.134485>>.

52 Parliamentary questions of 21 March 2019, Question for written answer E-001444-19 to the Commission Rule, 130, Csaba Molnár (S&D), <https://www.europarl.europa.eu/doceo/document/E-8-2019-001444_EN.html accessed> 19 Mar 2022.

stakeholders. Ultimately, the envisaged reforms were withdrawn.⁵³ Probably in the light of the Polish experience and the doubts around the Hungarian administrative justice, the Hungarian Parliament adopted a constitutional amendment, which underlined the significance of constitutional identity as well as the role of the national authorities in its protection: *All bodies of the State shall protect the constitutional self-identity of Hungary*.⁵⁴

The term ‘constitutional self-identity’, commonly used in the Hungarian case law and literature, also shows that the functions assigned to constitutional identity are slightly different in Hungary than in Poland. Even the normativity of the Polish concept is subject to severe concerns, but the Hungarian framework is also supposed to contain several extra-legal elements. The issues raised by this characteristic will be detailed in the fifth and the sixth sections.

5, CONSTITUTIONAL IDENTITY IN THE EUROPEAN LEGAL SPACE: THE POLISH AND HUNGARIAN EXPERIENCES

The issue around constitutional identity is based on a core tension between the European and the national aspects of the issue, and the scientific discourse has not substantially reflected on that.⁵⁵ On one hand, constitutional identity shall embody the specificity of a member state, and shall enumerate those elements of the national constitutional order which distinguish it from the constitutional identity of other countries, and which shall be untouchable even for constitutional amendments,⁵⁶ like the eternity clauses in certain constitutions.⁵⁷ On the other hand, if constitutional identity is invoked as a limit on the supremacy of EU law over national constitutions, it should have a unitary character, or at least a coherent European-wide standard, to prevent member states from justifying several overbroad exceptions from the scope of European harmonization.

Due to the political circumstances and the numerous legal controversies concerning Poland and Hungary before the European judicial bodies during the recent years, in both countries, constitutional identity has been used as an argument to retain the sovereignty of member states within the European legal space.⁵⁸ Owing to these tendencies, the scope of constitutional identity has been considerably extended during recent years by the Polish and Hungarian Constitutional Courts, when compared with the traditional concept of national identity.⁵⁹ National identity, protected by Art. 4 (2) of the Treaty on the European Union,⁶⁰ has been a regularly invoked argument, accepted

53 E Burján, B Szentgáli-Tóth, ‘A Cursory Glance on the Hungarian Administrative Justice System After Two Main Reform Attempts’ (2015) *Dublin Law & Politics Review*, 1–15 <<http://real.mtak.hu/116981>> accessed 28 Oct 2021.

54 Seventh Amendment to the Fundamental Law of Hungary, art. 4.

55 AF Tatham, ‘A case of ‘Friendliness is next to Stateliness’: The Migration of Constitutional Ideas on Euro-Conform Interpretation of National Law’ (2013) *Revija za evropsko parvo* 15(1), 5 <<http://scindeks.ceon.rs/article.aspx?artid=1450-79861301005T>> accessed 19 Mar 2022.

56 A Bragyova, F Gárdos-Orosz, ‘Vannak-e megváltoztathatatlan normák az Alaptörvényben?’ [Are there unamendable provisions at the Fundamental Law?] (2016) *Állam- és Jogtudomány* vol. 3, 35 <http://real.mtak.hu/43468/1/2016_03_BragyovaA_GardosOroszF.pdf> accessed 19 Mar 2022.

57 S Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021), <<https://www.doi.org/10.1093/oso/9780198858867.001.0001>>.

58 K Popławski (2019).

59 T Drinóczi, ‘Az alkotmányos identitásról. Mi lehet az értelme az alkotmányos identitás alkotmányjogi fogalmának?’ [From constitutional identity: what might be the advantages of constitutional identity?] (2016) *MTA Law Working Papers* 3(15), 4 <<http://real.mtak.hu/121445/>> accessed 19 Mar 2022.

