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## Constitutional or ethnocultural? National identity as a European legal concept

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### Abstract

Identity has long been a contested concept in the social sciences. In contrast, legal scholars have come late to the analytical discussion about the concept. It was only in the late 2000s that the concepts of national and constitutional identity became part of the European legal discourse. Today, *national identity* is a legal concept in EU law. Article 4(2) of the Treaty on European Union obliges the EU to respect the national identities of Member States. A literal understanding of this provision suggests that any domestic interpretation would be consistent with EU law. This paper challenges this view. It differentiates between national and constitutional identity. The former refers to identity that can be connected either to a community's ethnocultural characteristics or to its political institutions and foundational constitutional values. The latter is often called *constitutional identity*. Yet, this article defines the term constitutional identity differently by concentrating on identity attached to a democratic constitution. Thereby, it offers a novel, constitutionalist approach. The article argues that the concept of national identity in EU law is a constitutionalist one and demonstrates, using the example of Hungary, how an ethnocultural national identity runs counter to this constitutionalist concept and how a new constitutional identity may be developed. The implication of having a constitutional identity that respects universal constitutional principles is that such a constitutional identity would be more compatible with values at the European level.

**Keywords:** constitutional identity, national identity, ethnocultural justification, European Union, Hungary

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## 1 Introduction

Identity as a concept has been discussed and contested in many scientific disciplines. Historians, sociologists, social psychologists and political theorists have taken a critical stand against this concept (Brubaker & Cooper, 2000; Bar-Tal, 1998; Appiah & Gates, 1995; Erikson, 1974). These insights from social sciences have greatly informed the legal debates and jurisprudence on national identity. Experience has also shown that the relationship may operate the other way around: when the law vows to protect a specific understanding of national identity it can have enormous consequences for social reality, and consequently for social science. That is because state authorities have the means to enforce the law, so a legal entrenchment of a specific understanding of national identity can affect various sectors of society such as government, education, and media.

This article does not offer a general discussion and critique of the notion of identity. Instead, it focuses on constitutional identity and national identity as legal concepts and demonstrates, taking the example of Hungary, how an ethnocultural national identity claim runs counter to the European Union's constitutionalist concept of national identity. Since the article has both descriptive and normative aspects, it employs two distinctive methods – a formal-legal approach and a contextual-interpretative approach – to determine what national identity claims fit the letter and spirit of EU law.

Legal scholars came late to the analytical discussion about the concept of identity. This is because, for a long time, the term 'identity' did not play any role in European legal discourse. It was only in the 2000s that the concept became part of the continent's legal repertoire. European constitutional courts started to use the language of 'constitutional identity' (Claes, 2012, p. 124) to draw certain red lines related to further European integration. In parallel, the 2009 Lisbon Treaty, which amended the two treaties that form the EU's constitutional basis, introduced 'national identity' as a justiciable concept to challenge domestic courts' interpretations. The concept's importance was emphasised by the fact that it was reproduced in the preamble to the EU Charter of the Fundamental Rights.

Currently, both the concepts of constitutional identity and national identity play a central role as a matter of positive law. Article 4(2) of the Treaty on European Union (henceforth, TEU) obliges the EU to respect the national identities of Member States. Although EU law explicitly uses the notion 'national identity', Article 4(2) contextually suggests that national identity has constitutional relevance (Toniatti, 2013, p. 63). It protects national identities that are inherent in the Member States' fundamental structures, political and constitutional, inclusive of regional and local self-government. And, under 'constitutional' the case law of the European Court of Justice (henceforth, ECJ) understands a normative framework that embodies the universal constitutional principles: human rights, democracy, and the rule of law, as they relate to institutional practices in and beyond the state. Therefore, the national identity concept embodied in EU law is a constitutionalist one. Interestingly, although EU law refers to national identity, its concept is essentially constitutionalist.

By contrast, the Hungarian Fundamental Law uses the term 'constitutional self-identity', but its understanding is fundamentally nationalist. According to the solemn declarations and further provisions of the Fundamental Law, it is the duty of every state organ to protect Hungary's constitutional self-identity and Christian culture and ensure that the upbringing of children is based on these values (National Avowal, Articles R and XVI). Ostensibly, the qualifier 'constitutional' suggests that this self-identity is closer to a constitutionalist mean-

ing. In fact, under ‘constitutional’ the Fundamental Law understands the constitution in the empirical sense of the political condition of the state (Gosewinkel, 2018, p. 947) and not a normative framework. Moreover, the Fundamental Law applies the term ‘constitution’ only with regard to the ‘historical constitution’. The doctrine of the historical constitution can be traced back to the nineteenth century (Radnóti, 2012, p. 94) and its core ideas imply a preference for the Hungarian Kingdom’s ancient territory over the current state borders, hierarchy over republican traditions, and a ‘mystic membership’ of all ethnic Hungarians over constitutional patriotism. So, the ‘constitutional self-identity’ entrenched in the Fundamental Law does not give concrete form to universal constitutional principles; rather, it represents a national-historical ethnic category.

The Hungarian government labels this ‘constitutional self-identity’ national identity and applies Article 4(2) TEU as a means of derogating from some of its obligations imposed by EU law. For instance, by invoking Article 4(2), Hungary, together with Slovakia, turned to the ECJ to challenge the legality of Council Decision 2015/1601, which established the EU refugee relocation scheme (Case C-643/15). The claim was that Hungary is different because it rejects migration and multiculturalism (Orbán, 2018); hence, the EU should accommodate its distinctive national identity and allow the country to refrain from participating in the EU refugee relocation scheme. The ECJ rejected this claim by demanding the primacy of EU law and held that the country had breached its EU obligations (Court of Justice, 2020).

