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PROTECTING NATIONAL SOVEREIGNTY AND CONSTITUTIONAL IDENTITY – TWO SIDES OF THE SAME COIN?

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The protection of sovereignty and constitutional identity as factors in the relationship between the European Union and its Member States has recently become a topical issue. The constitutional courts of the Member States have developed their case law concerning European integration essentially with reference to these two concepts. However, a number of unresolved questions have also arisen in relation to constitutional identity and national sovereignty. On the one hand, the specific elements of constitutional identity vary from one Member State to another. On the other hand, sovereignty has acquired a somewhat new meaning precisely in the process of European integration. The aim of the following paper is to explore two concepts, i.e. the protection of sovereignty and identity control, by analysing the relationship between them. In addition to presenting the relevant legal literature, this holistic review will also explore the relevant case law of the constitutional courts of the Member States, as certain constitutional courts have examined the relationship between national sovereignty and identity control in depth.

KEYWORDS:

national sovereignty, constitutional identity, primacy of EU law, transfer of competencies, case law of the constitutional courts of the Member States

INTRODUCTION

The relationship between the European Union and the Member States is one of the most researched fields in current constitutional law literature. Upon their accession to the European Union (hereinafter: EU), Member States transfer certain competencies to the Union in order to achieve some common objectives. These common objectives – enshrined in Article 2 of the Treaty on the European Union (hereinafter: TEU) – include the promotion of peace, offering

an area of freedom, security and justice, combating social exclusion and discrimination, and facilitating the internal market. Moreover, the Member States also undertook to respect the primacy of EU law over contrary domestic law provisions. Nevertheless, this delegation of powers and the primacy of EU law must not lead to an abdication of national sovereignty. According to some scholars, the transfer of competencies to the EU “is neither a full transfer of sovereignty, nor can it be, as it would lead to the dissolution of the statehood of those who compose the Union, and the latter would turn into a federal state, which is not the reality, nor an explicit wish of the (majority) of the states”.¹

For this reason, the constitutional courts of the Member States have developed a number of control mechanisms over the last few decades to protect those national competencies which are of particular importance to them and to safeguard the supremacy of their national constitutions. While these constitutional courts, in their case law, highlight the importance of EU integration and taking the interpretation of national constitutions that is favourable to the EU is the main rule, they also underline that some regulatory areas are so important for the Member States that, given their cultural, social, historical or even economic specificities, the EU cannot interfere in their regulation.

The three main control mechanisms² developed are fundamental rights control, *ultra vires* control, and identity control.³ The first of these three mechanisms to emerge was fundamental rights control, which appeared in the practice of the Federal Constitutional Court of Germany (which can be generally considered as being at the forefront of the development of these control mechanisms), following the *Solange I*⁴ and *Solange II*⁵ judgments. Later *ultra vires* and identity control also emerged. In addition to these three control mechanisms, the constitutional courts of the Member States have also invoked the protection of national sovereignty to a significant extent in nearly all cases where they have dealt with European integration. However, the relationship between the protection of national sovereignty and identity control needs to be explored and analysed in more depth, since, on the one hand, these two concepts (and identity control in particular⁶) have been widely used by the constitutional courts of the Member States in recent years and, on the other hand – as will be seen below – the two concepts share a number of similarities.

After a brief overview of the evolution of the protection of national sovereignty in the context of European integration and identity control, this paper will focus on the relationship between them. In making this comparison, it is essential to include the relevant case law of the constitutional courts of the Member States, in addition to considering some of the most prominent views from the legal literature. Although the case law varies from one Member

¹ VARGA 2019: 453. A similar conclusion was reached by the Constitutional Court of Hungary in Decision 22/2016 (XII. 5.) AB.

² Other mechanisms were also created, such as the *controlimiti* doctrine developed by the Constitutional Court of Italy.

³ BLUTMAN 2017: 7–9.

⁴ BVerfGE 37, 271 Judgment of the Federal Constitutional Court of Germany.

⁵ BVerfGE 73, 339 Judgment of the Federal Constitutional Court of Germany.

⁶ BLUTMAN 2017: 9.

State to another (especially in the context of the protection of constitutional identity, where the content of the constitutional identity of each Member State differs to some extent), some trends that highlight common features can also be discerned.