60 A von Bogdandy, S Schill, ‘Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag’ (2010) *ZaöRV* vol. 70, 712 <https://www.zaoerv.de/70_2010/70_2010_4_a_701_734.pdf> accessed 12 Mar 2022.

several times⁶¹ by the ECJ.⁶² This concept has justified the differing regulations of member states in the field of language issues, use of names, or certain family law cases. National identity has been an important consideration in the reasoning of the ECJ, however to date it has not constituted an absolute value, other factors and the common European interest might outweigh it.⁶³

The difference of opinion between the ECJ and national constitutional courts is certainly not a new dispute.⁶⁴ While ECJ has acknowledged national identity only in certain narrow fields,⁶⁵ the German Federal Constitutional Court interpreted the unamendable provisions of German Basic Law as the constitutional identity of Germany and stated that the priority of these norms should not be questioned by the supremacy of European law.⁶⁶ For instance, the Court concluded that national law should prevail over European law when the supremacy of EU law would diminish the level of the fundamental protection of rights in Germany.

In Polish and Hungarian discussions, constitutional identity has appeared as a factor protecting the key elements of state sovereignty: its territory, its integrity, its population, and its internal structure of administration.⁶⁷ The Polish Constitutional Tribunal, especially since 2015⁶⁸, and since 2016 also the Hungarian Constitutional Court, have given such an interpretation to constitutional identity, which has been criticised heavily by the European authorities.⁶⁹ It should be noted that the recent development of constitutional identity, whether in Poland or Hungary, is just an indicator of increased political and social tensions within the European community as a whole. Due to the ambiguity of constitutional identity outlined, in my view, the ideal way out of this dilemma would be to outline a minimum standard in the founding treaties and for detailed case law based on this to be jointly elaborated by the ECJ and the national constitutional courts.⁷⁰ The standard should contain some rigid components to establish the unity of the European Union as one pillar; but also should leave broad space for member states to manoeuvre, reflecting their unique characteristics.

The dialogue between these judicial entities has not been fruitful at any stage of European integration; nevertheless, several steps have been made to moderate the alleged tensions and to bring the different approaches closer to each other. It is worth contemplating that both constitutional courts have shown a willingness to consider the case-law of Luxembourg and Strasbourg, with several Polish and Hungarian rulings containing an extensive overview of the relevant European

61 Article 4(2) of the Treaty on the European Union (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] JoL C 115, 1-338).

62 D Preshova, 'Battleground or Meeting Point? The Respect for National Identities in the European Union – Article 4(2) The Treaty on the European Union' (2012) Croat Yearb Eur Law Policy vol. 8, 284 <<https://hrcak.srce.hr/clanak/139309>> accessed 19 Mar 2022.

63 Judgement of the ECJ C-51/15 EU:C:2016:985.

64 Judgement of the ECJ C-6/64 EU:C:1964:66; Judgement of the ECJ C-11/70.

65 Judgement of the ECJ T-529/13 EU:T:2016:282.

66 M Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) ICON 14(2), 411, <<https://doi.org/10.1093/icon/mow035>>.

67 A Voßkuhle, *Verfassungsgerichtsbarkeit und europäische Integration* (Bundesverfassungsgerichts 2012), <https://www.vfgh.gv.at/downloads/verfassungsgerichtsbarkeit_und_europaeische_integration_hup.pdf> accessed 3 Nov. 2021.

68 Judgements of the Polish Constitutional Tribunal of 20 April 2020, U 2/20 (2020) OTK-A 61; of 28 January 2020, Kpt 1/20 (2020) OTK-A 60; of 15 June 2021, P 7/20 (2021) OTK-A 49.

