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The Concept of Constitutional Identity as a Substantive Expression of the Principle of Subsidiarity

The introduction of the subsidiarity principle by the Maastricht Treaty was intended to strike a balance between the Member States and the supranational level in terms of non-exclusive competences. However, the principle of subsidiarity in the current EU structure is Janus-faced: although it was theoretically included in the founding treaty to protect the lower levels, its modus operandi is actually aimed at demonstrating the supranational level's capacity to act. Perhaps this is why the enshrinement of the subsidiarity principle in the Treaty has not lived up to expectations, and the relevant Treaty provisions have largely remained dead letters. At the same time, the need represented by the principle of subsidiarity, namely the protection of the autonomy of the Member States, remained present in European integration, which finally emerged in the concept of constitutional identity, linked to the redefined identity clause after the Lisbon Treaty. In this sense, the identity clause in Article 4(2) TEU has become the legal device or standard that is able to transfer the constitutional needs of the Member States to the level of EU law and provide the possibility for their recognition at EU level. For this to work, a cooperative approach by national constitutional courts seems essential.

Keywords: European Union, subsidiarity principle, constitutional identity, preliminary rulings, constitutional court

The unique structure of the European Union

As Azoulai and Dehousse put it, the European Union is a “paradise for lawyers”.² To achieve their common objectives, the Member States have transferred powers to the European Union, which they exercise through a legal and institutional system established by

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² AZOULAI–DEHOUSSE 2012: 354.

a specific type of international treaty.³ The historic innovation of the European Union's legal order is precisely this special system of state cooperation, which is established on the basis of international law but does not operate on the basis of international law, but rather on the basis of a *sui generis* legal and institutional system. The EU can, therefore, be understood in terms of its unique in-between situation: it has long been more than an international organisation but still less than a state.⁴ This in-betweenness has inspired a number of academic narratives, with a recurring question being the extent to which the EU can be interpreted through the tools of federalism studies. These include such ideas as legal federalism, in which the founding treaties can be seen as a functional constitution,⁵ or the idea of federalism without federation,⁶ and even a version of a dual (*layer cake*) or cooperative (*marble cake*) federalism, based on the development of the United States of America.⁷

The basis for these ideas can be traced back to the defining elements of federalism.⁸ According to Riker's classic definition,⁹ three conditions must be fulfilled to be a federal structure: first, there must be two distinct levels of government in a given geographical area (supranational level – Member State level); second, each level must have at least one autonomous power of its own (supranational and Member State exclusive powers); and finally, there must be safeguards that protect the autonomous powers of the governments (judicial procedures and principles). However, this also means that although the debates related to the 'f' dilemma¹⁰ revolve around the concepts of statehood and sovereignty, in fact this dilemma can be put in brackets: the European Union is not a sovereign state,¹¹ while the *sui generis* theory¹² describing the European Union independently of the question of statehood allows the use of the adjective federal as a structural attribute instead of the noun of federation.¹³

³ According to paragraph 157 of Opinion 2/13, "the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, judgments in *van Gend & Loos*, 26/62, EU:C:1963:1, p. 23; *Costa*, 6/64, EU:C:1964:66, p. 1158, and Opinion 1/09, EU:C:2011:123, paragraph 65)." ECLI:EU:C:2014:2454.

⁴ SÜLYÖK-ORBÁN 2017: 117. According to paragraph 156 of Opinion 2/13, "unlike any other Contracting Party, the EU is, under international law, precluded by its very nature from being considered a State." ECLI:EU:C:2014:2454.

⁵ BOGDANDY 2010: 1–2. VOIGT 2012: 13–15. This is also referred to in the judgment of the Court of Justice of the European Union in the *Les Vert* case: "It must first be emphasised in this regard that the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty." C-294/83. *Les Verts v. Parliament* ECLI:EU:C:1986:166, point 23.

⁶ BURGESS 2006: 226.

⁷ SCHÜTZE 2009: 346.

⁸ ELAZAR: 1995: 5.

⁹ RIKER 1964: 11.

¹⁰ MILLET 2012: 53.

¹¹ SCHÜTZE 2018: 263.

¹² SCHÜTZE 2018: 73.

¹³ LENAERTS 1990: 205; PERNICE 1999: 707; WEILER 2000: 2–4; WALKER 2002: 27; AVBELJ 2008: 5; VAUCHEZ 2020: 22.



The use and erosion of the subsidiarity principle

The specific legal structure of the European Union means that it has both the strengths and weaknesses of federal structures. As far as the strengths are concerned, federal structures are typically created for two reasons: to counterbalance central power, as in the case of Germany (more a feature of *coming together federalism*), and to reconcile diversity, as in Bosnia and Herzegovina, Iraq or Belgium (more a feature of *holding together federalism*). Similar advantages can be mentioned in the case of the European Union: on the one hand, the founding treaties were created as a guarantee of peace after the Second World War, the instrument of which was the establishment of interdependencies between states,¹⁴ and on the other hand, the motto of the European Union, “United in Diversity”, refers to the pluralistic nature of an integrating Europe.

