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STRIKING A BALANCE: THE INTERPLAY OF CJEU RULINGS AND INTERNATIONAL HUMAN RIGHTS OBLIGATION WITH CONSTITUTIONAL IDENTITIES

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The article examines approaches to the interaction of decisions of the Court of the European Union (CJEU) and international obligations in the field of human rights with the constitutional identity of states. Attention is focused on the concepts of “national identity” and “constitutional identity”, their relationship, and the introduction of the concept of “national identity” into the European legal order after the signing of the Maastricht Treaty (1993). Attention is drawn to the fact that the primary law of the EU does not contain the concept of “constitutional identity”, but this term is widely used in the decisions of the constitutional courts of several EU member states. In these decisions, the constitutional courts raised the issue of the protection of the constitution and constitutionality in the EU member state given the harmonization of legislation and/or ultra vires decisions.

The article notes that the concept of constitutional identity is broad, it covers the historical, political, cultural, and legal identity of the state, as well as the connection of national law with the international and autonomous legal order of the EU. The idea of constitutional identity is dynamic and constantly evolving due to the continuous development of the states themselves.

The analysis of various approaches to this interaction based on the German Federal Constitutional Court, Hungarian Constitutional Court, and Italian Constitutional Court was carried out. It is noted that the interaction of CJEU rulings with constitutional identities is based on the principle of primacy of the EU law, and international human rights obligations are based on the conventional feature of the “obligation of uniform interpretation” and universal standards while ignoring the constitutional tradition of the states. It means that CJEU judgments have a higher legal force than national court judgments, while international human rights obligations should become precedents for subsequent national court judgments, not lowering the national standards of human rights protection.

Key words: Court of the European Union, constitutional court, human rights, international human rights obligations, constitution, human dignity, national identity, constitutional identity, primacy of EU law, protection of the constitution, interpretation, sovereignty, conflicts, harmonization, doctrine of friendly treatment to international law, the doctrine of the supremacy of EU law.

Дешко Л., Бойко В. Досягнення балансу: взаємодія рішень Суду ЄС і міжнародних зобов'язань з прав людини з національною конституційною ідентичністю.

В статті досліджуються підходи щодо взаємодії рішень Суду Європейського Союзу (ЄС) та міжнародних зобов'язань у галузі прав людини з конституційною ідентичністю держав. Акцентується

увага на поняттях «національна ідентичність» та «конституційна ідентичність», їх співвідношенні та введенні поняття «національна ідентичність» в європейський правопорядок після підписання Маастрихтського договору (1993). Звертається увага на те, що первинне право ЄС не містить поняття «конституційна ідентичність», але цей термін широко застосовується в рішеннях конституційних судів низки країн-учасниць ЄС. В цих рішеннях конституційні суди підіймали питання захисту конституції та конституційності в державі-члені ЄС з огляду на гармонізацію законодавства та/або рішення *ultra vires*.

В статті зазначається, що поняття конституційної ідентичності є широким, воно охоплює історичну, політичну, культурну, правову ідентичність держави, а також зв'язок національного права з міжнародним та автономним правопорядком ЄС. Ідея конституційної ідентичності є динамічною та постійно розвивається завдяки постійному розвитку самих держав.

Проведено аналіз підходів, які застосовує Федеральний конституційний суд Німеччини, Конституційний суд Угорщини та Конституційний суд Італії. Зазначається, що взаємодія рішень Суду ЄС з конституційними ідентичностями ґрунтується на принципі примату права ЄС, а міжнародні зобов'язання з прав людини ґрунтуються на конвенційній рисі «зобов'язання щодо однакового тлумачення» та універсальних стандартах, ігноруючи конституційні традиції держав. Це означає, що рішення СЕС мають вищу юридичну силу, ніж рішення національних судів, а міжнародні зобов'язання щодо прав людини мають стати прецедентами для наступних рішень національних судів, не знижуючи національних стандартів захисту прав людини.