69 Last time confirmed by the ruling of the Hungarian Constitutional Court, 33/2021.(XII.22.) [2021] ABH.

70 Judgement of the ECJ C-208/09 EU:C:2010:806; Judgement of the ECJ C-391/09 EU:C:2011:291; Judgement of the ECJ C-438/14 EU:C:2016:401.

jurisprudence. However, requests for preliminary rulings have not been submitted to the ECJ by the Polish or Hungarian Constitutional Courts,⁷¹ at most these bodies sometimes suspended the proceedings before them when the matter was being simultaneously heard by the ECJ, and waited for the European judgment.⁷²

The attitude of Central-European constitutional courts has also changed recently: national constitutional courts are more reluctant to deal with European legal practice; greater weight is given to the development of national case law based on local specificities. For instance, the Polish Constitutional Tribunal analysed the imperialism of international courts in its recent abortion ruling.⁷³ Obviously, these tensions are partly consequences of the continuous deepening of European integration, which has consistently generated opposing views from supporters of broader national sovereignty at the national level.

Constitutional identity has an inherent place in the European legal space and constitutes a legitimate reflection of member states on European integration while retaining certain elements of their sovereignty. Nevertheless, I hold that this concept should not be used as a political instrument, and should not be a victim of the increasing political and social tensions around Europe.⁷⁴ More willingness for cooperation and compromise-finding will be necessary, both in Poland and Hungary, and also across Europe, in order to establish the proper place of this concept in the European constitutional discourse and to avoid further misconceptualisation. For this purpose, a clear standard coming from the founding treaties is necessary to create common grounds for the national definition of constitutional identity to be vested with a normative legal character.

6. THE RELATIONSHIP OF CONSTITUTIONAL IDENTITY WITH THE HISTORICAL TRADITIONS OF THE NATION

A framework with a normative legal character should be clearly distinguished from the terms of other branches of science and should not be mixed up with sociological or cultural, legally non-tangible elements.⁷⁵ This requirement has specifically not been fulfilled in Hungary, where the legal character of constitutional identity has not been crystallized yet. In Poland, constitutional identity is based on the 1997 Constitution of the country, at the extremes the Constitution of 4 May 1791 might be also considered. Constitutional identity based on the case-law of the Constitutional Tribunal on the unalienable competencies of the state, only its content is dubious. This is the reason why lawyers call on the concept of Polish constitutional identity in inherently different contexts.

In Hungary, the new Fundamental Law raised the significance of historical traditions in constitutional argumentation.⁷⁶ As a consequence, several scholars shared their views about the

71 A Vincze, 'Előzetes döntéshozatal és alkotmánybíráskodás' [Request for preliminary ruling and constitutional review] (2018) Alkotmánybírósági Szemle vol. 1, 22.

72 L Blutman, 'Az Alkotmánybíróság és az előzetes döntéshozatali eljárás' [The Constitutional Court and requests for preliminary ruling] (2015) Közjogi Szemle vol. 4, 1.

73 The judgement of the Polish Constitutional Tribunal of 22 October 2020, K 1/20 (2021) OTK-A 4.

74 LFM Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) Utrecht L Rev (6)3, 36 <<http://doi.org/10.18352/ulr.139>>.

75 M Rosenfeld, *The Identity of the Constitutional Subject* (Routledge 2010).

76 Z Fejes, 'Constitutional Identity and Historical Constitution Clause in the Hungarian Fundamental Law and Its Effects on Constitutional Interpretation' in Z Sente, F Mandák, Z Fejes (eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development* (L'Harmattan 2015) 25–44.

constitutional uniqueness of the country,⁷⁷ and the Constitutional Court has also analysed the historical development of particular actual laws on several occasions.⁷⁸ Constitutional identity as a concept was seen from the perspective of this discussion, and the undefined range of historical constitutional achievements was considered to be the main source of constitutional identity. When this framework was officially acknowledged by the Constitutional Court, its conceptualization has been conducted under very problematic terms:

The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created – just acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State.⁷⁹