The greatest threat to the federal structure is that the levels involved may feel an urge to undermine its functioning. The top tier tends to overreach its defined powers, while the bottom tier can undermine the functioning of the structure by giving up its willingness to cooperate and shirking its responsibilities.¹⁵ The identification of this danger draws attention to the second element of Riker’s definition, the distribution of competences, and the third element, procedures for resolving conflicts between the different levels, and to the principles of guaranteeing order, such as the principle of subsidiarity. As regards the distribution of competences, the distinction between supranational and national competences was unclear for a long time. However, the focus on the appropriate level of action, and with it the focus on efficient operation, has been a relevant issue since the birth of the European Union. It is also at the core of the theory of *multi-level governance*, which is interested in partnership-based governance, the maximum development and exploitation of territorial capital and the optimal use of human resources. The need to clarify competences was already expressed in the Laeken Declaration and, after the rejected Constitutional Treaty, the Lisbon Treaty was intended to find a solution. Finally, the latter distinguished between so-called exclusive and shared competences, and competences to support, coordinate and complement the actions of the Member States and coordinate economic and employment policies.¹⁶

Several mechanisms for resolving conflicts between different levels – annulment procedure and the action for failure to act on the one hand and infringement proceedings on the other – have been institutionalised before the Court of Justice of the European Union (hereinafter: CJEU),¹⁷ to which the subsidiarity principle has been added among the guarantee principles in the Single European Act in relation to environmental protection. It was subsequently enshrined as an overarching principle in the Maastricht Treaty,¹⁸ at the birth of the European Union, as a counterweight to integration, designed

¹⁴ MITRANY 1966.

¹⁵ KELEMEN 2007: 53.

¹⁶ KIRÁLY 2005; The Committee of the Regions’ White Paper on multilevel governance: <http://www.cor.europa.eu/pages/DocumentTemplate.aspx?view=detail&id=31bc9478-1acb-4870-999d-cc867f1925f6>. CRAIG 2004: 323; CRAIG 2008: 137.

¹⁷ ORBÁN 2021: 71.

¹⁸ Article 25(4) of the Single European Act and Article 3b(2) of the Treaty establishing the European Community.



to protect the competences of the Member States.¹⁹ The introduction of the principle of subsidiarity by the Maastricht Treaty was intended to strike a balance between the Member States and the supranational level as regards non-exclusive competences.²⁰

Under the current Treaty definition

“[u]nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”²¹

There are two tests hidden in this formulation. The first is the test of inadequacy of the national level, meaning that the EU shall act “when” the lower levels cannot provide a satisfactory solution in a particular area. The second is the test of comparative effectiveness, whereby the EU shall act “only if and in so far as” the action in question can “be better achieved at Union level”.²²

The enshrinement of the subsidiarity principle at the level of the founding treaty also ensured its enforceability before the CJEU. However, Protocol No 2 to the Lisbon Treaty not only provides for a judicial, *ex-post* possibility to examine subsidiarity, but also a political, *ex-ante* mechanism.²³ Under the Protocol on the application of the principles of subsidiarity and proportionality, national parliaments became the custodians of subsidiarity control, which was also intended as a solution to the so-called democratic deficit by integrating national parliaments into the EU’s decision-making procedure. This means that an *early warning mechanism* involving national parliaments can be successful if several national parliaments (or their chambers) present a reasoned opinion, which can trigger what are metaphorically known as the yellow or orange card mechanisms, which can get a draft legislative act taken off the agenda.²⁴

However, the effectiveness of both mechanisms has become questionable by now. On the one hand, the horizontal communication of national parliaments is difficult,²⁵ as shown by the fact that, since its introduction in 2009, not even a single orange card procedure was initiated by national parliaments.²⁶ On the other hand, experience also raises questions about the enforceability of the subsidiarity principle before the CJEU. The restrictive interpretation of the CJEU²⁷ came to light relatively early on, when the CJEU concluded, without further analysis, that the EU legislator had paid sufficient

¹⁹ ESTELLA 2003: 179.

²⁰ “Subsidiarity comes into play when competence is not exclusive.” MINNERATH 2008: 54.

²¹ Article 5(3) of the Treaty on European Union [TEU].

²² SCHÜTZ 2018: 257.

²³ TAMÁS 2010: 7–23.

²⁴ JANČIĆ 2015: 940.

²⁵ The Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) is the key institution for communicating between national parliaments.

²⁶ To date, the yellow card procedure has been triggered three times in total: the first on the so-called Monti II Draft Regulation, the second on the establishment of the European Public Prosecutor’s Office and the third on the Posted Workers Directive. BARRETT 2016: 433; KECSMÁR 2022: 56–58.