Ключові слова: Суд Європейського Союзу, конституційний суд, права людини, міжнародні зобов'язання щодо прав людини, конституція, людська гідність, національна ідентичність, конституційна ідентичність, примат права ЄС, захист конституції, тлумачення, суверенітет, колізії, гармонізація, доктрина дружнього ставлення до міжнародного права, доктрина верховенства права ЄС.

Formulation of the problem. The interplay of CJEU rulings and human rights obligations with national constitutional identity is a complex issue that does not have an unambiguous solution.

On the one hand, firstly, the doctrine of a “friendly attitude towards international law” is an integral part of the rule of law principle. Constitutional courts are consistently and increasingly guided by the doctrine of a friendly attitude to international law, interpreting the provisions of national constitutions and national laws. Secondly, EU law is a special system of law that operates alongside international and national law. Its main characteristic features distinguishing this system of law are the priority of EU law over the national law of EU member states and the direct effect of EU law norms in their national legal systems. All normative acts of the EU member states are covered by the doctrine of the supremacy of EU law, according to which the norms of EU law have greater legal force compared to the norms of the national law of the member states, and in the event of a legal conflict between the norms of the law of the European Union and the national norms of the member states, public relations are regulated based on EU law.

On the other hand, the Constitution of the state is a systemic act that comprehensively regulates all legal relations in the legal system of the state together with their interconnections. Constitutional courts should, of course, take into account the practice of the Court of the EU, the European Court of Human Rights, based on the Convention on the Protection of Human Rights and Fundamental Freedoms, but it cannot replace the practice of national constitutional control and protection of the norms of the state constitution with this practice and the highly specialized approaches of this body. Constitutional courts of several EU member states continue to uphold the supremacy of the constitution in the national legal system.

In each specific case, the constitutional courts must weigh all the benefits and drawbacks before deciding to question the CJEU or ECtHR judgments and make a reference to the violation of Article 4(2) TEU or taking measures to protect constitutional identities.

The state of development of this problem. It is crucial to make a distinction between the European framework and the role provided by Member States within it. As Villotti stated, it is necessary to guarantee some level of consistency and, as a result, to create a minimum shared understanding of the substantive parameters of Article 4(2) TEU [18]. Besides, according to Van Der Schyff, the idea of national identity can become too nebulous to be useful and Member States might intentionally use it as a tool to reshape European law to their preferences [17]. Schyff adds to this discussion by arguing that constitutional identity helps differentiate constitutional orders based on the decisions they make, encompassing constitutional customs and rules that support governance frameworks, such as fundamental rights protection.

The purpose of the article is a critical review of the interplay of the ruling of the Court of the European Union (CJEU) and international human rights obligation (ECHR and the Charter of Fundamental Rights of the EU) with national constitutional identities.

Presenting main material. After the signing of the Maastricht Treaty (1993), the idea of national identity was introduced into the European legal order. “The Union shall respect the national identities of its Member States,” declared Article F. Since 2009, this provision has been elaborated and now Article 4(2) of the Treaty of the European Union (TEU) states the EU shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government [14].

The term “national identity” mentioned in Article 4(2) TEU is used mostly by the EU institutions and CJEU as a test for determining if the actions of the EU are legitimate. For instance, in the first ECJ ruling on Article 4(2) TEU on the case C-391/09, the Court recognized that the national language of the Member State as part of the national identity should be respected, and the EU actions were not legitimate [8].

The term “constitutional identity” is not referred to in the primary law of the EU, however, it is derived from the Member States’ Constitutional Court’s rulings [2, 29]. The purpose of these rulings is to defend the constitution and constitutionality within the Member State in case of EU harmonization activity and/or ultra vires decisions.

The concept of constitutional identity is broad, it encompasses the State’s historical, political, cultural, and legal identity, and the relationship of the national law with the international and autonomous EU legal orders. The idea of constitutional identity is dynamic and continuously evolving due to the continuous development of the States themselves.