THE EMERGENCE OF THE PROTECTION OF NATIONAL SOVEREIGNTY AND IDENTITY CONTROL

The foundations of the modern concept of national sovereignty were laid down in the Peace of Westphalia⁷ and essentially entailed a prohibition of interference by others in the internal affairs of a state.⁸ In the current understanding of sovereignty, it is necessary to distinguish between its internal and external dimensions.⁹ The internal dimension is equivalent to the supreme power of the state, i.e. the right of a state to regulate all matters within its territory with respect to all persons. The external dimension refers to the independence of states and the equality between them.

In today's globalised world, this approach to sovereignty (as a result of the transfer of national competencies to international organisations) has come under criticism. It is worth noting, however, that by acceding to the EU, Member States have merely transferred certain sovereign competencies to the EU, rather than surrendering their sovereignty.¹⁰ A transfer of national competencies is not equivalent to a transfer of sovereignty.¹¹

The protection of national sovereignty appeared most visibly in the practice of the Federal Constitutional Court of Germany, notably in the *Maastricht*¹² and *Lisbon*¹³ judgments. In this context, it is worth mentioning that according to Article 23 (1) of the Basic Law of the Federal Republic of Germany, with the consent of the Bundesrat, Germany can transfer sovereign powers by law to the EU. However, the establishment of the EU or any changes in its treaties that amend the Basic Law shall respect the eternity clause contained in Article 79 (3).

In its *Lisbon* judgment, the Federal Constitutional Court emphasised in relation to sovereignty that “[t]he Basic Law abandons a self-serving and self-glorifying concept of sovereign statehood and returns to a view of the state authority of the individual state which regards sovereignty as ‘freedom that is organized by international law and committed to it’”.¹⁴

⁷ Moreover, “[u]nder the Westphalian paradigm which emerged in Europe with the formation of territorial states in the 17th century, and was spread by Europe around the world in the ensuing centuries, two separated body of laws governed action by states – constitutional law, regulating the exercise of public power within sovereigns; and international law, prescribing rules of conduct among sovereigns.” FABBRINI 2013: 9.

⁸ CZUBIK 2022: 98.

⁹ JAKAB 2016: 98; CZUBIK 2022: 101; VON BOGDANDY 2004: 887.

¹⁰ Thus, for example, the term “sovereign powers” used by the Federal Constitutional Court of Germany is appropriate, as it precisely separates national competencies from sovereignty as a whole.

¹¹ CZUBIK 2022: 106. Moreover, one of the most important characteristics of sovereignty is its indivisibility. See FLOREA 2023: 171.

¹² BVerfGE 89, 155 Judgment of the Federal Constitutional Court of Germany.

¹³ BVerfGE 123, 267 Judgment of the Federal Constitutional Court of Germany.

¹⁴ BVerfGE 123, 267 Judgment of the Federal Constitutional Court of Germany, Reasoning 223.

At the same time, in relation to the sovereignty challenges of EU integration, the court pointed out that

“[t]he Basic Law does not grant powers to bodies acting on behalf of Germany to abandon the right to self-determination of the German people in the form of Germany’s sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone.”¹⁵

Moreover, the Federal Constitutional Court also emphasised that the principle of democracy sets further content-related limits on the transfer of sovereign powers.¹⁶ Based on all these arguments, as a partial conclusion the reasoning of the judgment stated that “[i]t follows from the continuing sovereignty of the people [...] and from the circumstance that the states remain the masters of the Treaties, that [...] the member states may not be deprived of the right to review compliance with the integration programme”.¹⁷

In connection with identity control, it is particularly important to address the concept of constitutional identity itself. As there is no generally accepted definition of the concept, existing approaches to constitutional identity take as their starting point the findings of the literature and the case law of the constitutional courts of the Member States and the Court of Justice of the European Union.¹⁸ Based on all these findings, constitutional identity can be summarised as a set of values by which a state identifies itself and distinguishes itself from other states. The main source of the elements of a nation’s constitutional identity is its constitution itself. However, in addition to constitutions, a number of other factors also influence constitutional identity, such as the social structure of the given state, its culture, or its history.¹⁹ For this reason, the sources of the elements of constitutional identity are classified in the relevant legal literature as “constitutional norms or meta-norms”.²⁰ Nevertheless, as some scholars have pointed out in the legal literature, it is not the constitutions themselves that have an identity, but the society they stem from, whose identity is merely reflected in a given constitution.²¹ The constitutional identity of a state enjoys both internal and external protection.²² Whilst internally, constitutional identity has to be protected against future constitutional amendments, the most explicit manifestation of its external protection is identity control.