²⁷ TOTH 1994: 268.



attention to the subsidiarity principle in the context of a directive.²⁸ Beyond the formal fulfilment of the obligation to state reasons, the CJEU has not undertaken any quantitative or qualitative analysis when carrying out the substantive tests of Article 5(3) TEU, so, putting the second test in brackets and focusing only on the first test, it is content to leave the Council with a wide discretion as to what area it considers to be in need of EU level legislation.²⁹ Consequently, the CJEU has reduced the level of subsidiarity scrutiny to whether the EU legislature has committed a manifest error or misuse of powers, or whether the institution in question has manifestly exceeded the discretion conferred on it.³⁰

One of the reasons for the low threshold set by the CJEU may be the statement made by Antonio Tizzano, an Italian judge at the 2010 Madrid Congress of the International Federation of European Law (FIDE), on the subsidiarity scrutiny, which he said was “a political question *par excellence*”.³¹ However, in addition to the difficulty of using the concept, the enforceability of the subsidiarity principle is also hampered by the fact that while subsidiarity can, in principle, be invoked in the interests of the Member States,³² in the EU it is in fact used as an effective justification for greater integration: what needs to be justified in the case of the draft legislation is that “the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level”. In the light of all this, it is safe to assume that the concept of subsidiarity in the current EU structure is *Janus-faced*;³³ although it was theoretically included in the founding treaty to protect the lower levels, its *modus operandi* is actually aimed at demonstrating the supranational level’s capacity to act.

“Repackaging” the substantive needs hidden in the principle of subsidiarity

To understand the problem rooted in the dual nature of the principle of subsidiarity, it is necessary to return to the original meaning of the concept. The principle of subsidiarity is not a legal concept, but is essentially a social-philosophical one, which Aristotle himself had already called for.³⁴ If we approach the concept from an etymological point of view,³⁵ it is basically focused on helping the individual, a kind of “help for self-help”.

²⁸ C-233/94. *Germany v. European Parliament and Council* ECLI:EU:C:1997:231. Similarly, see C-377/98. *Netherlands v. European Parliament and Council* ECLI:EU:C:2001:523; C-508/13. *Estonia v. European Parliament and Council* EU:C:2015:403.

²⁹ C-84/94. *United Kingdom v. Council* ECLI:EU:C:1996:431; C-491/01. *R v. Secretary of State for Health, ex parte Imperial Tobacco* ECLI:EU:C:2002:741. 177–185.

³⁰ DE BÚRCA 1993: 105.

³¹ JUHÁSZ-TÓTH 2011: 43–47.

³² This is also confirmed by the second sentence of Article 1 TEU, which states that it “marks a new stage in the process of creating an ever-closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”. (Emphasis added by the author.)

³³ PACZOLAY 2006: 69–70.

³⁴ PÁLNÉ KOVÁCS 2006: 288.

³⁵ SORONDO 2008: 63.



The term subsidiarity derives from the Latin *subsidium*, which means “reserve”, and figuratively “help” or “assistance”. From the point of view of the larger scale levels, the idea is that, through decentralisation, initiatives from lower levels relieve the burden on higher levels. Subsidiarity is therefore closely linked to the principle of the common good and the idea of solidarity: the common good can be achieved through the division of labour and cooperation between the members of a community built on the principle of solidarity.³⁶ This makes it unlawful to pass on to the larger community the tasks that can be carried out at the lower level, the idea being that if the state consistently applies the principle of subsidiarity, it will operate more efficiently, as the higher levels will not have to deal with issues that smaller communities are able to deal with appropriately. As a result, this perspective sees the principle of subsidiarity as a positioning of the lower levels meaning that the further we move towards larger scale communities, they must strive to create the right conditions for the lower levels to flourish.

However, the European Union is not a structure fragmented from the centre, where tasks are delegated downwards, but rather a *coming together* structure where, in accordance with the principle of conferral, it is precisely the delegation of tasks to the supranational level that must be justified. This reverse-perspective structure was intended to incorporate the principle of subsidiarity as a kind of restraining mechanism to protect the Member States’ room to manoeuvre when the European Union was created in 1992. Nevertheless, it seems that the application of the principle does not reflect its original philosophical meaning of assistance and enabling.³⁷ While the principle of subsidiarity has been interpreted in the European Union as a fundamentally formal and jurisdictional, if you like, technical, state-organisational element, legitimising the possibility of action at the supranational level on the basis of efficiency considerations, the philosophical concept of the principle has a reverse optic, focusing on the autonomy, identity and development of smaller-scale communities. Perhaps, this is why the latter concept of subsidiarity,³⁸ which formulates substantive requirements, found its place not in the originally intended subsidiarity scrutiny, but in the concept of constitutional identity, and has risen especially after the adoption of the Lisbon Treaty, which redefined the treaty clause on the protection of national identity.³⁹

The close link between subsidiarity and constitutional identity has already been discussed in the literature since the Amsterdam Treaty.⁴⁰ However, the nexus has not received much attention, which may be related to the rather “decorative nature” of the early formulation of national identity, as evidenced by the small number of cases before the Court of Justice of the European Union. However, especially because the ordinary legislative procedure became the default rule which went together with the almost complete abolition of the veto rights, Member States continued to insist on the need to

³⁶ MINNERATH 2008: 45–57.

³⁷ “Subsidiarity is synonymous with auxiliaryity.” MINNERATH 2008: 53.

³⁸ Similarly, a distinction can be made between the terms top-down regionalisation, which is purely technical and modernising, and bottom-up regionalism, which values localism and is linked to a sense of identity and community self-organisation, and is of a permanent nature. STERCK 2018: 281.

³⁹ CLOOTS 2016: 96.

