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The protection of constitutional identity in some East-Central European states

Ochrona tożsamości konstytucyjnej w wybranych państwach Europy Środkowo-Wschodniej

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Abstract: Constitutional identity is, in its essence, an expression of the fundamental constitutional values of a state. The protection of all these values is of paramount importance, both in domestic law and in the relationship between EU law and national constitutions. While the former can be linked with the concept of unconstitutional amendments to the Constitution, the latter has resulted in the development of identity control. This contribution aims to examine these two aspects of constitutional identity in the case of seven East-Central European countries (Romania, the Czech Republic, Croatia, Slovakia, Poland, and Hungary). Although what constitutes part of a state's constitutional identity varies from nation to nation, one can notice that certain values, such as the protection of fundamental human rights and freedoms are broadly embedded. This contribution seeks to focus on all these similarities and differences through a comparison of the constitutional identities of the states under examination.

Keywords: constitutional identity, eternity clause, unconstitutional constitutional amendments, identity control

Abstrakt: Tożsamość konstytucyjna jest, w swojej istocie, wyrazem fundamentalnych konstytucyjnych wartości państwa. Ochrona tych wartości jest sprawą najwyższej wagi, zarówno

w prawie krajowym jak i w relacjach między prawem unijnym a konstytucjami narodowymi. Jeśli pierwsze można łączyć z koncepcją niekonstytucjonalnych poprawek do konstytucji, drugie doprowadziło do rozwoju sprawowania kontroli nad tożsamością. Celem niniejszej pracy jest zbadanie tych dwu aspektów tożsamości konstytucyjnej w przypadku siedmiu krajów Europy Środkowo-Wschodniej (Rumunia, Czechy, Chorwacja, Słowacja, Polska, i Węgry). Chociaż to, co stanowi część tożsamości konstytucyjnej państwa jest różne w różnych narodach, można zaobserwować, że pewne wartości, takie jak ochrona podstawowych praw człowieka czy wolności, są szeroko zakorzenione. W konsekwencji, autor koncentruje się na wszystkich tych podobieństwach i różnicach poprzez porównanie tożsamości konstytucjonalnych analizowanych państw.

Słowa kluczowe: tożsamość konstytucjonalna, klauzula wieczności, niekonstytucjonalne poprawki do konstytucji, kontrola tożsamości

1. Introduction

Constitutional identity has become a popular concept in the field of constitutional law in recent years. However, neither the term nor its specific content is free from dogmatic controversy. As a definition one could note that “constitutional identity may be perceived as the self-identity of the nation or the people as a ‘collective identity of the constitutional subject,’ provided that these terms – nation and people – are incorporated in the constitutional text” (Drinóczi 2020: 117). According to another definition, constitutional identity is “the legal manifestation of national identity, i.e., a set of norms that allow the national identity to assert itself and to oppose interference by principles or values that would be contrary to it, but also to hold dialogue with other identities” (Mathieu 2022: 22). Last, but not least, some scholars believe that “in a deeper sense, identity relates to the social substrate, which the norm may seek either to enshrine and protect [...] or rather to transform [...] depending on the ethos, the specific representation of the world (Weltanschauung) that characterizes the Fundamental Law in question” (Iancu 2023: 275).

All in all, constitutional identity is reflected in the content of the constitution, both in the wording of the text and in the underlying cultural and legal circumstances (Sajó and Uitz 2019: 98). If we take the text of the constitution as the basis, then constitutional identity appears as a legal identity. The whole text of the constitution may bear some sort of legal identity, but one can observe different layers within the elements of the text (Stumpf 2020: 232). Moreover, constitutional identity can also be linked to the case law of the national constitutional courts that influences the interpretation of the relevant constitutional provisions (Sajó and Uitz 2019: 98).

At the same time, one has to take into account that constitutional identity can vary over time and may even be in relation to other forms of identity such as the religious or cultural one (Rosenfeld 1995: 1049). It is generally accepted in the legal literature that constitutional identity is based on experience and social dialogue, and even though it can change, it is also withstanding (Jacobsohn 2013: 5).

Constitutional identity is meant to protect constitutional values that distinguish a particular nation from other nations. In this way, constitutional identity, like other forms of identity, covers the particularities of the given subject, in this case, the nation. At the same time, a community can only exist if its members agree on certain values and share the recognition and protection of it (Mathieu 2022: 28). “One must therefore assume that the existence of common values is a prerequisite for the existence of a political community and hence a democratic regime” (Mathieu 2022: 30).