¹⁵ BVerfGE 123, 267, Reasoning 228.

¹⁶ BVerfGE 123, 267, Reasoning 247.

¹⁷ BVerfGE 123, 267, Reasoning 334.

¹⁸ SYRYT 2023: 51.

¹⁹ The impact of historical experience on constitutional identity was already noted by one of the fathers of the concept, Michel Rosenfeld. See ROSENFELD 1995: 1063.

²⁰ SYRYT 2023: 52.

²¹ CSINK 2015: 135.

²² ORBÁN 2020: 25–26.

The basis for identity control was also laid down by the Federal Constitutional Court of Germany in its *Lisbon* judgment.²³ Nonetheless, the *European Arrest Warrant* judgment²⁴ and the *OMT* judgment²⁵ are much more relevant in the context of this control mechanism. On the one hand, in its *European Arrest Warrant* judgment, the Federal Constitutional Court underlined that “the scope of precedence of application of European Union Law is mainly limited by the Basic Law’s constitutional identity”.²⁶ However, in this judgment the Federal Constitutional Court of Germany, after having established these limits on primacy, adopted a non-confrontational stance, noting that the protection of human dignity is, under certain conditions, compatible with the European Arrest Warrant. Moreover, according to some scholars, the dialogue between the two courts in this case ended with a positive outcome.²⁷

On the other hand, in the *OMT* judgment, the German constitutional court emphasised that

“[t]he fundamental elements of the principle of democracy enshrined in Art. 20 secs. 1 and 2 GG are part of the constitutional identity of the Basic Law, which has been declared to be beyond the reach of constitutional amendment and of European integration”.²⁸

Based on these observations two conclusions can be deduced. Firstly, the main limit of the primacy of EU law is the protection of constitutional identity. Secondly, the values that provide the content of the German constitutional identity cannot be undermined in the process of European integration. Interestingly, in the context of identity control, the Federal Constitutional Court has not addressed either the principle of openness to EU law or the issue of whether it can refer for a preliminary ruling to the Court of Justice of the European Union while also practicing identity control or not.²⁹

With regard to identity control, it is salient to underline that the protection of the identity³⁰ of the Member States is also provided for in Article 4 (2) of the TEU,³¹ which states that “[t]he

²³ CALLIES 2020: 171.

²⁴ 2 BvR 2735/14 Order of the Second Senate of 15 December 2015 of the Federal Constitutional Court of Germany.

²⁵ BVerfGE 142, 123 Judgment of the Federal Constitutional Court of Germany.

²⁶ BVerfGE 142, 123 Judgment of the Federal Constitutional Court of Germany, Reasoning 41.

²⁷ DRAGOȘ–LAURENȚIU 2022: 96.

²⁸ BVerfGE 142, 123 Judgment of the Federal Constitutional Court of Germany, Reasoning 121.

²⁹ CALLIES 2020: 171.

³⁰ Nevertheless, it is important to note that while national constitutional courts refer to constitutional identity, the TEU provides for the protection of national identity. The relationship between the two terms has been extensively examined in the legal literature. See for example DRINÓCZI 2020: 105–130. Even though some scholars consider that national identity and constitutional identity are in an “antecedent-consequence” relationship (DRINÓCZI 2020: 118), I would suggest that in the relationship under scrutiny in this paper, the two concepts refer to the same content and to the same set of core values. For a different opinion see TÉGLÁSI–BOROS 2022: 424–425.

³¹ It is worth pointing out that the protection of the Member States’ identity at EU level goes back to the Maastricht Treaty, Article F of which stated that “[t]he Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy”. Moreover, an interpretation of this provision in line with the Treaty as a whole also reflects that the identity of the Member States is shaped by ethnic, linguistic, cultural, and religious factors. Article 4 (2) TEU, by contrast, focuses much more on the constitutional elements of identity. See LUPU 2022: 295–297.

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”. Some scholars have argued that this provision implies that “Member States can define their own fundamental political and constitutional structures and principles”.³² Moreover, according to another opinion expressed in the legal literature, Article 4 (2) means “that the process of constitutional integration within the EU is limited precisely by the fundamental political and constitutional structures of the Member States”.³³ At the same time, it is also important to bear in mind Article 2 (3) of the TEU, which provides that the EU “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced”.