⁴⁰ “The principle of subsidiarity is closely linked to this obligation of the Union and its institutions [the Union shall respect the national identities of its Member States].” PERNICE 1999: 742.



strengthen their position with a more detailed identity clause⁴¹ resulting in the current wording of Article 4(2) TEU in 2009. According to this, “the Union shall respect the equality of Member States [...] as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”.

The increasing importance of constitutional identity in the EU context has been pointed out in the literature, for example by Michel Troper, who argues that identity means the highlighting of some constitutional principles, the function of which is, on the one hand, to distinguish the constitution from other constitutions and, on the other hand, to be used to defend the constitution.⁴² In this context, he also examined the “principle of a common constitutional tradition” developed by the CJEU as a way of capturing the common denominator of the separate constitutions of the Member States. An important difference, however, is that while national constitutional identities can be detected “within national constitutions”, common constitutional traditions can be detected “between national constitutions”. Moreover, they have different functions: the constitutional identities of Member States identify the essential content of the constitution concerned in order to distinguish between permissible and impermissible delegations of powers towards the supranational level,⁴³ whereas the function of the common constitutional traditions is to create a kind of constitutional legitimacy.

Nevertheless, unlike the subsidiarity principle, the concept of constitutional identity has legal theoretical significance as it challenges the principle of the supremacy of EU law, according to which “the validity of a community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure”.⁴⁴ While the supremacy of EU law over the so-called ordinary law is generally recognised in the Member States of the European Union,⁴⁵ this relationship is much more diverse in terms of the constitutional laws of the Member States. Examining the latter, Christoph Grabenwarter classified the Member States into three groups.⁴⁶ According to this classification, some Member States, such as the Netherlands, which has a monist legal system, fully recognise the primacy of EU law as one not derived from the constitution, but as a given, derived from EU law. This means that there can be no conflict of laws between EU law and the national constitution following the transfer of competences based on an international treaty, which was adopted by

⁴¹ CONV 375/1/02 REV 1. 12: <https://data.consilium.europa.eu/doc/document/CV-375-2002-REV-1/en/pdf>

⁴² TROPER 2010: 195, 202.

⁴³ SAJÓ–UITZ 2017: 65.

⁴⁴ C-11/70. Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel ECLI:EU:C:1970:114. point 3. The decisions following the entry into force of the Lisbon Treaty confirmed the previous doctrine, see C-409/06. Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim ECLI:EU:C:2010:503. paragraph 61: “The provisions of national law, even at constitutional level, cannot be allowed to have a negative impact on the coherence and effectiveness of EU law.” For similar reasoning, see C-399/11. Stefano Melloni v. Ministerio Fiscal ECLI:EU:C:2013:107. paragraph 59.

⁴⁵ DE WITTE 2021: 212.

⁴⁶ GRABENWARTER 2010: 85–91.



a two-thirds majority in the Dutch Parliament.⁴⁷ In contrast, another group of Member States recognise the limited supremacy of EU law over constitutional law: in their case, the supremacy of EU law over the constitution is also guaranteed by the national constitution, but with restrictions, in other words with constitutional reservations. This group includes, for example, Italy (*contro-limiti* doctrine),⁴⁸ Spain (recognition of *primacía*, but maintaining the *supremacía* of constitutional law),⁴⁹ and also Germany. Finally, the third group includes those Member States that clearly give primacy to the constitution. In this context, the author mentions Greece and France.

The latter two groups are of particular relevance to our topic, since both of them contain the formulation of a reservation related to constitutional identity. If we compare two founding Member States from the latter two groups, we can see that the German and French constitutional protection bodies have formulated different doctrinal responses to the protection of constitutional identity,⁵⁰ which have been determined in their elaboration by their constitutional culture, their different procedures and, obviously, by the petitions put before them.

L'identité constitutionnelle

In the jurisprudence of the *Conseil constitutionnel*, the issue of constitutional identity, formulated as inherent rules and principles of constitutional identity (*règles et principes inhérents à l'identité constitutionnelle de la France*) appeared in decision 2006-540 DC,⁵¹ after which it was raised as a limitation of EU law in about fifteen other decisions. With its 2006 decision, the French Constitutional Council was the first among the bodies performing constitutional court functions to formulate a limitation of this type. The source of inspiration for this, as the official commentary on the case⁵² points out, was the Treaty establishing a Constitution for Europe, from which the clause on the protection of national identity was later transferred to Article 4(2) TEU as well.

The late emergence of the examination of constitutional identity is probably due in part to the trivial reason that this conceptual construct simply did not arise in the context of EU law earlier,⁵³ but it has come to the fore during the debates taking place within the framework of the European Convention.⁵⁴ All this was further facilitated by the introduction of Article 88-1 of the Constitution, linked to the Maastricht Treaty, which created the possibility for the Constitutional Council to contribute to ensuring the effective application of EU law and to the control of its constitutionality. Prior to this, as Anne Levaide notes,⁵⁵ the relationship between the Constitutional Council

⁴⁷ VAN DER SCHYFF 2021: 340.

⁴⁸ FABBRINI-POLLICINO 2021: 210.

⁴⁹ Decision No. 1/2004 of the Spanish Constitutional Court, 13 December 2004.

⁵⁰ MILLET 2013: 27, 87.