Moreover, constitutional identity can be seen as a direct link between the constitution and its surrounding context, i.e., between the constituent assembly and the people (Orbán 2020: 24). Based on this approach, the question arises as to whose values exactly does constitutional identity represent: that of the nation or that of the people? If we accept that identity represents the identity of the nation, another question arises, namely: how homogeneous are these nations? Does constitutional identity represent the values of the whole nation, or are there minorities that cannot identify themselves with these values (Tribl 2022: 224)? Based on all these questions, some scholars believe that the term “identity of the constitution” describes best those sets of values, that are enshrined in the constitutions of nation-states, and the protection of which is of utmost importance (Drinóczi 2020: 119). However, I intend to retain the term “constitutional identity” in this contribution, since in the current context of the European Union one may conclude that this concept covers best all the specific values that distinguish each Member State from the others.

Constitutional identity nowadays arises concerning two main aspects: firstly, in domestic law, in the context of protection against unconstitutional amendments to the constitution, and secondly, in the context of EU law, in manifestation of the identity control. This contribution aims to examine the constitutional identity of some East-Central European countries (Romania, Czechia, Croatia, Slovakia, Poland, and Hungary) along these two aspects. At the very outset, it should be noted that the internal or external dimension of constitutional identity is not always apparent in the case of all the seven states examined, but it can be nevertheless admitted that the protection of constitutional identity is, to a different extent, a priority in all of these states.

2. The domestic legal dimension of constitutional identity: the doctrine of unconstitutional constitutional amendments

The basis of the domestic legal dimension of constitutional identity stems from the separation between the constituent power and the constitutional amending power. The constituent, during the constitution-making process, does not merely create the constitutional amending power, but also establishes its competencies (Orbán 2020: 26). On this basis, the constituent defines the limits imposed on the constitutional amendment, thus protecting the values that form the core of the constitutional identity.

As a result of the limitation of the content of constitutional amendments, eternity clauses emerged as a guardian of all the constitutional values that form the identity of a nation; they represent the core of the constitution. Historically, the first eternity clause appeared in the 1814 Constitution of Norway, which in Article 112 prohibited any amendment that is contrary to the spirit of the Constitution (Orbán 2020: 27).

The essence of the eternity clause is that the later provision cannot override the previous one. By this clause the provisions of the constitution are situated in a hierarchy of norms, resulting in the application of the principle of *lex superior derogat inferiori* (Orbán 2020: 27).

From a practical point of view, eternity clauses can be divided into two main types: explicit and implicit eternity clauses (Szakály 2022: 208). Explicit eternity clauses are those that are actually enshrined in the text of a national constitution, that directly appear in the wording of the Constitution (Szakály 2020: 8). The main purpose of these explicit eternity clauses is “to give a higher level of protection to the embedded principles and institutions to help strengthen the budding democracy and rule of law” (Szakály 2020: 9). In contrast to explicit eternity clauses, in the case of implicit eternity clauses, the constituent has not enshrined the special protection of certain provisions in the constitution, leaving to the constitutional courts the power to define the core of the constitution, the principles that cannot be overruled by a subsequent amendments (Orbán 2020: 27).¹

One might ask how the explicit and implicit eternity clauses relate to each other. Can a constitutional court establish implicit eternity clauses if the constitution of the given state already contains explicit clauses? The answer that can be drawn from the case law of national constitutional courts is that constitutional

¹ With regard to implicit eternity clauses, it is worth highlighting the relevant case law of the Indian Supreme Court, which has laid down the theory of the “basic structure of the constitution”. For details see: Szakály 2020: 9-10, Orbán 2020: 30.

provisions can be declared to be unamendable, even if the constitution already contains explicit eternity clauses (Orbán 2020: 29).

In examining the constitutions of the East-Central European countries under review, one can reach a number of conclusions regarding the eternity clauses (see e.g., Szakály 2022: 208-209). First of all, it is salient to note that only the constitutions of Romania and the Czech Republic contain explicit eternity clauses.