The protection of the identity of Member States is likewise reflected in the case law of the Court of Justice of the European Union. In this context, it is worth highlighting the *Sayn-Wittgenstein* judgment,³⁴ in which the Court of Justice held that – taking into account the historical specificities of Austria – the Law on the abolition of the nobility is an element of Austrian national identity.³⁵ Another relevant issue concerning the protection of the identity of the Member States arose in the so-called *Runevic-Vardyn* case.³⁶ In its judgment on that case, the Court of Justice emphasised that the official national language of a Member State is an inherent part of its identity and thus it has to be protected.³⁷ A similar conclusion was reached by the Court of Justice in the *Anton Las* judgment.³⁸

At the same time, one has to take into account that the Court of Justice “is not in the position to determine what is and what is not part of the constitutional identity of a Member State”.³⁹ The content of the constitutional identity of each Member State has to be determined by the state’s own Constitutional Court, as “[c]onstitutional courts are best placed to be familiar with national evolutions when analysing complex issues arising in the relationship between national and EU law”.⁴⁰ Meanwhile, national constitutional courts must work in close cooperation with the Court of Justice, as it is the latter Court’s competence to examine the compatibility of EU law with the constitutional identity as established by national constitutional courts.⁴¹ Thus, the relationship between the constitutional courts of the Member States and the Court of Justice must be based on mutual trust and loyal cooperation.

³² MOTOC 2022: 324.

³³ VERESS 2023: 345.

³⁴ Judgment of the Court of 22 December 2010 in Case C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*.

³⁵ Judgment of the Court of 22 December 2010 in Case C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Reasoning 80.

³⁶ Judgment of the Court of 12 May 2011 in Case C-391/09 *Małgorzata Runevic-Vardyn and Lukasz Pawel Wardyn v. Vilniaus miesto savivaldybes administracija and Others*.

³⁷ Judgment of the Court of 12 May 2011 in Case C-391/09 *Małgorzata Runevic-Vardyn and Lukasz Pawel Wardyn v. Vilniaus miesto savivaldybes administracija and Others*, Reasoning 86.

³⁸ Judgment of the Court of 16 April 2013 in Case C-202/11 *Anton Las v. PSA Antwerp NV*, Reasoning 26.

³⁹ BESSELINK 2010: 45.

⁴⁰ TEODOROIU–ENACHE–SAFTA 2019: 45–46.

⁴¹ BESSELINK 2010: 45.

THE RELATIONSHIP BETWEEN THE PROTECTION OF NATIONAL SOVEREIGNTY AND IDENTITY CONTROL

The relationship between the protection of national sovereignty and identity control has been the subject of much attention in recent years, both in the legal literature and in the case law of the constitutional courts of the Member States. However, a number of – often slightly divergent – views on this relationship have emerged.

Anita Schnettger argues that constitutional identity is not equivalent to the sovereignty or the autonomy of the Member States.⁴² Nevertheless, she acknowledges that “national constitutional identity and sovereignty are two connected concepts located on different levels of abstraction and discussion”.⁴³ Schnettger concludes, however, that the protection of the identity of the Member States is essentially a practical implementation of the shared sovereignty between the EU and the Member States.⁴⁴ Moreover, in this sense, “[b]y transferring sovereign rights to the EU, the Member States confer sovereign power upon the EU”.⁴⁵

This approach raises some objections, however. If the existence and operation of an actor (an international organisation) are entirely dependent on the decision of other actors (Member States), it does not have its own sovereignty.⁴⁶ This is also the case for the EU: its existence, the conditions for its functioning, and the level of integration all depend on the decisions and will of the Member States.⁴⁷ On the other hand, as already mentioned above, one of the main characteristics of sovereignty is its indivisibility. For these reasons, *inter alia*, it is problematic to derive from this supposed shared sovereignty between the EU and the Member States the link between the protection of national sovereignty and identity control.

This relationship has also been examined in the case law of the constitutional courts of the Member States in a number of instances. As early on as in its Lisbon judgment, the Federal Constitutional Court of Germany held that

“[t]he Basic Law strives to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution as a right of the people to take constitutive decisions concerning fundamental questions as its own identity”.⁴⁸

⁴² SCHNETTGER 2020: 24.

⁴³ SCHNETTGER 2020: 24.

⁴⁴ SCHNETTGER 2020: 24.

⁴⁵ CALLIES-SCHNETTGER 2020: 353.

⁴⁶ CZUBIK 2022: 109.