The ECJ judgment did not come as a surprise. As the adjudication scheme adopted in cases concerning national identity claims demonstrates, the ECJ respects national identity embodied by the domestic legal system from the moment of the foundation of an independent and democratic state. This suggests that national identity interpreted by domestic authorities as a concept representing a national-historical ethnic category does not correspond to EU law because it runs counter to EU foundational values as ensured by Article 2 TEU and the ECJ’s efforts to reconcile the various national identities of the Member States with these values.

This article aims to present an alternative to the ethnocultural Hungarian national identity: an inclusive yet distinctive constitutional identity embedded in a domestic democratic tradition and consistent with the EU’s foundational values. The article is structured as follows. Part 2 begins with a critical genealogy of the relationship between national identity and constitutional identity. Part 3 describes Hungary’s path from constitutional identity to ethnocultural national identity. Part 4 opens with an analytical account of the meaning and judicial interpretation of Article 4(2) TEU. This is the provision Hungary has applied to fend off EU law. Finally, Part 5 offers a way to reconstruct constitutional identity in Hungary. Part 6 concludes.

## 2 Two competing concepts: national identity and constitutional identity

On 9 September 2016, when accepting the Person of the Year Award from then-Polish-Prime-Minister Beata Szydło, Hungarian Prime Minister Viktor Orbán said:

The Central European nations must preserve their identities, their religious and historical national identities. [...] I regret to say that we must [protect these virtues] from time to time not only against the faithless and our anti-national rivals but also from time to time we must do so against

Europe's various leading intellectual and political circles. But we have no choice: we must protect our identities – Polish, Hungarian and Central European identities– in the face of everyone because otherwise there will be no room for us under the sun. (Orbán, 2016)

Here, I believe, we are presented with a false dichotomy. National identity is portrayed as if it were a thing having DNA that contains all the information necessary to develop a common identity, and as if it were so evident that community members are all familiar with it. If a community does not recognise and protect its 'naturally given' national identity, so the argument goes, it will unavoidably fail.

National identity, however, does not exist naturally, nor does it enjoy timeless validity. It is not a matter of fact; it is a matter of choice. It is an imagined and socially constructed concept (Anderson, 2017); a product of particular conjunctures of ideas and interests. Political actors construct and apply national identity according to the needs of particular historical moments, and invent traditions, sets of practices of a symbolic nature, which imply continuity with a suitable historical past (Hobsbawm, 1992, pp. 1–11). This is made possible by the fact that history offers several options among which political actors may choose concerning when and how to develop a common identity. It is the presenting of history that establishes and re-establishes identity (Rév, 1995, p. 9). History is not a natural science; it cannot be described and explained in the way scientists describe the laws of nature. Hence, one cannot exclude moral categories and judgments from history (Berlin, 1959, p. 267). But this does not mean that presenting history is inevitably biased. The reconstruction of history can be a self-reflective process; one that liberates a nation from its past, but the presenting of history can also be false and misleading. When is it false and misleading? For instance, when it in practice means an 'apologetic relationship to one's own national past' and that 'historical narratives are replaced by an ideological agenda and a sense of victimisation' (Michnik, 2009, p. 446).

The theoretical roots of progressive thought (Kumm, 2005) and the heroic history connected to the struggles for universal constitutional principles are present and waiting to be discovered in every country's past. And, of course, every country's history contains reactionary (Lilla, 2016) ideas and periods, and all have dark chapters in which they have denied the universality of human rights. For instance, many identify twentieth-century Russia with the atrocious cruelties that were committed under the Stalinist totalitarian regime; however, in 1917, before the Bolshevik seizure of power, Russia was among the first countries to grant suffrage to women (Ruthchild, 2017). To take another example, German history includes not only the tradition of the Weimar democratic parliamentary system but also of its predecessor, the Prussian authoritarian regime, not to mention the successor Nazi regime. It is, therefore, crucial to identify which part of the country's history serves as a reference point for identity-making and to determine how those architecting national identity relate to the past of the given political community. They may relate to the community's history reflexively and critically, but they may also be nonreflexive (Michnik, 2009). For example, German national identity is solidly founded on equal human dignity based on an open distancing of the polity of the Nazi past. In Russia, by contrast, aversion to the Stalinist regime is not at the heart of its identity construction. History is not linear but goes in several directions; thus, only a critical and reflexive view can differentiate between better or worse choices when it comes to decisive historical events that can serve as components of national identity.

A narrative about the common past can be an important national identity component, but not the only one. During the exercise of identity construction, political actors who aim to construct an idiosyncratic national identity will likely opt for traditional religious virtues, like loyalty or faith, and they will probably offer special protection to 'traditional marriage'. And the identity components they assemble will most likely include the protection of the majority's language and a specific mass culture that has its antecedents in particularities such as the community's local habits, rituals, and symbols (Smith, 2001, p. 571). All of these things can be distilled into a single adjective of national identity: ethnocultural. Anyone who advocates such an ethnocultural national identity stresses the need for the strict internal homogeneity of the community, and 'the elimination or eradication of heterogeneity' (Schmitt, 2000, p. 9). They also hold that the identity of the community is present prior to any constitutional order and the community consists of members who have 'their roots in the generations that have lived in the nation's territory and share its customs and culture (e.g., language, religion) since childhood' (Haller & Ressler, 2006, p. 822). The underlying foundational idea is that national communities are predicated on genetic affiliation and that ethnically defined people have a common interest and will. Accordingly, the nation is fully formed prior to the adoption of a constitution or to the creation of the state, and national identity is perceived as something given, fixed, and unchangeable that exists in nature, outside time (Geertz, 1973).