In the case of Romania, Article 152 of the Constitution contains all the values that cannot be subject to constitutional amendments. Therefore, under Article 152 (1), “[t]he provisions of the Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision.”²

Furthermore, based on the provision of (2) of the same Article, “[n]o revision shall be made if it results in the suppression of the citizens’ fundamental rights and freedoms, or of the safeguards thereof” [Article 152 (2) of the Constitution of Romania]. In the case of Czechia, the explicit eternity clause is contained in Article 9 (2) of the Constitution. Under this article: “[t]he substantive requisites of the democratic, law-abiding State may not be amended” [Article 9 (2) of the Constitution of the Czech Republic].³

Although only the constitutions of these two states in the region contain explicit eternity clauses, even the solutions chosen by them differ significantly. The eternity clause contained in the Constitution of Romania specifically identifies, by means of an enumerative list, all the values that cannot be amended by the constitutional amending power (and thus also refers, to some extent, to the specific articles considered unamendable). In contrast, the solution of the Constitution of the Czech Republic merely provides a general framework for the unconstitutional constitutional amendments.

In two other countries of the region under examination (Croatia and Slovakia) the constitutional courts have developed implicit eternity clauses. According to a Decision pronounced in 2014 by the Constitutional Court of Croatia (Decision U-VIIR-164/2014), the implicit eternity clause of the Constitution of Croatia includes the following: “unitary and indivisible democratic and social state, popular sovereignty, freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and environment, rule of law and

² The Constitution of Romania is available in English at: <https://www.presidency.ro/en/the-constitution-of-romania>.

³ The Constitution of the Czech Republic is available in English at: <https://www.psp.cz/en/docs/laws/1993/1.html>.

democratic multi-party system” (Szakály 2022: 209). Moreover, in the opinion of some scholars, the Constitutional Court of Croatia, through the protection of the social state, indirectly seeks to protect human dignity as well, by means of an implicit eternity clause (Petric 2020: 127).

On the other hand, the Constitutional Court of Slovakia has ruled in its case law that some core values cannot be the subject of an amendment, such as: “sovereignty, principles of democracy, rule of law, protection of fundamental rights and freedoms, and taxes, levies and state budget not being subject of a referendum – in connection with fundamental rights” (Szakály 2022: 209).

In the case of Hungary, one can notice a unique solution. In recent years, the Hungarian Constitutional Court has embraced the achievements of the historical constitution⁴ and, as it were, uses it as one of the ways of interpreting the Fundamental Law (Zétényi 2023: 64). The achievements of the Hungarian historical constitution will be detailed below when examining the relationship between EU law and national constitutions, but with regard to the eternity clause, it is pivotal to point out that many scholars believe that these achievements of the historical constitution can be interpreted, to some extent, as implicit eternity clauses (Zétényi 2023: 64, Szakály 2022: 208). On this basis, the Constitutional Court of Hungary tends to consider the achievements (acquis) of the historical constitution as core elements of Hungarian constitutional identity and thus seeks to protect these achievements. This was also highlighted by the Constitutional Court in a Decision held in 2021, when it emphasised that “[t]he values that make up Hungary’s constitutional identity [...] are legal facts that cannot be waived either by way of an international treaty or with the amendment of the Fundamental Law, because legal facts cannot be changed through legislation” [Decision 32/2021. (XII. 20.) AB: 101].

Another specific situation is that of Poland, where the Constitution does not contain an explicit eternity clause; however, a specific procedure for amending certain constitutional provisions is provided for in Article 235. According to Article 235 (6), if the amendment is related to the provisions on the Republic (Chapter I), on the freedoms, rights and obligations of persons and citizens (Chapter II) or on the amendment of the Constitution (Chapter XII), one-fifth of the number of Deputies, the Senate or the President of the Republic may require a confirmatory referendum. According to some scholars, “these provisions are the fundamental core of the Constitution” (Mázi 2023: 20).

Looking at the implicit or, where appropriate, explicit eternity clauses of the scrutinized East-Central European countries, some conclusions can be high-

⁴ The historical constitution is the set of written documents of a constitutional nature that have developed throughout history. Hungary had a historical constitution until 1949. For more about the historical constitution see: M. Balázs, n.d.

lighted regarding the values that some states seek to protect. First of all, one can notice that some common values are protected by many of the states under review. For example, the protection of fundamental human rights appears both in the case of Croatian and Slovak implicit eternity clauses; moreover, the Romanian explicit eternity clause also refers to the prohibition of constitutional amendments that would limit the fundamental rights and freedoms of the citizens [Article 152 (2)]. Nevertheless, alongside these similarities, there are also significant differences. These differences suggest that even within a smaller region, such as East-Central Europe, each state has its specific values (alongside the common values) that distinguish it from others.