⁴⁷ This was explicitly highlighted by the Constitutional Tribunal of Spain as well in Declaration 1/2004, in which it stated that “the primacy operates with regard to the competences transferred to the Union by sovereign will of the State and also sovereignly recoverable by means of the procedure of ‘voluntary withdrawal’”. For details see Declaration 1/2004 of the Constitutional Tribunal of Spain, available in English at: <https://www.tribunalconstitucional.es/ResolucionesTraducidas/Declaration%201-2004.pdf>

⁴⁸ BVerfGE 123, 267 Judgment of the Federal Constitutional Court of Germany, Point 340.

On the basis of this reasoning, it can be concluded that the integration of Germany into the EU cannot infringe its constitutionally enshrined sovereignty, nor upon the right of the people to decide on important issues. The Federal Constitutional Court regarded the reservation of this right to make decisions on fundamental issues as an inherent part of the identity of Germany. The link between the protection of sovereignty and identity is neatly illustrated by this line of interpretation. Nonetheless, in the reasoning put forward by the Federal Constitutional Court, it is identity that is at issue, not constitutional identity as such.

The Constitutional Tribunal of Poland is another strong advocate of both the protection of national sovereignty and of identity control. For example, in a press release issued in connection with case P 7/20 the Constitutional Tribunal stated that “the principle of the Nation’s sovereignty rules out any possibility of subjecting the fundamental norms making up the constitutional identity to the decisions and determinations of such bodies whose members are not elected and overseen by Polish citizens”.⁴⁹ Thus, the elements of constitutional identity can only be regulated by bodies that are elected and supervised by the people. Based on this observation, it is precisely the sovereignty of a Member State that makes it necessary to protect its constitutional identity.

Moreover, in its Lisbon judgment, the Constitutional Tribunal highlighted that, based on the provisions of the Constitution of Poland, “the sovereignty of the Republic of Poland is expressed in the inalienable competences of the organs of the state, constituting the constitutional identity of the state”.⁵⁰ Accordingly, the manifestation of the sovereignty of the State is in the very same inalienable powers that are elements of its constitutional identity. In summarising the relevant findings of the Constitutional Tribunal of Poland, Aleksander Stepkowski concluded that “[t]he concept of the protection of constitutional identity is rooted in the protection of the national sovereignty, which is considered a fundamental constitutional value”.⁵¹ The Constitutional Tribunal of Poland attaches particular importance to the close relationship between the protection of national sovereignty and identity control. The basis of this close relationship lies precisely in the fact that the protection of the Polish constitutional identity is based on the sovereignty of Poland. At the same time, it is salient to underline that the Constitutional Tribunal does not equate the two concepts.

The most extensive and multi-layered examination of the relationship between the protection of national sovereignty and identity control has been carried out in the case law of the Constitutional Court of Hungary. In a decision issued in 2016, the Constitutional Court ruled that the joint exercise of competencies with the EU has two limits: “[o]n the one hand the joint exercise of a competence shall not violate Hungary’s sovereignty (sovereignty control), and on

⁴⁹ Press release of the Constitutional Tribunal of Poland after the hearing in Case P 7/20. Available in English at: <https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11588-obowiazek-panstwa-czlonkowskiego-polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-kszaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa>

⁵⁰ Judgment of 24 November 2010 Ref. No. K 32/09 of the Constitutional Tribunal of Poland, Reasoning 2.1.

⁵¹ STEPKOWSKI 2023: 245.

the other hand it shall not lead to the violation of constitutional identity (identity control).⁵² Thus, the Constitutional Court interpreted both the protection of national sovereignty and identity control primarily in the context of the delegation and joint exercise of competencies.

It is also noteworthy that, in the Constitutional Court's understanding, Hungary has not waived its constitutional identity by joining an international organisation, "Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood".⁵³ In this way, the Constitutional Court, in a sense, associated the need to protect constitutional identity with the sovereignty of a state. Moreover, it explicitly stated that "sovereignty and constitutional identity have several common points".⁵⁴ This finding of the Constitutional Court of Hungary was criticised by some commentators on the grounds that although the decision declares the existence of common points between sovereignty and constitutional identity, it does not interpret them in more depth, nor does it provide a precise distinction between the two concepts.⁵⁵

Finally, a detailed analysis of the relationship between the protection of national sovereignty and identity control was made by the Constitutional Court of Hungary in Decision 32/2021 (XII. 20.) AB (therefore the above criticism of the legal literature has, in my opinion, since been rendered obsolete). In its Decision, the Constitutional Court emphasised that "constitutional identity and sovereignty are not complementary concepts, but are interrelated in several aspects".⁵⁶ This finding was based on four observations, which can be summarised as follows.