This vision, however, is a mirage (O'Toole, 2019, p. 29). The scholarship suggests that nationalists merely imagine a common ethnic community (Appiah, 2018). There is nothing natural about nations. Different groups are created and accidental entities; thus, national identity is neither self-evident nor the product of ancient tradition (Friedman, 1995, p. 503). Instead, it is socially constructed to serve the needs of the community, which is likewise invented (Brubaker, 1996, p. 276). 'The line between members and non-members of the nation has nothing to do with consanguinity' (Holmes, 2019, p. 46) because nations are contingent social constructions that never cease to undergo transformation (Appiah, 2018). So, in terms of national identity, nothing is fixed or given because all of its components are in a constant state of change.

Yet traditionally, the starting point for constructing a common identity was this pre-legal understanding of national identity. In democracies, this understanding of identity has been restricted by universal constitutional principles: the protection of human rights, democracy, and the rule of law. With the advent of this restriction, the understanding of national identity evolved from a pre-legal to a legal understanding. National identity, in this sense, is connected to the demos-oriented *state-nation* (Preuss, 1994, p. 150) or *civic-nation* (Kohn, 1944; Tamir, 1993; Kymlicka, 1995; Miller, 1995; Ignatieff, 1995) concept, whereby membership is based upon political criteria: for example, citizenship (Lilla, 2018, p. 86) or residence. This type of common identity is either called 'national constitutional identity' (Claes, 2012, p. 208) or 'constitutional identity' (Śledzińska-Simon, 2015, p. 124; Khvorostiankina, 2017, p. 45). These terms are interchangeable: they both emphasise that the interpretation of national identity has to move from a pre-legal to a legal approach (Faraguna, 2016, p. 492).

*Constitutional identity* is a concept difficult to articulate, and views differ about the exact meaning of the phrase. Some scholars approach this concept from the political people's perspective and understand constitutional identity as the people's unique 'collective self-identity' (Rosenfeld, 2012, p. 757). The main problem with this view is that although con-



stitutions are often bearers of particular conceptions of 'collective self-identity', such conceptions may also be different to the identity of the constitution that gives rules to the given people (Martí, 2013, p. 19). When the constitution is externally or internally imposed (Arato, 2018, p. 75) on the people, then the people's self-determination might not be bound up with the constitution. The most blatant manifestations of this phenomenon were the Stalinist constitutions. For example, in 1949 a Stalinist constitution was imposed on Hungary by Soviet forces (Pogany, 1993), and most of the population considered it a sham constitution that was not their own (Kertesz, 1950).

Therefore, the author of this article is more convinced by another argument that leaves out the community's characteristics from consideration and understands constitutional identity solely in terms of domestic constitutional law (von Bogdandy & Schill, 2011). This approach locates constitutional identity within constitutions themselves and considers constitutional identity to be the identity of the constitution (Troper, 2010, p. 201). The roots of this idea go back to Aristotle's *Politics*, where he argues that the identity of the polis is not constituted by its walls, but by its constitution (Aristotle/Barker, 1952, p. 98). And 'whether the community is the same over time depends on whether it has the same constitution' (Miller, 2017). In this case, Aristotle is not referring to a particular document but the organizing principles of the polis. For him, the constitution is a certain way of organizing offices and those who inhabit the polis. Accordingly, the notion of constitutional identity in this paper refers to the fact that it is not the physical characteristics or the ethnocultural form of life of the community's members that matters, but the organizing principles.

Today all countries in the world have either a codified or a non-codified constitution that forms the basis of the organisation of the state: some are constitutions that take the universal constitutional principles (human rights, democracy, and the rule of law) seriously; others are sham constitutions. Although the sham constitutions often proclaim some or all these constitutional principles, they actually reinforce the absolute power of a person or a party, and they tend to recognise human rights in an equivocal and conditional way. This article takes the qualifier 'constitutional' seriously and recognises constitutional identity as a normative concept (Polzin, 2016). Following Mattias Kumm, it calls the approach that considers certain moral commitments as constitutive of the constitutional legal order 'constitutionalist' (Kumm, 2013, p. 605). This constitutionalist approach understands the 'constitutional' in constitutional identity as the set of principles that define democratic politics. Viewed in this way, we might understand constitutional identity as referring only to the identity of those constitutions that are perceived as higher regulatory norms and that establish legitimate authority tied to the protection of human rights, democracy, and the rule of law.

How can such a constitutional identity be determined? When seeking to understand the identity of a constitution, scholars should consider the sets of norms – including the underlying values, the system of constitutional organs, and basic liberties – that provide information about the fundamental structure of a given constitutional order. Second, scholars should also consider preambles and entrenchment clauses that make certain constitutional provisions irrevocable, and constitutional amendment procedures as sources from which we are able to determine a given constitutional identity (Grew, 2013, p. 40).

Yet, constitutional texts themselves have limited potential to offer information on constitutional identity. The words of the constitution need to be interpreted. There may be inconsistencies in the text, and it is the task of constitutional institutions to 'reconcile and ac-

commodate the disharmonic elements' (Jacobsohn, 2010, p. 22). Socially embedded legislative and judicial institutions have the power to give authoritative interpretations of the constitution. During this interpretative exercise, they focus on the national contestations of universal constitutional principles and give concrete form to these principles.