3. The international dimension of constitutional identity: the relationship between EU law and national constitutions

Constitutional identity has been one of the most relevant concepts in recent decades with regard to the issues raised in the relationship between EU law and the constitutions of the Member States. It goes without saying, that the Member States of the EU have not completely abdicated their sovereignty by the accession. In view of the current ambitions of the EU, they have felt it necessary to find methods by which they can avoid direct confrontation and, at the same time, protect their national sovereignty (Trócsányi 2014: 72).

First of all, it has to be mentioned that national constitutional courts act concerning EU law mainly when there is a question of the EU having exceeded its powers by the acts it adopted (Blutman 2017: 2). Over the past decades, the practice of national constitutional courts has developed three main types of control mechanisms against *ultra vires* acts of the EU: the fundamental right control, the *ultra vires* control, and the identity control (Blutman 2017: 7-9). At the same time, identity control has come to the fore in recent years, with national constitutional courts relying primarily on this control mechanism when highlighting the supremacy of certain constitutional provisions over contrary EU law norms (Blutman 2017: 9).

Identity control in this context first appeared in the case law of the Constitutional Court of Italy in relation to the Granital case. Moreover, the Constitutional Council of France, in two decisions pronounced in 2004 and 2006, emphasized that constitutional identity encompasses all the elements inherent in the existence of the French state, that cannot be affected by the provisions of EU law (Lupu 2022: 215). At the same time, the concepts of constitutional identity and identity control were most accurately derived from the case law of the Federal Constitutional Court of Germany, which laid down the foundations of this control mechanism (Lupu 2022: 215).

Identity control is based on the constitutional identity of the Member States and on the fact that each Member State has its own values (alongside the common values of the European community)⁵ that it does not wish to relinquish and that it seeks to protect even against contrary EU law provisions. The intention to preserve these national specificities was already expressed at the time of the signing of the Maastricht Treaty, when Ireland requested that a separate protocol be annexed to the Treaty, stipulating the inviolability of constitutional provisions of major importance for Ireland (Sven 2021: 197).

The protection of the constitutional identity of the Member States has been given a new impetus following the signing of the Treaty of Lisbon. Under Article 2(4) of the Treaty on European Union (hereinafter: TEU): “[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”

Based on these provisions, the requirement for the EU to respect the national identity of the Member States has become *de facto* a limitation of the primacy of EU law since this primacy is now only guaranteed if it does not infringe the national identity of the Member States (Trócsányi 2014: 79). However, one can observe that while national constitutional courts act to protect the constitutional identity of the Member States, the TEU requires the respect of the national identity. Hence, the question arises whether constitutional identity and national identity refer to the same set of values or not.

According to some scholars, the broad sense of national identity should not be confused with constitutional identity, since these concepts “are in an antecedent – consequence relation with each other” since “national identity, as a collective identity of the constitutional subject presupposing identical values and consensus, first presents itself in the act of constitutional drafting” (Drinóczi 2020: 118). At the same time, other scholars, precisely because of this antecedent-consequence relation, consider that constitutional identity is basically the “legal expression” of national identity (Mathieu 2022: 22).

All in all, however, there is a consensus in the legal literature that, within the relationship between EU law and national constitutions, constitutional identity and national identity are used to denote the same concept, as these two terms “refer to the same obligation of the EU institutions – respect – and at the same core element of the constitutional setting of the particular Member State – to be respected” (Drinóczi 2020: 107). This finding is also underlined by the fact that Article 4(2) of the TEU states that national identity is an inherent part

⁵ There are basically three main elements associated with the common European identity: the Acropolis, representing the ancient heritage; the Golgotha, referring to the Judeo-Christian heritage; and the Roman law, as the legal heritage (Martonyi 2021: 167).

of the political and constitutional structure of a state. This approach “brings the broader concept of national identity closer to the concept of constitutional identity” (Orbán 2020: 102-103).