This amounts to a discrepancy with the normative approach experienced in Poland: The Hungarian Constitutional Court failed to properly distinguish constitutional identity from other forms of identity. Constitutional identity should be a primarily legal category with legally tangible elements and with such a level of precision that may provide substantial orientation for the interpretation. However, the Hungarian reasoning mostly relies on a cultural approach to national identity, which is merely acknowledged by the legal norms, even by the constitution. This approach is based on undoubtedly crucial factors for a national community to build its own collective identity, and these values should be preserved by the society in daily life. Nevertheless, as far as legal interpretation is concerned, a more rigorous and normative approach would be necessary to implement constitutional identity in the legal system with sufficient transparency. Constitutional identity does not serve as the basis of a country's self-identity; it is just a framework of interpretation elaborated for serving special purposes, especially the substantial review of constitutional amendments or restricting the scope of European integration.⁸⁰ By contrast, the Hungarian Constitutional Court declared that constitutional identity is not established by the Fundamental Law of Hungary, but merely acknowledged. This statement is valid for national identity in its cultural sense for the whole community since the Fundamental Law or constitution

77 For instance amongst the first of those please see: Z Sente, 'Történeti alkotmány és a Szent Korona az új Alaptörvényben' [Historical constitution and Holy Crown in the Fundamental Law] (2011) *Közjogi Szemle* vol. 3, 1.

78 Amongst others please see: ruling of the Hungarian Constitutional Court, 33/2012.(VII.17.) [2012], <https://hunconcourt.hu/uploads/sites/3/2017/11/en_0033_2012.pdf> accessed 19 Mar 2022; ruling of the Hungarian Constitutional Court, 45/2012.(XII.29.) [2012], <https://hunconcourt.hu/uploads/sites/3/2017/11/en_0045_2012.pdf> accessed 19 Mar 2022; ruling of the Hungarian Constitutional Court, 28/2013.(X.9.) [2013] ABH 865; ruling of the Hungarian Constitutional Court, 7/2014.(III.7.) [2014] ABH; ruling of the Hungarian Constitutional Court, 3072/2015.(IV.23.) [2015] ABH 1616; ruling of the Hungarian Constitutional Court, 2/2016.(II.8.) [2016] ABH; ruling of the Hungarian Constitutional Court, 12/2017.(VI.19.) [2017], <https://hunconcourt.hu/uploads/sites/3/2018/11/12_2017_en_final.pdf> accessed 19 Mar 2022; ruling of the Hungarian Constitutional Court, 15/2019.(IV.17.) [2019] ABH; ruling of the Hungarian Constitutional Court, 22/2020.(VIII.4.) [2020] ABH 2048.

79 The ruling of the Hungarian Constitutional Court, 22/2016.(XII.5.), point 67.

80 A Kustra-Rogatka, 'Constitutional Identity as Implied Limits of Constitutional Amendment Powers. The Case of Poland' (2019) TSP-W vol. 15, 39–53 <<http://dx.doi.org/10.12775/TSP-W.2019.003>>.

are just concrete expressions of national identities with legal terms.⁸¹ This meaning of national identity should also not be mixed up with the notion of national identity that appears in the reasoning of the ECJ,⁸² since the latter falls closer to constitutional identity at the national level.⁸³

The wording of ‘constitutional self-identity’ consistently used by the Hungarian Constitutional Court⁸⁴ and by several scholars also clearly demonstrates that the Hungarian concept is filled with crucial elements, but also with components which lack any normative character. So, in my view, even though the Fundamental Law acknowledges the national identity of Hungary, the constitutional identity of the country as a legal framework is or should be grounded in the Fundamental Law. Without this distinction, constitutional identity would fail to fulfil its functions as outlined in the third section, and would be just an empty concept in the Hungarian constitutional discourse.

7. THE MAIN CONCERNS AROUND CONSTITUTIONAL IDENTITY IN POLAND AND HUNGARY

In the light of the preceding details, one may raise four main concerns regarding the current development of constitutional identity in Poland and Hungary, inherently similar in the two countries despite having slightly different highlights, and perhaps also worthy of consideration for other European countries.