Constitutional identity is thus rooted in text, reaffirmed by experience, and contingent upon the values embedded in the political culture. Jürgen Habermas – and following Habermas, Jan-Werner Müller – call this embeddedness 'constitutional patriotism'; that is, a devotion, a 'reflective civic attachment' to these values and the way these values are discussed and established in the democratic context (Habermas, 2003, p. 155; Müller, 2007). Only in this democratic context, where the growth of free people is guaranteed, may we expect spontaneous enthusiasm and responsible activism for the political community (Bibó, 2015, p. 161). Without it, constitutional identity will remain fragile and be unable to withstand the test of time.

In short, this article regards constitutional identity as a socially constructed normative concept that is rooted in the text of the democratic constitution and emerges from the dialogical process of democratic institutions. In this sense, it is not pre-institutional; instead, it is the outcome of democratic institutional structures and procedures. Constitutional identity, thus defined as entailing the various understandings of the protection of human rights, democracy, and the rule of law, can automatically be recognised as national identity, but, as we will see in the following sections, not all national identities can be recognised as constitutional identities even if they are in some form enshrined in a domestic constitution.

### **3 Hungarian dynamics: From a constitutional identity to an ethnocultural national identity**

In the second half of the twentieth century, shortly after European states experienced the terror of Nazi and Soviet totalitarianism, a combination of the concept of constitutional identity and a reflexive account of history served as a tool to facilitate constitutional democracy. In the European constitutions adopted after the Second World War, the declaration of human dignity as an inviolable principle became a manifesto for a new era of peace and democracy. Articles 22 and 27 of the 1946 first draft of the French Constitution, Article 3 of the 1947 Constitution of Italy, and Article 1 of the 1949 West German Basic Law nicely illustrate how the principle of human dignity occupied a central place in these new constitutional structures. The centrality of human dignity meant that these countries committed themselves to a universalistic constitutional project.

After successfully transitioning from authoritarianism to constitutional democracy in 1989, former Soviet-satellite Central-European countries, including Hungary, followed this path. Hungary's departure from the Soviet past and openness toward European integration played an important role in its identity formation. The country's constitutional revisions adopted in 1989–1990 (henceforth, the 1989 constitution) gave birth to a constitutional identity based on the core features of constitutionalism – the commitment to human rights, democracy, and the rule of law. The newly established constitutional court's leading decisions (e.g., decision 23/1990 that abolished the death penalty and decision 36/1994 that protected criticism of public figures) reflected this choice, and a constitutional identity developed steadily.



Although several constitutional amendments occurred during the two decades after the transition to democracy, these were mainly connected to Hungary's membership of NATO and the EU. The constitutional changes did not affect the core of the constitution, so the constitutional identity remained untouched until 2010.

The 2010 changes in the Hungarian constitutional framework went to the very heart of this identity. In that year, Viktor Orbán's Fidesz party and its satellite Christian Democratic Party gained a constitutional majority, opening the way for a profound change of direction. One year into its term, the governing coalition passed a new constitution officially called the Fundamental Law. The coalition justified its adoption with the argument that the 1989 constitution's identity had failed to comply with Hungarian national identity. For that reason, the ruling politicians argued, the country needed a 'social contract' that provided a 'foundation for the spiritual and intellectual renewal of Hungary' (Proclamation on Statement of National Cooperation, 2010; Navracsics, 2011). The Fundamental Law does not acknowledge continuity with the previous democratic regime. It explicitly breaks with the essential notion of a republic and changes the country's name from the 'Republic of Hungary' to simply 'Hungary' (Takács, 2020). The act of renaming the state is important: it suggests that the Fundamental Law's concept of identity is incompatible with the concept of the republic and that Hungary does not cherish democratic ideals.

This article does not deal with the difficult question of what caused this shift in identity. What is certain is that constitutional revisions adopted after 1989 are perceived by many political actors and their supporters not as something homegrown or evolving organically, but something imposed by external forces, such as the international community. As Viktor Orbán put it, 'we are writing our own constitution [...] And we don't want any unconsolidated help from strangers who are keen to guide us' (Orbán, 2012).

The term 'identity' features prominently in the Fundamental Law. Among the solemn declarations, we find that safeguarding Hungary's identity is the state's fundamental duty. In Article R(4), we read that every state organ must protect 'Hungary's constitutional self-identity and Christian culture'. Furthermore, the Fundamental Law explicitly mandates that the state ensure that children receive an 'upbringing based on the value system of Hungary's constitutional self-identity and Christian culture' (Article XVI).

This so-called 'constitutional self-identity' rests on three pillars: non-inclusive religious considerations, historical myths, and the mythical concept of the 'nation'. The Fundamental Law's text and the symbolism around it have a relatively straightforward religious profile. It was Easter Monday of 2011 when the Fundamental Law was signed into law by the president. The invocation to God in the very first sentence, 'God bless the Hungarians!' implies that everyone who wishes to identify with the text also identifies with this opening entreaty (Arato et al., 2012, p. 460). The legally binding preamble to the Fundamental Law, called the National Avowal, also has its foundation in religious considerations. The Avowal, as its name suggests, does not only reflect the historical role of Christianity in founding the state, but also expresses that Hungarian constitutionalism today is based upon traditional Christian views. For example, the Avowal 'recognises the role of Christianity in preserving nationhood' and mandates that the state organs protect Hungary's Christian culture.