Before presenting the identity control of the assayed East-Central European states, I consider it salient to point out that, in the relationship between EU law and national constitutions, constitutional identity is most often related to eternity clauses. National constitutional courts primarily act in relation to EU law in order to defend the values protected by eternity clauses.

Identity control has so far been applied by the constitutional courts of four of the states under examination: Romania, the Czech Republic, Poland, and Hungary. In the following, I will focus on the case law of constitutional courts of these states.

From the case law of the Constitutional Court of Romania, one can highlight four relevant decisions in which the protection of constitutional identity in relation to EU law has been emphasised. The first decision was issued in 2012, when the Constitutional Court of Romania resolved a constitutional conflict between the Government and the President of Romania. In this decision, the Constitutional Court, relying significantly on the case law of the Federal Constitutional Court of Germany, underlined that: “Member States retain competencies that are inherent to the preservation of their constitutional identity” (Decision No. 682/2012).

The second occasion when the concept of constitutional identity appeared in the case law of the Constitutional Court of Romania occurred in 2015. The Constitutional Court ruled on the exception of unconstitutionality of the Law on insolvency proceedings. Although the decision only partially addressed the examined issue, the Constitutional Court held that the invoked EU law provisions (Council Directive 98/59/EC) do not affect the Romanian constitutional identity (Decision No. 64/2015: 32).

Nevertheless, in 2019, the Constitutional Court of Romania once again invoked the concept of constitutional identity in order to challenge the absolute primacy of EU law. In Decision No. 137/2019 (for a more detailed analysis of the decision, see: Varga 2019: 464-466) the Constitutional Court held that although, based on Article 148 of the Constitution, Romania cannot adopt a legal act contrary to the obligations to which it has committed itself as a Member State, this provision has admittedly a constitutional limit, expressed in what the Court has called “national constitutional identity” (Decision No. 137/2019: 99). Moreover, the Constitutional Court established that the essence of the European Union is the transfer of competencies by the Member States for the achievement of the community objectives, without prejudice, of course, to constitutional identity. That is why the Member States retain the competencies

that are essential in order to preserve their constitutional identity (Decision No. 137/2019: 101).

Last, but not least, one should also mention Decision No. 390/2021 of the Constitutional Court of Romania. In the given Decision, the Constitutional Court underlined that the primacy of EU law should not be perceived in the sense of suppressing or disregarding the constitutional identity of Romania, enshrined in Article 11 (3) read in conjunction with Article 152 of the Constitution, as these provisions represent the guarantee of the fundamental core identity of the Romanian constitution, “which should not be relativized in the process of European integration” (Decision No. 390/2021: 81).

Several conclusions can be drawn from the above-presented case law of the Constitutional Court of Romania. First of all, in this case law, the two terms referring to the core values are combined, somewhat strangely, in the term “national constitutional identity”. Thus, the Constitutional Court of Romania does not apply either the notion of constitutional identity or that of national identity but rather merges them into a single term with the same content as the two other phrases.

Secondly, it is clear from the case law of the Constitutional Court that the Romanian constitutional identity is essentially based on the values that are protected by the eternity clause. As presented above, Article 152 of the Constitution of Romania contains an explicit eternity clause, thus the values listed in this Article represent the constitutional identity of Romania, which it seeks to protect also in the context of the EU. With all these findings, the Constitutional Court of Romania essentially incorporated the practice of the Federal Constitutional Court of Germany (Guțan 2023: 266). However, according to the critics’ opinions expressed in the legal literature, the incorporation of the German practice is not the most optimal solution, instead it would be necessary to reflect more “on the historical origins of the elements of Romanian constitutional identity” (Guțan 2023: 270).

It is also worth highlighting that according to some scholars, the reference to the constitutional identity over the absolute primacy of EU law can lead to an equation between the fundamental core identity of the Romanian Constitution and the Constitution as a whole (Lupu 2022: 236). According to this view, the protection of the fundamental core identity of the Romanian Constitution is based on the provisions of Article 11 (3) of the Constitution of Romania, “which implies the non-acceptance of international law as long as it contravenes the Constitution” (Lupu 2022: 236). On this basis, the protection of constitutional identity can refer to essentially all provisions of the Constitution of Romania. Although this interpretation can be deduced from the above-presented case law, the Constitutional Court – by referring explicitly to the eternity clause – intended

to express the view that constitutional identity refers only to the provisions that are protected by this clause. Moreover, the relationship between national and EU law is not governed by the provisions of Article 11 of the Constitution, “but by a constitutional regime determined by the specificity of the application of EU law” (Guţan 2023: 253). Based on all these arguments, I do not consider that the above view of legal literature is well-founded.