⁵¹ 2006-540 DC 27 July 2006, paragraph 19.

⁵² *Conseil constitutionnel* 2006: 5.

⁵³ DUBOUT 2010: 453.

⁵⁴ The European Convention 2002: 12.

⁵⁵ LEVAIDE 2009.



and the CJEU was characterised mostly by ignorance and mutual trivialisation, as is illustrated by the fact that the Constitutional Council did not react to the CJEU's *Costa* and *Van Gend & Loos* judgments and simply considered EU law as international law. This means that the Constitutional Council, on the basis of Article 54 of the Constitution, in accordance with the monist doctrine, only examined whether international treaties, such as the EU founding treaties and their amendments, which are interposed between the Constitution and national legislation, are constitutional; in other words, whether the commitments contained in them may pose a threat to the essential conditions for the exercise of sovereignty (*les conditions essentielles d'exercice de la souveraineté nationale*).⁵⁶

However, the emergence of Article 88-1 of the Constitution prompted the Constitutional Council to review its previous practice, as the constitutionality of several French laws implementing various directives was referred to the Constitutional Council in 2004.⁵⁷ The panel concluded that recognition of the constitutionality of a law transposing a directive could be refused if an EU standard satisfying the conditions for direct effect was in concrete contradiction with an express provision of the Constitution (*disposition expresse contraire de la Constitution*).⁵⁸ This test, used three more times in 2004,⁵⁹ was changed in 2006 to "inherent rules and principles of constitutional identity". According to the new doctrine, the constitutionality of an implementing law can be called into question if the constitutional "hard core" is violated by the directive's provisions having direct effect, as included in the transposing law; in other words, by the sufficiently clear and unconditionally applicable provision of the directive.

The introduction of the so-called priority constitutionality question (*question prioritaire de constitutionnalité*, QPC) in Article 61-1 of the Constitution in 2008 promised to be a further significant step in the examination of the constitutionality of transposing legislation. Based on this provision, both supreme courts – the *Cour de Cassation*, at the top of the ordinary courts, and the *Conseil d'État*, at the top of the administrative courts – can initiate *ex-post* norm control of laws if a party to the proceedings claims that the law applied infringes their right or freedom guaranteed by the Constitution. However, in order for the judiciary to initiate proceedings before the Constitutional Council, they themselves must first assess the constitutionality of the transposing legislation. However, it appears from the 2007 *Arcelor judgement* of the *Conseil d'État* that the level of protection under EU law is not assessed in the context of safeguarding fundamental rights; instead, all that needs to be examined is whether the constitutional principle allegedly infringed is also protected by EU law and, if so, to presume that the appropriate level of protection is met.⁶⁰ Later, in line with this, the Constitutional Council also found that it lacked competence with regard to the principles of freedom of expression, freedom of opinion and freedom to conduct a business, as these are also guaranteed by EU law.⁶¹

⁵⁶ The first appearance of this test is linked to the examination of the Treaty of Luxembourg of 22 April 1970 amending certain budget provisions: 70-39 DC 19 June 1970, paragraph 9.

⁵⁷ GUERRINI 2015: 157.

⁵⁸ 2004-496 DC 10 June 2004, paragraph 7.

⁵⁹ 2004-497 DC 1 July 2004, paragraph 18; 2004-498 DC 29 July 2004, paragraph 4; 2004-499 DC 29 July 2004, paragraph 7.

⁶⁰ DUBOUT 2010: 454.

⁶¹ 2018-768 DC 26 July 2018.



However, it also follows from this assertion of the principle of equivalence that only principles and rules that are not guaranteed by EU law can in fact form an inherent part of constitutional identity. In other words, constitutional identity is a narrow concept, the content of which may be some specific constitutional provision that applies only to a given Member State.⁶²

Nevertheless, the Constitutional Council did not give a definition or examples of the content of constitutional identity, but instead expressed the negative expectation that the implementation of the directives and the national regulations implementing other EU acts shall not infringe the constitutional identity of France. Moreover, it is always reiterated that even if such a principle or rule were to be infringed, it is not an absolute barrier to the application of EU law, since the infringement can be remedied with the consent of the constituent power (*sauf à ce que le constituant y ait consenti*).⁶³ According to the sovereign understanding of the constituent power, the Constitutional Council does not examine the constitutionality of constitutional amendments,⁶⁴ therefore if it finds a breach of the Constitution due to EU law – whether an amendment to the founding treaty or secondary EU law – it leaves it to the sovereign decision of the constituent power to resolve the conflict of laws.

Verfassungsidentität

Until the adoption of the Maastricht Treaty, the German *Grundgesetz* did not contain a separate European clause, but EU membership was made possible on the basis of transferring sovereign powers to international organisations, as ensured under Article 24.⁶⁵ Since the German legal system can be described as moderately dualistic in its approach to the enforcement of international law, international commitments must be incorporated into the German legal system by separate legislative acts, such as the Act of 27 July 1957 ratifying the Treaty of Rome.

The standalone European clause was finally included in Article 23, according to which the Federal Republic of Germany contributes to the realisation of a united Europe through the establishment of the EU. At the same time, the clause also defines the core of the German constitution that cannot be affected by integration, by referring to the eternity clause of the Basic Law, Article 79(3).