Yet, the reference to Christianity is more about the national culture than Christianity as faith (Roy, 2016, p. 186). Some Fundamental Law provisions are worded in the spirit of traditional Christian culture. For instance, Article L defines the family according to the traditional Christian view of marriage and family by stipulating that only a man and a woman

can marry, and declares that families, which are the foundation of the nation's survival, are based on marriage, parent-child relationships, or both. The provision also clarifies that the mother is a woman; the father is a man. The protection of traditional marriage is complemented with a provision seeking to 'protect the foetal life from the moment of conception' (Article II), and another that ensures the children's right to identify with their gender at birth (Article XVI(1)). The latter provision also requires children to be raised with a 'Christian interpretation' of gender roles and have an upbringing based on national identity and Christian culture, thereby mandating that the upbringing should have both a national identity and a Christian component.

Other provisions that are not worded explicitly in the spirit of traditional Christianity, such as the basic principles (e.g., the rule of law) or some fundamental rights provisions (e.g., freedom of assembly), are to be interpreted following the national-historical narrative and Christian culture. This is because the Avowal is not just a solemn declaration which signals a certain self-interpretation of the community; it has normative strength. Article R(3) requires that all Fundamental Law provisions, even those that declare universal constitutional principles, should be interpreted according to the Fundamental Law's objectives, the Avowal and the 'achievements of the historical constitution'.

The Fundamental Law suggests that Hungary's 'constitutional self-identity' is distinctively and uniquely rooted in its 'historical constitution'. But what exactly is the historical constitution? The doctrine of the 'historical constitution' dates to 1896, the 1000th anniversary of the conquest of Hungary's territory (Bak & Bak, 1981). At that time, a claim appeared that Hungary was the only nation in Central Europe with a tradition of statehood dating back 1000 years. The doctrine was built on the Holy Crown doctrine. The crown in question was allegedly the one which the future king (later Saint) Stephen received from Pope Sylvester II as he laid the foundations of the centralised Hungarian Kingdom by converting to Christianity, but there is no reliable scientific evidence backing up this claim (Bak & Pálffy, 2020, p. 263). According to the doctrine, the crown is an ancient source of authority, a literal marker of the unity of the king and the noblemen (Péter, 2012).

The third pillar of the identity offered by the Fundamental Law is the mythical concept of the nation. Although it does not explicitly define the notion of the nation, its provisions imply that under the term 'nation' the Fundamental Law understands a political power located outside the legal order. 'The members of the Hungarian nation' include ethnic Hungarians living beyond the state, even those without an effective link to it (Körtvélyesi, 2012), but there is no place in this concept of the nation for ethnic or other minorities living within the country. Therefore, the 'nation' is construed through an invocation of trans-border co-ethnics and, in parallel, the exclusion of ethnic minorities, refugees, and 'others' who are considered not to belong to the nation.

In sum, the non-inclusive religious considerations, the historical myths of origin, and the assumed common ethnicity of the Hungarian people serve as the core of the exclusivist (Körtvélyesi & Majtényi, 2017) pre-institutional national identity provided by the Fundamental Law. From the point of view of this national identity, the 2015 EU refugee relocation system is believed to impose the model of a multicultural society that the Hungarian government opposes. The government presents the debate within the EU about migration and multiculturalism as a clash between the ideologies of national 'identity protection' and 'identity destruction' (Kövér, 2019). They claim that Hungary's foundational pillars, as a Christian nation, as a nation strengthening its historic national identity, are being under-

mined. For them, the EU is siding with the identity destroyers; thus, the ‘fight against Brussels’ is an obligation in relation to which Hungary ‘as an experienced nation in identity protection ever since 1920’ (Kövér, 2019) can lead the way.

Today, ‘the death of the nation’ and ‘the annihilation of the nation’ are frequently used phrases (Orbán, 2019). The phenomenon is not new, as István Bibó, the most prominent Hungarian political theorists of the twentieth century emphasised; a characteristic feature of the unbalanced East European political mentality is existential anxiety about the fate of the community (Bibó, 2015, p. 149). What is novel is that Hungarian politicians cite Article 4(2) TEU to justify their stance concerning immigration. They argue that they are only defending Hungary’s national identity against any abuse of power by the EU.

#### 4 National identity under Article 4(2) TEU

Article 4(2) TEU obliges the EU to respect Member States’ national identities. Although the TEU explicitly uses the notion of national identity, Article 4(2) contextually suggests that this identity has constitutional relevance and makes explicit the relevant aspects of national identity. Only those aspects that are inherent in Member States’ fundamental political and constitutional structures are relevant. Article 4(2) focuses on the Member States’ political and constitutional structures, which indicates a shift in emphasis from the pre-legal national identity to the legal understanding of constitutional identity (Schnettger, 2020: 20). Thus, although this section follows Article 4(2) TEU when using the notion national identity, it understands it as constitutional identity.

Initially, it may seem that Article 4(2) protects Member States from intervention by EU law and EU institutions and that this article provides them with a wide margin of appreciation in building national identities. The Member States tend to interpret this clause as a sort of competence clause under which the EU should seek to achieve the common objectives without ultimately undermining national identities (Faraguna, 2016, p. 519). According to this view, Article 4(2) allows Member States to use their country’s particular identity to justify a restriction of the obligations imposed by EU law.

However, when drafting Article 4(2), the European Commission rejected the idea of the identity clause as a ‘counter-limits clause’, and it did not specify that the application of Article 4(2) was limited to the cases in which the EU exercises its competencies (Ponzano, 2002, p. 5; Guastafarro, 2012, p. 281). Accordingly, Advocate-General Cruz Villalón argued that ‘it is an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as “constitutional identity”’ (Case C-62/14, emphasis in the original). In other words, Article 4(2) does not give a blank cheque to national governments to construct national identities in a manner incompatible with EU law (Kelemen & Pech, 2018). The EU has to respect national identities as long as identity retention does not undermine the EU foundational principles (Konstadinides, 2011, p. 195).