In examining the case law of the Constitutional Court of the Czech Republic, one can highlight two decisions in which the issue of constitutional identity was addressed in some instances. The first decision was delivered already in 2008, in relation to the Treaty of Lisbon. In the given decision, the Constitutional Court of the Czech Republic underlined that the delegation of powers to international organisations “cannot go so far as to violate the very essence of the republic as a democratic state governed by the rule of law, founded on the respect for the rights and freedoms of human beings and of citizens” (PL. ÚS 19/08: 1). As it has been noted in the relevant legal literature, this decision makes no direct reference to constitutional identity (Tribl 2022: 229). The Constitutional Court of the Czech Republic only pointed out some fundamental values that cannot be affected by accession to international organisations. However, the Constitutional Court emphasised that *ultima ratio* as it can assess whether an EU law provision infringes the powers transferred to the EU and leads to the “abandoning the identity of values” or not (PL. ÚS 19/08: 120).

In 2012, another decision was pronounced by the Constitutional Court of the Czech Republic, this time in relation to the “Slovak Pensions” case (PL. ÚS 5/12). In the given decision, the Constitutional Court stated that: “If European bodies interpreted or developed EU law in a manner that would jeopardize the foundations of materially understood constitutionality and the essential requirements of a democratic, law-based state that are, under the Constitution of the Czech Republic, seen as inviolable (Art. 9 par. 2 of the Constitution), such legal acts could not be binding in the Czech Republic” (PL. ÚS 5/12: 7).

Based on this reasoning, the Constitutional Court of the Czech Republic also concluded that the values that form the constitutional identity of the Czech Republic (and that it wishes to protect) can be found in the eternity clause contained in Article 9 of the Constitution. Nonetheless, as Article 9 defines the protected values in a broader framework, the Constitutional Court has not effectively listed all the elements that it wishes to protect against the absolute primacy of EU law. On this basis, further relevant decisions can be expected in the near future, by which the Constitutional Court is foreseen to further nuance the scope of protected values.

The legal literature has also drawn other conclusions from the case law of the Constitutional Court of the Czech Republic. According to some scholars,

this case law suggests that “secondary law could theoretically derogate from certain constitutional provisions, while primary law, a body of rules superior to secondary law, would have to fully comply with the Constitution of the Czech Republic” (Lupu 2022: 177). Although this opinion may seem illogical at first sight, its practical benefit is indisputable since the Constitutional Court would have difficulties in reviewing such a significant number of provisions as the secondary sources of EU law, and therefore it prefers to examine the primary sources of EU law which the secondary sources are based on (Lupu 2022: 177).

As regards the relevant case law of the Constitutional Tribunal of Poland, it is necessary to reflect on its decision on the Treaty of Lisbon. In the given decision the Constitutional Tribunal underlined that: “[a] democratic state ruled by law [...] being an EU Member State, fully retains its constitutional identity, due to the fundamental homogeneity of the role the law fulfils in the political systems of the Member States and in the organisations they form” (Judgment of 24 November 2010: 2.6). Hence, in the interpretation of the Constitutional Tribunal, EU membership cannot imply the abdication of the constitutional identity. This protection of the constitutional identity derives from the homogeneity of the law, and from the specifics of each Member State.

Furthermore, in its decision, the Constitutional Tribunal also laid the foundations of Polish constitutional identity, stating that “the sovereignty of the Republic of Poland and its independence [...] mean confirmation of the primacy of the Polish Nation to determine its own fate. The normative manifestation of that principle is the Constitution, and in particular the provisions of the Preamble, Article 2, Article 4, Article 5, Article 8, Article 90, Article 104(2) and Article 126(1)” (Judgment of 24 November 2010: 2.1).