From the established case law, it can be pointed out that usually the terms “national identity” and “constitutional identity” are used interchangeably notwithstanding the difference between them [4, 82]. For instance, Advocate General Bot in his opinion in the Melloni case recognized that constitutional identity certainly forms a part of the national identity of the Member States [9, 137-138, 142].

The debate over the interplay between national constitutional courts and EU law—using Germany, Hungary, and Italy as case studies—is highly complex and demonstrates the different ways in which these nations reconcile their commitments under EU law with their sense of national identity.

The notion of constitutional identity was first introduced during the period of the Weimar Constitution, in 1928, by Carl Schmitt and Carl Bilfinger. It was used within their different theories to justify implicit (constitutional) limits for amendments to the Weimar Constitution [13].

The German Federal Constitutional Court (BVerfG) in its decision on the compatibility of the European Union’s newly adopted primary law (Treaty of Lisbon) with the German Constitution was referring to the “national constitutional identity” [2]. Also, the Court stressed in that decision the importance of the guarantees of national constitutional identity and emphasized that the constituent power of the Member States as the masters of the Treaties corresponds to the non-transferable identity of the Constitution.

At the same time, Hungary states in the preamble of the Fundamental Law of Hungary that “protecting our identity, as it is rooted in our historical Constitution, is a fundamental duty of the State” [16].

Germany and Hungary are widely known for the protectionism of their Constitutions based on the number of cases questioning the legality of the EU legislation. These countries are highly cautious of the new EU laws, in the form of regulations, decisions, and directives, fearing some threat to the national sovereignty or violation of constitutional provisions. The behavior of the BVerfG can be described as confrontational and controlling towards the EU law [2, 271].

Another approach that strikes a balance between respecting national constitutional issues and EU integration has resulted from the “judicial dialogue” between the CJEU and national courts. Examples of this cooperative mindset include the Aranyosi case and Taricco II. Referring to national (constitutional) identity in the framework of the EU emphasizes the dual role these concepts play in upholding Member States’ sovereignty and guaranteeing the legitimacy of EU actions.

The Aranyosi case is a prime illustration of the judiciary’s transparency and collaboration in maintaining the integrity of EU law. A German court was unsure whether to allow the execution of two EAWs (European Arrest Warrants) issued by Romania and Hungary because of their deplorable prison circumstances, which included overcrowding and had already been denounced by the European Court of Human Rights [10]. The BVerfG states that if an EAW is against the EU Charter of Fundamental Rights, it should not be carried out by the State.

A similar by-nature review was carried out by the Hungarian Constitutional Court (“HCC”) in its ruling 22/2016 (XII.5), wherein it tackled a distinct type of challenge from the ones addressed by the Member States’ Lisbon decisions [6, 123].

HCC declared that it could, under special circumstances, examine whether Hungary's commitments to the EU infringe upon fundamental human rights (including human dignity) or Hungarian sovereignty as guaranteed by the Hungarian Constitution. Hungary's decision puts it firmly in line with the increasing number of EU member states (like the Federal Republic of Germany) whose constitutional courts have determined that EU member states are not required to violate their domestic constitutions to fulfill their shared EU commitments, even in light of the European Court of Justice's rulings regarding the primacy of EU law.

At the same time, the Italian Constitutional Court (ICC) questioned the conformity of the EU law with national provisions in a different way. ICC was trying to establish a "judicial dialogue" with the ruling of ECJ in the Taricco case [7] and find common ground, not criticize, or use Article 4(2) TEU as an excuse not to follow the EU law.

The idea of constitutional identity was put forward by ICC for the first time in its Decision No. 24/2017. The court requested the European Court of Justice (ECJ) to elucidate whether the Taricco ruling genuinely gave national courts the authority to disregard domestic norms, even if doing so went against a fundamental principle of the Constitution, namely the legality principle found in Article 25 TEU.

The ICC notes in paragraph 8 of its order of reference that the ECJ's ruling in Taricco does not take into account whether [Article 325 TFEU] is consistent with the fundamental tenets of the Italian constitutional order; rather, it seems to have specifically assigned this responsibility to the relevant national authorities [11].