- 1st observation: "the safeguarding of Hungary's constitutional identity, also as a Member State within the European Union, is fundamentally made possible by its sovereignty."⁵⁷ This finding is based on the fact that the sovereignty of a Member State enables it to safeguard its constitutional identity. Moreover, even before the first decision of the Constitutional Court (from 2016), some Hungarian scholars had already formulated the position that in order to protect constitutional identity, the preservation of sovereignty needs to be taken as a basis, or as a starting point.⁵⁸ A similar conclusion was reached by the Constitutional Tribunal of Poland in its case law cited above. Based on this observation of the Constitutional Court "the protection of constitutional identity is primarily a matter of protection of sovereignty".⁵⁹
- 2nd observation: "constitutional identity manifests itself primarily through a sovereign act, adopting the constitution."⁶⁰ Indeed, one of the main sources of a state's constitutional identity is its Constitution, which – by virtue of the specific competence of the *pouvoir constituant* – is itself a manifestation of sovereignty. Nonetheless, "constitutional

⁵² Decision 22/2016 (XII. 5.) AB of the Constitutional Court of Hungary, Reasoning [54].

⁵³ Decision 22/2016 (XII. 5.) AB of the Constitutional Court of Hungary, Reasoning [67].

⁵⁴ Decision 22/2016 (XII. 5.) AB of the Constitutional Court of Hungary, Reasoning [67].

⁵⁵ KÉRI–POZSÁR–SZENTMIKLÓSY 2017: 12.

⁵⁶ Decision 32/2021 (XII. 20.) AB of the Constitutional Court of Hungary, Reasoning [99].

⁵⁷ Decision 32/2021 (XII. 20.) AB of the Constitutional Court of Hungary, Reasoning [99].

⁵⁸ VARGA Zs. 2016: 11.

⁵⁹ ORBÁN–SZABÓ 2022: 109.

⁶⁰ VARGA Zs. 2016: 11.

identity does not require a written constitution but constitutional norms”.⁶¹ Moreover, some “pre-, supra- or extra-constitutional factors” also shape constitutional identity.⁶² Hence, it goes without saying that while the primary manifestation of constitutional identity is expressed in the form of national constitutions, other forms must also be taken into account.⁶³

- 3rd observation: “taking into account Hungary’s historical struggles, the aspiration to safeguard the country’s sovereign decision-making powers is itself part of the country’s national identity and, through the recognition by the Fundamental Law, of its constitutional identity as well”.⁶⁴ Several observations should be made in relation to this finding of the Constitutional Court. First, the Constitutional Court interpreted Hungary’s power to make sovereign decisions as part of its constitutional identity. Second, the Constitutional Court specifically highlighted the importance that the safeguarding of this sovereign decision-making power has had throughout the history of Hungary. In this way, the Constitutional Court took a historical approach, through which it interpreted not only constitutional identity but also the sovereignty of Hungary. Third, it is noteworthy that the Constitutional Court somehow distinguished national identity from constitutional identity, emphasising that sovereign decision-making power – as part of Hungary’s national identity – became part of the constitutional identity of Hungary when it was incorporated into the Fundamental Law. A similar “antecedent-consequence” relationship between national and constitutional identity has been noted by several scholars.⁶⁵
- 4th observation: “the main features of State sovereignty recognized in international law are closely linked to Hungary’s constitutional identity due to the historical characteristics of our country.”⁶⁶ As already mentioned above, the contemporary concept of sovereignty can be divided into two main elements, external and internal sovereignty. If one seeks a more precise definition of these elements, it could be stated that internal sovereignty refers to the “state’s exclusive power over its own territory and its own citizens, including the internal freedom of shaping economic relations” whilst external sovereignty includes “the external activity of the state – entering into alliances, establishing diplomatic relations, creating external economic ties, etc.”⁶⁷ In making this fourth observation, the Constitutional Court emphasised that all these features of state sovereignty are linked to the constitutional identity of Hungary. Thus, the exclusive right of Hungary to legislate on its own territory for all persons and in all

⁶¹ SYRYT 2023: 52.

⁶² DUMBRAVĂ 2024: 66.