Based on this principle, the above listed provisions of the Constitution are elements of the constitutional identity of Poland. On this basis, it is an inherent part of the Polish constitutional identity, among others: the principle of democratic state ruled by law and implementation of the principles of social justice (Article 2), national sovereignty vested in the nation, that can be exercised directly or by representatives (Article 4), independence and territorial integrity, ensuring the rights and freedoms of persons and citizens, security of the citizens, safeguard of the national heritage, protection of the natural environment pursuant to the principles of sustainable development (Article 5) or the supremacy of the Constitution of Poland over the legal order (Article 8). All these listed constitutional values were protected against the absolute primacy of EU law by the Constitutional Tribunal already in its Lisbon Decision.

From the case law of the Constitutional Court of Hungary, one can reflect on several principles. The first relevant decision was delivered by the Constitutional Court in 2016 [Decision 22/2016. (XII.5.) AB]. According to some

scholars, the Constitutional Court of Hungary was taking the first steps on the path of protecting the constitutional identity of Hungary, by delivering this decision (Varga Zs. 2018: 28).

By the given decision, the Constitutional Court of Hungary essentially established two control mechanisms in relation to the principle of the primacy of EU law: sovereignty control and identity control [Decision 22/2016. (XII.5.) AB: 54]. With regard to identity control the Constitutional Court of Hungary underlined that: “[t]he constitutional self-identity of Hungary is not a list of static and closed values; nevertheless, many of its important components [...] can be highlighted as examples: freedoms, division of powers, republic as the form of government, respect for autonomies under public law, freedom of religion, exercising lawful authority, parliamentarism, equality of rights, acknowledging judicial power, protection of the nationalities living with us” [Decision 22/2016. (XII.5.) AB: 65].

In a decision passed in 2021, the Constitutional Court of Hungary referred again to the protection of constitutional identity. According to the Constitutional Court: “[t]he listed elements of the historical constitution related to sovereignty, population, linguistic, historical and cultural traditions are considered to be achievements (acquis) with respect to Hungary’s constitutional identity” [Decision 32/2021. (XII. 20.) AB: 106].

Moreover, based on the interpretation of the Constitutional Court, it is also an element of the Hungarian constitutional identity in the territorial unity of the country, the population, the form of the government, and the structure of the State [Decision 32/2021. (XII. 20.) AB: 109].

Interestingly, the Constitutional Court reflected on the relationship between national sovereignty and constitutional identity as well, underlining that “the main features of State sovereignty recognized in international law are closely linked to Hungary’s constitutional identity” [Decision 32/2021. (XII. 20.) AB: 99].

As one can notice from the above decisions, the achievements of the historical constitution are an integral part of the Hungarian constitutional identity. According to some scholars, these achievements are one of Hungary’s greatest ideological weapons, a guarantee of the State’s sovereignty, and a cornerstone of its independence (Zétényi 2023: 64). Nothing suggests this better than the fact that even the Constitutional Court itself has reflected on the achievements of the historical constitution several times [e.g., Decision 33/2012. (VII. 17.) AB]. Moreover, in a concurring reasoning on a 2019 decision, Justice Dr. András Varga Zs. highlighted that according to the Fundamental Law, “the protection of our identity rooted in Hungary’s historic constitution is a fundamental obligation of the State” [Decision 2/2019. (III. 5.) AB: 69].

The achievements of the historical constitution, however, are not precisely defined either in the Fundamental Law or in the case law of the Constitutional Court. In its previous decisions, the Constitutional Court of Hungary highlighted that the independence of justice, freedom of religion, freedom of the press and historical and cultural traditions are elements of these *acquis*. At the same time, the relevant legal literature also identified the principle of separation of powers, the rule of law and popular sovereignty as achievements of the historical constitution (Stumpf 2020: 235). Even if this list of achievements of the historical constitution is not closed yet, one should agree that these *acquis* are cornerstones of Hungarian constitutionalism that should deserve special protection.

Against this background, it is not surprising that the Fundamental Law of Hungary, as the first of the constitutions of the Member States, explicitly provides for the protection of the constitutional identity. By the seventh amendment of the Fundamental Law, in 2018, a new paragraph was added to Article R), according to which: “The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.”⁶ Moreover, in 2023, a new provision was added to this paragraph, based on which an independent organ was established in order to protect constitutional identity.

On the basis of the above, one can conclude that, in the context of EU law, the elements of the Hungarian constitutional identity are not static; neither do these values form a closed system. At the same time, they, as the achievements of the historic constitution, provide the core of the elements of the Hungarian Fundamental Law, that the Constitutional Court seeks to protect even against contrary EU law provisions.