The ICC also states that "[its] conviction (...), confirmation of which is sought from the Court of Justice, is that the intention in making these assertions was to state that the rule inferred from Article 325 TFEU is only applicable if it is compatible with the constitutional identity of the Member State, and that it falls to the competent authorities of that State to carry out such an assessment" (para 7 of the order of reference).

It is suggested that the model that emerged in the jurisprudence of the Italian CC should be called the "cooperative model with embedded identity" [6, 105].

The concept of constitutional identity also covers the issue of the interplay of international human rights obligations with the national constitutional provisions. It means that the Constitution can affect the interpretation of international obligation and application within the States, which can cause 1) the violation of Article 46 (1) of the ECHR, which states "the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties" [5] or 2) hinder the adoption and/or implementation of the EU law.

The BVerfG has an interesting approach to dealing with issues of the international human rights obligation, primacy of the EU law, and protection of the constitutional identity altogether.

In its old ruling on the Solange II case (1986), the BVerfG affirmed that "as long as the EU's level of protection of fundamental rights were substantially equal to the protection afforded by the German constitution, the Court would not review Union acts in light of the fundamental rights of the Basic Law"[15]. The BVerfG meant that the protection of fundamental rights is also a part of constitutional identity, and it cannot be allowed to have lower standards at the EU level and force the Member States with higher standards to infringe the constitutional provisions.

The Federal Constitutional Court of Germany in the case regarding the Treaty of Lisbon (Lisbon) dated June 30, 2009, noted that "even after the entry into force of the Treaty of Lisbon, the European Union does not become an entity similar to a state... The Union is not a federal state, it remains a union of sovereign states with the current principle of limited powers in certain cases..." [19]. In its decisions, the Constitutional Tribunal of Poland emphasizes that "the Constitution remains the highest law of the Republic of Poland about all international treaties that are binding on it" [20]. Nevertheless, the Court of the European Union systematically emphasizes the inadmissibility of opposing EU law to national constitutional acts [21].

The idea of constitutional identity was referred to in connection with the ECtHR judgment in the case *Magyar Keresztény Mennonita Egyház and Others v. Hungary* [12]. It was the case concerning the violation of Article 11 (freedom of assembly and association) of the ECHR by Hungarian authorities because of the different treatment of the Applicant's church in comparison to the incorporated churches. This case went not only to the ECtHR but also to the Hungarian Constitutional Court (HCC) for review. HCC agreed with the ruling of the ECtHR, but it was not a unanimous decision. András Zs Varga, the judge of the HCC, in his dissenting opinion, pointed out that the differentiation of the incorporated churches and religious communities, stated in Article VII of the Fundamental Law of Hungary is an element of the historical constitutional identity of Hungary, and the ruling meant that the historical constitutional identity was abandoned to follow the international standards [1, 94–97].

Germany and Hungary exemplify the confrontational EU law model. The BVerfG, firstly, did not allow the unauthorized additional transfer of the competence to the EU and, secondly, gave priority to immutable human dignity over EU law, thus protecting the identity of the constitution. The argument was as follows: human dignity cannot be touched, even by the constitution-amending power; therefore, it was not possible to transfer this kind of amending competence to the EU [6, 126]. At the same time, Italy tried to find a solution to the existing problems between the national law and supranational EU law.

Conclusion. Constitutional identity is a dynamic reflection of a state's ideals, developed from history, culture, politics, and jurisprudence, that creates a unique sovereign state with its own rules and goals. Diverse approaches among Member States of the EU reflect the existing and ongoing tension between them in the context of competence and influence. Despite using different approaches, Germany and Italy demonstrate a willingness to reconcile national constitutional values with EU law. Hungary, on the other hand, appears to be taking a more solitary route, giving national identity precedence over EU integration. How these countries strike a balance between upholding their constitutional identities and adhering to their obligations as EU members may determine the course of these relationships in the future.

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