Although the concept of national identity had long been part of EU Law prior to the Lisbon Treaty, no reference was made to it in ECJ case law (Besselink, 2010, p. 41) until that treaty came to have legal effect in 2009. Since then, domestic interpretations of identity have been challenged before the ECJ several times. It is not up to the ECJ to decide on the compo-

nents of a particular Member State's national identity, but the ECJ as the final interpreter of EU law is in the position to contain and control the effect of national identity by deciding authoritatively whether the domestic interpretation is consistent with EU law (Opinion of AG Kokott, Case C-490/20). The ECJ distinguishes the valid form of national identity claims that can justify derogations from EU law from those that violate EU values. When a case comes to the ECJ, the court vets (Besselink, 2012, p. 687) Member States' arguments concerning legitimate interests. If the legitimate interest forms part of a Member State's constitutional core, it likely constitutes part of its national identity. In that case, the question the ECJ should answer is whether this characteristic of the national constitutional order is in harmony with EU values.

National identity claims of the EU Member States can take various forms. They can conform to universal constitutional principles, which occurs when domestic judges interpret and contextualise these principles in accordance with those very same principles. Nevertheless, there are national identity claims that are not consistent with EU values. Domestic constitutions and their interpretations may contain anti-constitutional principles. This arises, for instance, when national identity claims are informed mainly by ethnocultural and historical considerations. Thus, not everything presented as national identity by a Member State pertains to its national identity as protected under Article 4(2) TEU.

Article 2 TEU declares the values upon which the EU stands. It states that the 'Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. These values are worded as facts and not only as deeds, meaning that there is no possibility for a trade-off when it comes to them. Without sharing the basic presuppositions on which constitutional democracy is founded, forming a union would be impossible. Thus, the Member States' margin of appreciation under Article 4(2) applies only to non-Article 2 matters (Sadurski, 2019, p. 223) and the domestic institutions should interpret national identity in a manner consistent with the EU foundational values.

The following section will mention three post-Lisbon cases in which the domestic authorities made express reference to national identity, and the ECJ made an effort to reconcile the domestic interpretations of national identity with EU law. Although on the surface these ECJ judgments do not appear as manifestations of a coherent substantive theory of national identity, they suggest that the ECJ elaborated an adjudication scheme to review whether the domestic interpretation of national identity is consistent with EU law.

In the case of *Ilonka Sayn-Wittgenstein*, the ECJ held that the ban on a person using the noble elements of their name constituted a part of the national identity embodied in the legal system of the independent Republic of Austria (Case C-208/09). Similarly, in the *Bogendorff* case, the ECJ accepted the German constitutional choice to abolish privileges of birth and rank as an element of national identity (Case C-438/14).

Yet, as the *Malgožata Runevič-Vardyn* case illustrates, the ECJ seems to include some cultural elements – like the language of the majority – as part of the national identity concept in Article 4(2) (Case C-391/09). Being a member of the Polish minority in Vilnius, the applicant wanted to have her name registered in the civil registry in a form that complied with the rules governing Polish spelling: Małgorzata Runiewicz-Wardyn instead of Malgožata Runevič-Vardyn. The government, however, argued that not having the letter 'w' in the Lithuanian alphabet is a crucial element of Lithuanian national identity, which contributes

to the integration of citizens. The ECJ accepted this argument, so it seems that, even under EU law, there is some space for cultural considerations provided that they are connected to the national identity embodied by the domestic legal system from the moment of the foundation of the independent and democratic state.

## 5 A way to develop an EU-compatible constitutional identity

In Hungary, the independent and democratic state was founded in 1989 when the Soviet-type regime was dismantled peacefully. Since this transition process involved roundtable negotiations between delegates of the undemocratic ruling party and the democratic opposition, a coordinated transition to constitutional democracy happened (Kis, 1995, p. 399). The 1989 constitution eventually was not able to safeguard Hungarian democracy, but it had the potential to facilitate democracy and ensure the self-government of free and equal persons through the law.

The Fundamental Law and its subsequent amendments substantially reshaped this existing constitutional framework and introduced an identity based upon non-inclusive religious and historical considerations, and the mythical concept of the nation (Kovács & Tóth, 2011, p. 198). It cannot serve as a fundamental document that brings together the entire Hungarian community because its legitimacy (Tóth 2019b, p. 37) was compromised by the hasty, top-down and non-consensual process by which it was adopted and its divisive content (Arato et al., 2012; Bánkuti et al., 2012). Ostensibly, the Fundamental Law pledges allegiance to universal constitutional principles (Tóth, 2019a) and juxtaposes religious and historical values with universal principles. Yet, according to the Fundamental Law, all its provisions, including these principles are subordinate to the dictates of the historical constitution and the Christian commitments (Article R(4)). Thereby the Fundamental Law itself forecloses the possibility of interpreting its provisions in accordance with universal constitutional principles. Moreover, the Fundamental Law nullifies the entire jurisprudence of the constitutional court from 1991–2011 (closing provision 5 of the Fundamental Law); thus, none of the decisions that occurred before the enactment of the Fundamental Law can be relied on as legal authority, including all prior constitutional court decisions on human rights, democracy, and the rule of law.

The identity offered by the Fundamental Law is constructed by means of exclusion (Körtvélyesi & Majtényi, 2017), which in many ways contradicts the egalitarian claim that forms the basis of constitutional democracy: the protection of the human dignity of free and equal individuals. It privileges those who identify with the prescribed 'Christian' culture and accept the historical myths as a reference point while at the same time failing to integrate the whole population. Ultimately, the ethnocultural national identity allows only some and not all people to believe that they are part of the same political community.