In examining the international dimension of constitutional identity, one can notice that the constitutional courts of four of the examined EU Member States (Romania, Czechia, Poland, and Hungary) have already referred in their case law to the protection of this identity in relation to the principle of the primacy of EU law. At the same time, the case law of the constitutional courts of these States also differs, since, for example, in the case of Romania, the elements of constitutional identity are explicitly defined (those provisions of the Constitution of Romania that are protected by eternity clause), while in the case of Hungary, the Constitutional Court has ruled that the constitutional self-identity of Hungary is not a list of static and closed values.

⁶ The Fundamental Law of Hungary is available in English at: <https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178>

4. Closing remarks

The constitutional identity reflects the values of a state that represent the specifics of the given nation, and that somewhat distinguish it from others. Even within a region as small as East-Central Europe, there are differences in the values that each state considers essential to protect. Moreover, one can notice significant differences in the way constitutional identity is defended at national and international levels. While the constitutions of some states contain explicit eternity clauses (e.g., Romania, Czechia), elements of which form part of their constitutional identity and must therefore be guaranteed protection, in other states the constitutional courts have developed, in their case law, sets of values that reflect the constitutional identity of the given nation (e.g., Croatia, Slovakia). The situation is unique in the case of Hungary, where the protection of constitutional identity is now provided for in the Fundamental Law.

At the same time, despite all these differences, one can observe that all of the examined states seek to protect their constitutional identity. In the case of four of them (Romania, Czechia, Poland, and Hungary), the protection of constitutional identity was already expressed in relation to the principle of primacy of EU law as well. The constitutional courts of these four states consider that EU membership does not imply abdication of constitutional identity, protection of which must be ensured in the relationship between the EU and the Member States as well. All the similarities and differences between national approaches to the concept of constitutional identity are summarised in the table below.

Table 1. The similarities and differences between national approaches to the concept of constitutional identity

Country	The domestic legal dimension of constitutional identity	The international dimension of constitutional identity
Romania	Explicit eternity clause (Article 152 of the Constitution)	Identity control (e.g., Decisions No. 683/2012; No. 64/2015; No 137/2019; No 390/2021 of the Constitutional Court of Romania)
Czech Republic	Explicit eternity clause [Article 9 (2) of the Constitution]	Identity control (e.g., Decisions 2008/11/26 – PL. ÚS 19/08; 2012/01/31 – PL. ÚS 5/12 of Constitutional Court of the Czech Republic)
Croatia	Implicit eternity clause	No identity control yet
Slovakia	Implicit eternity clause	No identity control yet

Table 1 contd.

Country	The domestic legal dimension of constitutional identity	The international dimension of constitutional identity
Hungary	Achievements of the historical constitution	Identity control [e.g., Decisions 22/2016. (XII. 5.) AB; 32/2021. (XII. 20.) AB of the Constitutional Court of Hungary]
Poland	No explicit eternity clauses, but a specific procedure for amending certain constitutional provisions	Identity control (e.g., Judgment of 24 November 2010 of the Constitutional Tribunal of Poland)

Source: author's own elaboration

A precise definition of the concept of constitutional identity and some delimitation of its elements is still awaited. However, as each state defines its constitutional identity and the core elements of the constitution differently, in the context of the EU “[t]he protection of constitutional identity should be granted in the framework of an informal cooperation with EUC based on the principles of equality and collegiality, with mutual respect to each other.” [Decision 22/2016. (XII. 5.) AB: 63]. Neither the national constitutional courts nor the Court of Justice of the European Union can interpret constitutional identity on their own. This task can only be accomplished through cooperation and judicial dialogue between the national constitutional courts, on the one hand, and between national constitutional courts and the Court of Justice of the European Union, on the other (Lupu 2022: 257, Stumpf 2020: 238).

Abbreviations

EU – European Union
TEU – Treaty on European Union

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Legislation

Constitution of Romania
Constitution of the Czech Republic
Constitution of Hungary

Judicial decisions

Decision No. 683/2012, Constitutional Court of Romania, published in Official Gazette No. 479/2012.
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- Decision No. 137/2019, Constitutional Court of Romania, published in Official Gazette No. 295/2019.
- Decision No. 390/2021, Constitutional Court of Romania, published in Official Gazette No. 612/2021.
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