In the context of EU membership, the idea of the protection of constitutional identity (*Verfassungsidentität*) is only mentioned in the Constitutional Court's decision revising the Lisbon Treaty,⁶⁶ but, independently of this conceptual construction, the concept of identity⁶⁷ has already appeared in the earlier Constitutional Court decisions formulating another reservation. These earlier decisions are also of particular importance, because it was in the German context that the absolute understanding of the principle

⁶² GUERRINI 2015: 159–160.

⁶³ DUBOUT 2010: 453; LEVADE 2009.

⁶⁴ DC 2003-469 26 March 2003, paragraph 2.

⁶⁵ VINCZE-CHRONOWSKI 2018: 53.

⁶⁶ BVerfGE 123, 267.

⁶⁷ POLZIN 2016: 418–421.



of primacy was formulated by the CJEU, according to which the fundamental rights contained in the German Basic Law could not constitute an obstacle to the application of EU law. Following the judgment in the *Internationale Handelsgesellschaft* case,⁶⁸ the Frankfurt Administrative Court referred the matter to the Federal Constitutional Court for a review of the Community regulations. The resulting *Solange I* decision of 1974⁶⁹ included the so-called *fundamental rights reservation*, in which the Karlsruhe panel, for the first time, emphasised the protection of identity (*die Grundstruktur der Verfassung, auf der ihre Identität beruht*). According to this, since Article 24 of the Basic Law does not allow the ratification of an international treaty that would result in a change of the basic constitutional structure, it follows that, in the framework of an international treaty that has already been ratified, no secondary law may be created that conflicts with the identity based on the basic structure.

This reasoning also implies that, in the early stages of integration, the mention of possible violations of identity was in fact an expression of the need for further deepening of integration, for the development of a fundamental rights dimension. In comparison, the test of constitutional identity developed by the Federal Constitutional Court in the Lisbon Decision has an integration-limiting character: it defends the constitutional autonomy of the Member States against European integration.⁷⁰ The identity check allows the Constitutional Court to examine whether the inviolable provisions of the Constitution have been violated.⁷¹ A possible change of identity would mean a takeover of the constituent power, which would mean the erosion of the principle of democracy and the right to vote guaranteed by Article 38 of the Basic Law,⁷² which also provides the basis for constitutional complaints against acts of public power by the EU.

In addition to the eternity clause of the *Grundgesetz*, the Lisbon Decision named five further areas related to constitutional identity as a guarantee of the framework of democratic statehood: criminal law, the monopoly on the use of military and civilian forces, basic financial decisions of state operations, decisions on living conditions that can be guaranteed within the framework of the welfare state, and the shaping of areas of particular cultural importance such as family law, religious communities and the school and training system. Matthias Cornils sees these areas as the substantive limits to integration.⁷³ The German panel argued that the transfer of powers by sovereign states cannot be achieved without leaving sufficient room for manoeuvre (*ausreichender Raum*)⁷⁴ for the Member States to determine the political direction of economic, cultural and social life. The EU institutions must therefore use the powers delegated to them, especially in the area of freedom, security and justice, in a way that maintains the framework conditions for a living democracy (*lebendige Demokratie*) at national level.

⁶⁸ C-11/70. *Internationale Handelsgesellschaft mbH kontra Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114.

⁶⁹ BVerfGE 37, 271.

⁷⁰ BESSELINK 2010: 36.

⁷¹ VOSSKUHL 2010: 196–198.

⁷² GRIMM 2009: 360–362.

⁷³ CORNILS 2017b: 856.

⁷⁴ CORNILS 2017a: 249.



In its decision, the Constitutional Court also referred to the fact that the protection of identity is also guaranteed by Article 4(2) TEU;⁷⁵ however, in its request for a preliminary ruling in the OMT case, it explained that national identity as per Article 4(2) TEU is not the same as the concept of constitutional identity, since the latter requires absolute protection, which is the task of the Constitutional Court.⁷⁶ Nevertheless, the reservation based on constitutional identity – just like the *ultra vires* control mechanism developed in the Maastricht Decision⁷⁷ – must be applied in an integration-friendly manner, initiating, where appropriate, a preliminary ruling procedure.⁷⁸ The interpretation given by the CJEU must be respected by the Constitutional Court until it appears to be objectively arbitrary (*objectiv willkürlich*) on the basis of the methodology used.⁷⁹

What can we learn from French and German jurisprudence regarding constitutional identity?

A comparison of the French and German interpretations of the concept of constitutional identity allows us to make some important observations.

First, it shows the different nature of the concept in the EU Member States, as the French and German bodies have formulated different dogmatic responses to the protection of constitutional identity. The French constitutional identity focuses on the special national characteristics, as opposed to the German eternity clause, which stipulates general values such as respect for human dignity.

In this respect, it is worth pointing out that Pierre Mazeaud, former President of the *Conseil constitutionnel*, considers that the French constitutional identity is in fact the very essence of the Republic (*essentiel à la République*).⁸⁰ In line with this, the literature suggests that the French constitutional identity is rather the identity of the state,⁸¹ as opposed to the German constitutional identity, which is the identity of the constitution. The key to the latter is the application of the principle of democracy, democratic legitimacy and, ultimately, the right to vote and the community of German citizens exercising it. This can also be linked to the constitutional models of Rosenfeld, who distinguished between the French and German models within the seven constitutional models. The

⁷⁵ BVerfGE 123, 267. 240.