Thus, it seems improbable that the ethnocultural national identity entrenched in the Fundamental Law and approved by the constitutional court in its decision 22/2016 (Halmai, 2017) would conform with Article 2 and 4(2) TEU (Cloots, 2015, p. 151). Should a case come to the ECJ, the ECJ would likely realize that a claim that Hungary's traditions, cultures, and interests are so special that they cannot follow a particular piece of EU law would weaken the authority of the ECJ itself and, therefore, ultimately, the rule of law in the EU. The ECJ would also likely consider that such a solid ethnocultural national identity claim would negatively affect the European constitutional project and shatter its very foundations (Uitz, 2016).



A constitutional identity connected to both the text and values of a democratic domestic constitution committed to universal constitutional principles is more likely to be in compliance with Article 4(2). But how might such a constitutional identity be developed?

For Hungary to comply with these principles, which are also the foundational values of the EU, it would need to adopt a new democratic constitution suitable for offering an integrative constitutional identity. When developing this identity, the constitution drafters would have to consider universal constitutional values, especially if it is within the national culture to be committed to universal values. For instance, in Hungary, the most notable example is the commitment of the 1989 constitution to ensure everyone's inherent right to life and human dignity (Article 54). However, equally, local peculiarities of constitutionalism should be taken into account. Domestic democratic institutions (national assemblies, courts, ombudspersons) play an essential role in interpreting universal principles and applying them to the local context.

Following the two-pronged tradition of the commitment to universal principles and local peculiarities of constitutionalism, the pillars of the constitutional identity can include (1) the emblematic *political institutions* of the Hungarian democratic period between 1989 and 2010, (2) the universal constitutional *principles* as they were authoritatively interpreted by the independent constitutional court, and (3) the crucial *achievements of EU law* in concretising universal principles as they were implemented in domestic law. All three ingredients – institutions, principles, and EU law achievements – are essential. I will discuss each of them in turn in the following sections.

The first pillar of constitutional identity includes a commitment to basic democratic institutions built around the 1989 constitution during the country's two decades of democracy: representative government, consensual parliamentary democracy, and meaningful constitutional review exercised by an independent judiciary.

The ideal of representative government has its roots in Hungarian legal traditions. Although there was only one very brief republican period after the Second World War, the demand for representative government was embedded deep in Hungarian collective memory – one of the central demands of the revolutionaries associated with the 1848 Hungarian Revolution was a separate national government (and not just branches of the central ministries in Vienna) and annual national assemblies in Buda-Pest (Péter, 2012, p. 143). The April Laws set up an 'independent Hungarian responsible ministry' (Péter, 2012, p. 7) and extended the right to vote to adult males who met certain property-related requirements and spoke Hungarian. A year later, in April 1849, a separate Hungarian government was established within the Austro-Hungarian Empire. Thus, when the democratic opposition made constitutional choices in 1989, it followed this constitutional tradition and demanded real popular representation and a parliamentary republic. Although the then ruling party desired a semi-presidential system with a popularly elected president (Szoboszlai, 1991, p. 203), this alternative was closely identified in the public mind with the *ancien régime*. The introduction of a parliamentary democracy with an indirectly elected president followed the example of the proclamation Act I of 1946 that declared Hungary to be a republic with a president elected by parliamentarians. Hence, the 1989 Hungarian constitutional structure evolved its own constitutional tradition concerning representative government by establishing an adapted parliamentary system instead of importing a presidential architecture.

Another crucial institutional pillar is the *consensual* parliamentary democracy native to continental Europe. It assumes the presence of more than two parties in parliament, a co-



alition government, and a sufficiently proportional electoral system. The 1989 Hungarian constitution required a consensus of the governing coalition parties to govern the country properly. The system was consensual in another sense, too. The model demanded that governing parties involve their coalition partners and the opposition, at least in constitutional matters. Hence, the coalition government was required to agree with the opposition on the system of government and foundational values. This was ensured by the two-thirds-majority rule, which was not only a formal requirement but also proof of a broad political consensus in parliament. The rationale behind incorporating the supermajority statutes (major constitutional organs and fundamental rights) was that the government did not need to reshape the constitutional architecture or limit fundamental rights to govern the state properly. However, the constitution drafters needed to be aware that two-thirds-majority rule should be built on a sufficiently proportional electoral system, otherwise a party could secure two-thirds of the parliamentary seats with a little more than fifty percent of the votes.

Furthermore, constitutional review exercised by an independent court is an institutional pillar of constitutional identity. Independent checks are of utmost importance in a unitary state with a consensual parliamentary democracy, as legislative and executive powers are intertwined in such a system. In Hungary between 1990 and 2010, constitutional review provided crucial protections, and the position of the constitutional court as an important participant in the democratic process had a stabilising effect. Thus, meaningful *constitutional review* has its roots in Hungarian democratic history, and it may also serve as the primary constraint on the executive power in the future. In 1989, during roundtable discussions, the democratic opposition had three demands concerning the constitutional court: first, judges should be elected based upon consensus; second, everyone should have standing before the constitutional court; and third, the court should have the power to review the constitutionality of all legal rules and annul unconstitutional ones. These historical demands could provide a solid basis for the institutional pillar of a constitutional judiciary.

When developing a constitutional identity, the constitution drafters should also consider the 1989 constitution's vital public participatory elements, which gave the people the right to play a meaningful role in the governance process beyond voting in elections. It provided ways to ensure direct exercise of popular sovereignty (popular initiative, referendum) and ensured the right to appeal to an ombuds-institution, which proved to be an efficient remedy against maladministration. All these elements (constitutional review, ombuds-institution and referendum) would give the people a platform to challenge rules that ought to bind them. They would provide the people with the possibility to participate in decision-making processes in a democratic way.