⁶³ This aspect was pointed out by the Constitutional Court of Hungary itself when it defined the achievements (*acquis*) of the historical constitution as one of the main sources of the constitutional identity of Hungary.

⁶⁴ Decision 32/2021 (XII. 20.) AB of the Constitutional Court of Hungary, Reasoning [99].

⁶⁵ DRINÓCZI 2020: 118.

⁶⁶ Decision 32/2021 (XII. 20.) AB of the Constitutional Court of Hungary, Reasoning [99].

⁶⁷ CZUBIK 2022: 100.

matters, and Hungary's international independence and equality, are closely linked to its constitutional identity.

Based on these four observations of the Constitutional Court, some scholars have argued that constitutional identity and sovereignty are in a part-to-whole relationship, and the core of sovereignty is part of constitutional identity.⁶⁸ These authors conclude that “identity should be understood as the right to self-determination in relation to the most fundamental questions of sovereignty and the basic functions of the state”.⁶⁹

Last, but not least, at the end of 2024,⁷⁰ the Constitutional Court of Hungary once again issued a Decision in which the relationship between sovereignty and constitutional identity was analysed. In the said Decision, the Constitutional Court underlined that both constitutional identity and sovereignty are fundamental values that are “not created by the Fundamental Law but merely recognised by it”.⁷¹ At the same time, the Court also emphasised that – due to the fact that sovereignty lies with the people – any body entitled to exercise power or take decisions must have democratic legitimacy as a consequence of the rule of law clause, which is at the core of constitutional identity.⁷² This Decision of the Constitutional Court suggests that the relationship examined in this study will be subject to further interpretation in the near future.

CONCLUSION

The concept of constitutional identity has become a central feature of the discourse on multilevel constitutionalism, and – within it – the discussion of the relationship between the EU and national legislation. The constitutional courts of the Member States are increasingly invoking the protection of constitutional identity in relation to the absolute primacy of EU law and the exercise of certain EU competencies. Thus, identity control has become one of the most widely used constitutional mechanisms. At the same time, the concept itself is not free of dogmatic debate, as both its precise definition and its content are subject to controversy.

On the other hand, the concept of sovereignty has a lengthy and eventful history and, thanks to its internal and external dimensions, its fundamental elements are widely accepted. However, globalisation has brought new challenges to the traditional approach to sovereignty.⁷³ Hence, the aim of this paper was to explore two concepts that are topical today, by analysing

⁶⁸ ORBÁN–SZABÓ 2022: 109.

⁶⁹ ORBÁN–SZABÓ 2022: 109.

⁷⁰ Decision 20/2024 (XI. 28.) AB of the Constitutional Court of Hungary. In connection to this Decision, one has to highlight the relevance of the parallel reasonings of judge András Patyi and judge Zoltán Márki.

⁷¹ Decision 20/2024 (XI. 28.) AB of the Constitutional Court of Hungary, Reasoning [49].

⁷² Decision 20/2024 (XI. 28.) AB of the Constitutional Court of Hungary, Reasoning [125].

⁷³ FABBRINI 2013: 5, 9.

the relationship between them (i.e. between the protection of national sovereignty and identity control).

With regard to the relationship between the protection of national sovereignty and identity control, both the relevant legal literature and the case law of the constitutional courts agree that while the two concepts are not identical and cannot be equated, they are interconnected at several points. From the above discussion, it can be concluded that the most pivotal link between them concerns their relation to the transfer of national competencies to the EU. According to the findings of various constitutional courts, it is not possible to transfer sovereign powers to the EU that would infringe the constitutional identity of the Member States. Member States are determined to retain the right to regulate the meaning and content of values linked to their constitutional identity. Moreover, the protection of a Member State's constitutional identity is fundamentally made possible by the sovereignty of the given State. As the Constitutional Court of Hungary highlighted in its case law: a Member State "can only be deprived of its constitutional identity through the final termination of its sovereignty".⁷⁴ Thus, it is also pivotal to clearly differentiate between the transfer of competencies and the transfer of sovereignty.

In addition to this interconnection, there are several other links between the two concepts, as highlighted by a Decision of the Constitutional Court of Hungary. Exploring these links between the protection of national sovereignty and identity control can contribute not only to a deeper understanding of the two concepts but also to a clearer picture of the relationship between the EU and the Member States and to creating a balance between the interests of further integration and of the protection of the sovereignty of the Member States.

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