⁷⁶ BVerfGE 134, 366. 29.

⁷⁷ BVerfGE 89, 155.

⁷⁸ BVerfGE 142, 123. 156.

⁷⁹ However, the Constitutional Court did not initiate a preliminary ruling when it blocked a European arrest warrant in a December 2015 decision on the grounds of a breach of German constitutional identity. (2 BvR 2735/14.) At the same time, for another European arrest warrant issued in 2017, the case was referred back to the Hamburg Court for a preliminary ruling to clarify the circumstances of the surrender. (2 BvR 424/17.) Furthermore, it initiated a preliminary ruling in the PSPP case, in which the Federal Constitutional Court, making use of its *ultra vires* test, declared the CJEU's Weiss judgment to be arbitrary (2 BvR 859/15.).

⁸⁰ Josso 2008: 198.

⁸¹ SOMSSICH 2018: 16.



former is based on the statehood defined by the territory as uniting the *demos* living there, while the latter is ethnically based, as it is the *ethnos* that defines the common statehood.⁸²

Second, the two concepts of identity presented here also indicate that the existence of the eternity clause does not necessarily lead a constitutional court to identify it with the concept of constitutional identity: Article 89 of the French Constitution has such a character, but the French Constitutional Council – unlike the German body – did not link the two elements. This may be related to the relationship of the two constitutional identity concepts to their historical context: while François-Xavier Millet argues that the identity of the Republic has its roots in the French Revolution,⁸³ the German eternity clause, formulated after the Second World War, is meant to symbolise the rejection of the historical context.

Third, and closely following from the previous point, it is important to stress that the German concept of constitutional identity is much less flexible than the French one:⁸⁴ while in France any identity violation can be eliminated by a constitutional amendment, according to the German doctrine such a thing cannot take place, since the constitutional identity connected to the eternity clause constitutes an absolute limit of EU law (“*absoluten Grenze*” der Grundsätze der Art. 1 und Art. 20 GG).⁸⁵ This absolute character also means that the concept of identity formulated in this way is potentially more conflictual.⁸⁶

Fourth, it is also important to stress that the likelihood of conflicts depends on the narrow or broad understanding of the concept of identity: the fewer and more specific elements fill the national concept of constitutional identity, the more any possible norm-collision situations may appear capable of being moderated. In this respect, however, it is also worth pointing out that the narrowly conceived but undefined concept of French identity⁸⁷ is open to the Constitutional Council’s examination in new contexts, as evidenced by the expansive practice of recent years: while the 2006 decision was only aimed at reviewing national legislation transposing directives and, in the context of that review, only the provisions that satisfied the conditions of direct effect, the examination of the breach of constitutional identity was extended in 2017 to the international agreement concluded by the EU through the free trade agreement with Canada (CETA),⁸⁸ and in 2018 to national provisions implementing the GDPR Regulation in national law,⁸⁹ and to national acts implementing the unconditional and precise provisions of EU decisions.⁹⁰ However, in none of the cases examined so far has the Constitutional Council

⁸² ROSENFELD 2010: 152–158.

⁸³ MILLET 2019: 148.

⁸⁴ REESTMAN 2009: 384.

⁸⁵ BVerfGE 153.

⁸⁶ Both the *ultra vires* control and the identity control may lead to the Federal Constitutional Court declaring the secondary EU act inapplicable (*für unanwendbar erklärt werden*) BVerfGE 142, 123. 155.

⁸⁷ For example, the official commentary to DC Decision 2008-564 refers to the principle of laicity as part of constitutional identity: Conseil constitutionnel 2008: 8.

⁸⁸ 2017-749 DC 31 July 2017.

⁸⁹ 2018-765 DC 12 June 2018.

⁹⁰ 2018-750/751 DC 7 December 2018.



found a violation of the inherent principles and rules of constitutional identity, unlike the 2015 decision of the German Federal Constitutional Court.⁹¹

Finally, it is worth drawing attention to the explicit nature of the German concept of constitutional identity, which has been identified through specific constitutional rules and which, by naming the five specific areas of statehood identified in the Lisbon Decision, seems to be close to a substantive approach to the principle of subsidiarity.⁹² The German doctrine, which is based on the principle of democratic legitimacy, not only implies that democratic legitimacy is necessary for the possible transfer of new EU competences, but also requires that the citizens' right to vote is not emptied by leaving national institutions without sufficient power of disposal.⁹³ The issue of scale brings the concept of identity closer to the principles of subsidiarity and proportionality, which thus protects the room for manoeuvre of the Member States, which must be maintained even while participating in European integration and which is at the heart of maintaining statehood capable of democratic decision-making.⁹⁴

Final thoughts

The enshrinement of the subsidiarity principle in the Treaty has not lived up to expectations, and the relevant Treaty provisions have remained largely dead letters. At the same time, the need represented by the principle of subsidiarity, namely the protection of the autonomy of the Member States, remained present in European integration, which finally emerged in the concept of constitutional identity, linked to the redefined identity clause after the Lisbon Treaty.⁹⁵ In this sense, the identity clause in Article 4(2) TEU has become the legal device or standard that is able to transfer the constitutional claims of the Member States to the level of EU law, and provide the possibility for their recognition at EU level. For this to work, a cooperative and proactive approach by national constitutional courts seems essential.