Firstly, constitutional identity should enumerate those constitutional principles and values which are shared by the whole community; otherwise, it will not strengthen the legal cohesion of the country. If there is a commonly accepted definition of constitutional identity, its elements would still obviously be subject to further interpretation, but at least the grounds would be identical for everyone. Without clearly established sources and content, constitutional identity cannot play a primary role in constitutional discourse⁸⁵ and should be seen as an argument rather than a concept, and it will be subject to manipulative misconceptualisations by the different sides.⁸⁶

Secondly, constitutional identity should be coherently distinguished from other forms of identity. It should be borne in mind that constitutional identity is not just a list of common values, but also a narrow set of constitutional principles with normative legal force that should fulfil well-defined functions in the legal discourse.⁸⁷ Regardless of the huge number of common

81 GJ Jacobsohn, *Constitutional Identity* (HUP 2010).

82 Judgement of the ECJ C-393/10 EU:C:2012:110; Judgement of the ECJ C-58/13 EU:C:2014:2088; Judgement of the ECJ C-673/16, EU:C:2018:385.

83 M Sulyok, ‘Nemzeti és alkotmányos identitás a nemzeti alkotmánybíróságok gyakorlatában’ [National and constitutional identity in the case law of national constitutional courts] in MA Jakó (ed), *Nemzeti identitás és alkotmányos identitás az Európai Unió és a tagállamok viszonylatában* (SZTE-ÁJK 2014) 44–62, <<http://acta.bibl.u-szeged.hu/63836/>> accessed 19 Mar 2022.

84 The ruling of the Hungarian Constitutional Court, 2/2019.(III.5.) [2019] ABH 28–62; the ruling of the Hungarian Constitutional Court, 11/2020.(VI.3.) [2020] ABH 1118–1131.

85 A Śledzińska-Simon, M Ziolkowski, ‘Constitutional Identity in Poland: Is the Emperor Putting on the Old Clothes of Sovereignty?’ in C Calliess, G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2019) 243–267, <<https://www.doi.org/10.1017/9781108616256.012>>.

86 T Sulyok, G Deli, ‘A nemzeti identitás az Alkotmánybíróság gyakorlatában’ [National identity at the case law of the Constitutional Court] (2019) AB Szem vol. 1, 59.

87 T Konstadinides, ‘Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement’ (2011) Camb Yearb Eur Leg Stud vol. 13, 195 <<https://www.doi.org/10.5235/152888712801753031>>.

elements, constitutional identity is far from national self-identity. In my view, it should not prevail outside of legal argumentation, it should not secure the engagement of the people towards the state and the national community. There are other instruments, other forms of identity which should further these purposes and which should be strengthened in society to ensure the protection of national traditions in any field of life.

Thirdly, the ambiguity of constitutional identity should be understood, and particular weight should be given to this characteristics of this framework. Exchange of views on this matter evolves along two effectively independent branches: there is a discussion within member states on developing their constitutional identity, while the role of this concept is also uncertain in the European legal space. Constitutional identity must contain static and dynamic elements, even from a European perspective. One should not expect member states to operate with identical meanings for constitutional identity, since this would undermine the diversity of European integration and the right of member states to retain the core of their sovereignty. However, if a minimum European standard of constitutional identity is not met, this provides member states with unlimited potential to justify exceptions from rules with uniform European applicability.

This problem concerns European integration as a whole, not only in Poland and Hungary, and the solution might be imaginable only on two levels. An amendment of the founding treaties should provide certain minimum standards with which the constitutional identity of each member state should comply, and with this in place, the ECJ may precisely define the terms of the founding treaties in its case law. Simultaneously, member states should explicitly provide in their constitutions their definition of constitutional identity, which should be filled with more detailed content by the national constitutional courts in cooperation with the European judicial bodies. I am fully aware of the fact that in light of the current political and social situation these recommendations may be seen as idealistic, but in my view, the difficulties should not prevent us from at least defining proper targets and looking for steps which may lead us towards these aims.