The constitutional identity's second pillar should encompass universal *constitutional principles* and give the independent courts a free hand in contextualising them. Since Hungary is an EU Member State and a member of the Council of Europe, the domestic contextualisation of these universal principles should be embedded within the European constitutional context. Of course, understandings, practices, and interpretations of these principles might differ to a certain degree from one Member State to another because the Member States are self-governing polities. We may think of the German doctrine of militant democracy, which aims to protect the democratic state through a variety of laws that ultimately leads to a specific understanding of free speech. By contrast, until 2010, Hungarian free speech constitutional jurisprudence embraced the idea of content neutrality and did not restrict speech in the interest of social peace. The free speech interpretation of the Hungarian

constitutional court took a different path than other European courts did, but it remained consistent with the universal constitutionalist principles. The same is true of some other leading decisions of the Hungarian constitutional court. For instance, in the death penalty judgment, the court developed a complete theory of human dignity by saying that it is a value *a priori* and beyond law and is inviolable (Decision 23/1990). Or, to take another example, the constitutional court famously stated in one of its decisions that the state was to remain neutral in cases concerning the right to freedom of conscience and that it was required to guarantee the possibility of the free formation of individual belief (Decision 4/1993). These are just a few examples of how some crucial fundamental principles may be defined according to the Hungarian and the European constitutionalist tradition.

In addition to these principles, there are *specific legal safeguards* in EU law that concretise universal principles such as freedom and equality that might also serve as pillars of constitutional identity. These include anti-discrimination laws, including the ban on ethnic discrimination and gender equality measures. A significant milestone on the road to equality in the EU was the adoption of the Racial Equality Directive (2000/43/EC), which prohibits discrimination on the grounds of racial or ethnic origin in both the public and private sectors. Likewise, the equal treatment of women and men in employment, including the principle of equal pay for equal work, is a long-standing EU constitutional tradition (e.g., Directives 2006/54/EC, 92/85/EEC and 2004/113/EC). In 2003, Hungary adopted its first anti-discrimination law (Act CXXV of 2003) in line with these EU directives; however, the drafters constructed the anti-discrimination law such that it was broader in scope. It included other prohibited grounds in addition to those required by the directives and went beyond the employment field by referring to all aspects of social life (housing, access to goods and services, etc.). This commitment to equality in everyday life could serve as one of the main pillars of constitutional identity.

Information rights may be another possible component of constitutional identity. The introduction of technology-neutral information rights, including data protection and informational self-determination, was one of the first important steps taken by the Hungarian authorities after 1989 (decisions 15/1991 and 46/1995). There were strong protections on privacy in domestic law, the institutional underpinnings of which were developed in a system composed of ombudsperson-like and judicial protection (Lánczos, 2019, p. 390). However, the Fundamental Law abolished the office of data protection ombudsperson, discharged the incumbent ombudsman prematurely, and established an administrative agency for data protection. The ECJ later held that Hungary had violated the EU law on data protection, but the ombudsperson was not reinstated (Case C-288/12). Since then, privacy and data protection have been at the heart of political discourse.

It should be emphasised that the catalogue of crucial EU law achievements considered in this part is far from exhaustive. These are just examples of how EU law is contextualised and concretised in the domestic system might serve as pillars of the new constitutional identity.

## 6 Conclusion

Identity is a contested concept in the social sciences. These contestations have informed the legal scholarship and jurisprudence on the concepts of national identity and constitutional identity. Since the late 2000s, both concepts have played a central role as a matter of positive

law in Europe. The concept of national identity is deeply entrenched in EU law, and as a result there are domestic constitutions that have explicitly incorporated it in the meantime. One of these constitutions is the Hungarian Fundamental Law, which prominently features the term 'constitutional self-identity'. Interestingly, although EU law expressly refers to national identity, its concept is, in fact, a constitutional one. By contrast, the Fundamental Law uses the term 'constitutional self-identity', but it, in fact, refers to national identity connected to ethnic and religious homogeneity and ethnic particularities. This identity serves as a tool for fending off some of the country's EU legal obligations.

EU law encompasses the concept of national identity, and the ECJ is in a position to interpret this concept and reconcile the various national identities of the Member States with EU law. Based upon the ECJ's adjudication scheme, it seems that recognition of national identity as developed by domestic state actors is conditional on its compatibility with the foundational values of the EU; thus, national identity aimed at protecting ethnic or religious purity runs counter to EU law.

For Hungary to comply with the foundational values of the EU, it would need to adopt a new democratic constitution suitable of offering an integrative constitutional identity. The article demonstrates how such an inclusive constitutional identity may be developed. It argues that a sufficiently robust constitutional identity in Hungary may be built upon the prominent political institutions set up during the two decades of democracy: representative government, consensual parliamentary democracy, and meaningful constitutional review conducted by an independent judiciary. The second pillar of the new identity may be the universal constitutional ideals as interpreted by domestic institutions, especially the constitutional court. Finally, constitutional identity may be built upon the crucial EU achievements at concretising universal principles as domestic authorities implemented them. Such achievements could include non-discrimination in all aspects of social life and informational self-determination.

Suppose the new constitution complies with the requirements of constitutionalism. In that case, the identity of the constitution may serve as an integrative identity – i.e., a mirror in which all members of society can equally recognise themselves. The implication of having an integrative identity that respects universal constitutional principles is that such a constitutional identity would be more compatible with values at the European level.

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