⁹¹ 2 BvR 2735/14.

⁹² On one occasion, Advocate General Kokott also referred to a possible infringement of the identity clause in Article 4(2) TEU during the discussion of the subsidiarity test. She believed that a stricter application of the subsidiarity test would require some kind of substantive, identity-based violation to be alleged. Moreover, if there is a dispute as to whether the substantive requirements of the subsidiarity principle have been respected in the application of Article 114 TFEU on the approximation of laws, the review must be carried out primarily at the political level, with the involvement of national parliaments. C-358/14. Republic of Poland v. Parliament and Council ECLI:EU:C:2016:323.

⁹³ SPIEKER 2020: 367.

⁹⁴ VAN DER SCHYFF 2021: 332.

⁹⁵ „One of the major constitutional problems for any multilevel system of governance is creating an appropriate and clear division of powers. Notwithstanding this, provisions on competencies—like fundamental rights or the institutional setting—clearly have a constitutional character. Here again, the Treaty of Lisbon provides for major progress in transparency and legal certainty by giving procedural teeth to the principle of subsidiarity, clarifying the guaranty for the respect of Member States' national identities, and spelling out the system of conferred competencies.” PERNICE 2009: 391.



In theory, there are four ways for national constitutional courts to deal with EU law: they may ignore EU law related issues, they can take a fully pro-EU approach,⁹⁶ oppose EU law, or engage in dialogue. The latter can be done either informally or in a formalised manner. On the one hand, constitutional courts may take into account the growing jurisprudence of the CJEU on national identity under Article 4(2) TEU,⁹⁷ whereby constitutional courts may determine, on the basis of the available CJEU decisions, whether a possible objection based on the protection of identity is theoretically admissible. However, this can be seen less as a dialogue than as a technique of argumentation, similar to the way in which a constitutional court might cite decisions of the European Court of Human Rights or other constitutional courts.⁹⁸

On the other hand, the request for a preliminary ruling can be considered as the formal, genuine version of the dialogue.⁹⁹ There are three advantages of the procedure that are worth highlighting. First, the CJEU needs a credible source of information in order to take into account possible constitutional claims of Member States in cases before it, and in this respect, constitutional courts can take advantage of the preliminary ruling procedure as a channel for information. Second, the transmission of elements of national constitutional traditions towards the CJEU can strengthen the inclusiveness and legitimacy of the EU legal order, as the CJEU can no longer refer only to the common constitutional traditions in its judgments. Finally, the procedure also has the function of neutralising potential conflicts and collisions of norms since constitutional courts can indicate to the CJEU the elements of their constitutional systems that require identity protection.

While the use of the preliminary ruling procedures by constitutional courts is still rare, the trend is growing,¹⁰⁰ and more and more constitutional courts are turning to the CJEU to articulate constitutional concerns of Member States, the most notable example being the Italian Taricco II case.¹⁰¹ Similarly to the spread of the concept of constitutional identity in Europe,¹⁰² it seems that involvement in the preliminary ruling procedure can also be seen as a trend: fourteen¹⁰³ of the eighteen constitutional courts in the European Union have already declared their commitment to the spirit of cooperative constitutionalism by engaging in this formal dialogue.¹⁰⁴

⁹⁶ Such is the case of the Austrian Constitutional Court, which adopted a landmark decision regarding the relationship between national law and the Charter of Fundamental Rights, which in 2012 ruled that the EU Charter of Fundamental Rights has the same status as the Austrian Constitution and that, in addition to the substantive scope of Article 51 of the Charter, all Austrian legislation and administrative acts must comply with it. U 466/11-18, U 1836/11-13, 14. 03. 2012.

⁹⁷ ORBÁN 2022: 142–173.

⁹⁸ Decisions on German constitutional identity have also been taken as a reference by the Czech, Spanish and Hungarian Constitutional Courts, as well as by the UK Supreme Court. VAN DER SCHYFF 2021: 324. 2 BvR 424/17, Röss 2019: 39, VÁRNAY 2022: 99.

⁹⁹ SÜLYÖK-KISS 2019: 395–417.

¹⁰⁰ C-42/17 Criminal proceedings against M.A.S. and M.B. ECLI:EU:C:2017:936.

¹⁰¹ CALLIESS – VAN DER SCHYFF 2019.

¹⁰² The constitutional courts of the following Member States have referred a request for a preliminary ruling to the CJEU: Austria, Belgium, France, Poland, Latvia, Lithuania, Luxembourg, Germany, Italy, Portugal, Romania, Spain, Slovakia and Slovenia. PIVODA 2023: 7.

¹⁰³ Ingolf Pernice sees the resolution of constitutional conflicts through dialogue as a shared responsibility of the courts, see PERNICE 2013: 64.



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