One may also argue that the method of treatment outlined is quite time-consuming and therefore its impact might be tangible only for the long term, but such a complex issue as constitutional identity may not be reconsidered otherwise than at the end of an inclusive, transparent, and long series of negotiations. For instance, the Copenhagen Criteria, which were accepted by all new member states before their accession to the European Union, might constitute the basis of the minimum standards which the constitutional identity of each member state should comply with.⁸⁸

Fourthly, the attitudes of judges and other stakeholders regarding constitutional identity should considerably change to moderate the discussions around it.⁸⁹ Due to the European and national aspects of this matter, constitutional identity should be elaborated by constructive dialogue between the ECJ and national constitutional courts.⁹⁰ Regrettably, during recent years the dialogue, especially between the ECJ and the Polish and Hungarian constitutional courts, has not been fruitful, and all stakeholders have shown less willingness to understand the

88 P Rezler, 'The Copenhagen Criteria: Are They Helping or Hurting the European Union?' (2011) *Touro Law Rev* vol. 14, 390 <https://www.tourolaw.edu/ilr/uploads/articles/v14_2/5.pdf> accessed 19 Mar 2022.

89 I Kukorelli, 'Az Alaptörvény és az Európai Unió' [The fundamental law and the European Union] (2013) *Pro Bono Publico* 1(1), 4–11 <<https://folyoirat.ludovika.hu/index.php/ppbmk/article/view/3129/2379>> accessed 19 Mar 2022.

90 M Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) *Eur Const Law Rev* 10(2), 263 <<https://doi.org/10.1017/S1574019614001187>>.

counterarguments.⁹¹ If this attitude remains dominant, constitutional identity might be further misconceptualised, and will mostly serve as a political argument rather than an effective framework of legal interpretation.⁹² Now we are hopefully still at a stage early enough to prevent constitutional identity from being irreversibly politicised.

8. CONCLUSION

This contribution has reflected on an issue with increasing importance and attempted to add a new point of view to the ongoing discussion. Constitutional identity should be based on the legal tradition of each member state, but discussions on this matter should shift to a European level. The elements of national identity within the case-law of the ECJ, and constitutional identity in national jurisprudence, should be considered to establish a coherent legal instrument for wider European integration, as well as for each member state. A certain margin of freedom should be left for member states, but some restrictions on this flexibility should be agreed upon by the member states to make the European project viable in the long term.

To achieve this purpose, we must further examine the issue of constitutional identity on a supranational level with a comparative methodology to better understand what happens to the same legal concepts in the different corners of Europe, especially in the Visegrád region. A continuous dialogue would be necessary across the whole community to outline the proper place of constitutional identity in constitutional debates, and this is not feasible without constructing a detailed overview from the recent relevant developments within the Central-European region in this regard.

The role of constitutional identity has gradually grown alongside the deepening of European integration. Since the scope of harmonization is still increasing, constitutional identity has a prospective and evolving role in the constitutional dialogue of Europe, therefore greater efforts should be devoted to clarifying this legal construction.⁹³ Constitutional identity should avoid being relegated to an arbitrary argument with no justification.

As a closing remark, having considered carefully the difficulties entailed in this idea, I would like to stress again the importance of constitutional identity; its sufficiently deep elaboration would provide potential answers to several currently unresolved constitutional dilemmas. If compromises can be concluded from its interpretation, constitutional identity would not only clarify and partly reconsider the complex relationship between the European and national legal systems, but will also constitute convincing grounds for substantial review of constitutional amendments. Despite the fact that most stakeholders in Poland and Hungary focus on the European dimension of constitutional identity, this might be also an effective tool for national constitutional courts to protect the fundamental values of the constitution from internal attacks, so from constitutional amendments substantially incompatible with the spirit of the constitution. But we can only expect this in the case of a more transparent and balanced conceptualization of constitutional identity, based on joint and mutual respect of national identities and the interests of the European integration.

91 A Soltys, 'The Obligation to Interpret National Law in Accordance with the European Law in the Jurisprudence of Polish Constitutional Court – Focus on Limits' (2017) EJPM vol. 1, 51–62 <<https://wpia.uwm.edu.pl/czasopisma/sites/default/files/uploads/EJPM/2017/1/52-63.pdf>> accessed 14 Oct 2021.

92 RD Kelemen, L Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) Camb Yearb Eur Leg Stud vol. 21, 59–74 <<https://doi.org/10.1017/cel.2019.11>>.

93 AF Tatham, *Central European Constitutional Courts in the Face of EU Membership. The Influence of the German Model in Hungary and Poland* (Martinus Nijhoff 2013).

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