

International Conference of the Constitutional Court of the Russian Federation

«Constitutional Identity and Universal Values: the Art of Balance»

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**CONSTITUTIONAL IDENTITY AND UNIVERSAL VALUES: THE ART OF
BALANCING**

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Excellencies, ladies and gentlemen, dear colleagues,

It is a honor for me to take part in this conference. It is also quite symbolic that the conference takes place in St. Petersburg, a city which attests to the fact that national identity and foreign influence can be balanced very successfully. In this session, we have been asked to reflect upon the relationship between *Judiciary and Modern Populism*, this against the background of the general topic of Constitutional Identity and Universal Values. What I want to do in my presentation is to show that while the idea of constitutional identity was originally introduced as a *shield* aimed at protecting individual States against non-democratic measures adopted at the international level it is now increasingly turned into a *sword*, when used by populist forces to cover up their non-democratic practices. In my presentation, I will primarily focus on the situation in the European Union and, especially, in Central Europe.

Let me first recall that the concept of constitutional identity is not a new one. We find it already in the writings of Aristotle and other ancient thinkers. For a long time, the concept was mainly invoked within political and legal philosophy, as a means to describe and categorize political systems. In the recent decades, however, it has found a new sphere of application. It has started to be used as a practical instrument to settle, or avoid, normative and jurisdictional clashes between several legal orders or several judicial bodies. This is the result of two main phenomena, the increasingly blurred line between national, international and the EU law; and the proliferation of judicial and quasi-judicial bodies at the national and international level. The EU context, with its autonomous legal order and special judicial organs, is particularly interesting in this respect.

In the EU, the theory of *constitutional identity* first emerged in the judicial and doctrinal debate on whom should have the final say in conflicts between the EU law and national constitutional law. Trying to balance the principle of the superiority of the EU law with the idea of subsidiarity, the theory suggested that there should be no *a priori* primacy of either the EU or the national level. Rather, a solution to each problem would be found through an ongoing dialogue, mutual accommodation and self-restraint. The EU courts would keep the right to enforce common EU values. The national constitutional courts would keep the right to protect their own constitutional values. In the political area, the concept of constitutional

identify has its corollary in the concept of *national identity*. This concept is now explicitly enshrined in the Treaty on the European Union. Article 4(2) declares that: “*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*”. The Treaty however also stresses the principle of sincere cooperation under which “*the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*”.

As is obvious from this brief survey, in the EU, the concept of constitutional identity serves, to go back to the title of this conference, as a tool or, rather as, a part of balancing between various interests that might be at stake at the national or the EU level. The results of this balancing are always context specific. Yet, what is generally true is that the balancing can only produce valid and legitimate results if *three conditions* are met First, the body engaging in this balancing has to act in good faith. If it is a judicial body, it has to act independently of the political power. Secondly, the balancing act truly needs to involve balancing, i.e. it needs to take account of all interests and values at stake, not give automatic precedence to one set of such interests or values. Thirdly, balancing has to be done within the framework set by common values and has to aim at upholding, not undermining, these values. The common values are not imposed to States by the EU. Rather, they correspond to what the Venice Commission labels as the common constitutional heritage. Within the EU, the common values are set out in Article 2 of the TEU and they encompass “*the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights /.../*”. Respect for these values is one of the conditions for the accession to the EU and the failure to respect them may trigger the sanction procedure under Article 7 TEU (as is now the case for Poland and Hungary).

If these three conditions are met, then the concept of constitutional identity operates as *a shield*. It protects States against measures adopted at the EU level that would be too intrusive and/or would themselves disregard common values. A good example is provided by the case-law of the *German Federal Constitutional Court* in the Solange cases and in the Lisbon decision. In Solange I-II (1974, 1986), the Court focused on the human rights protection offered under the European Community law on the one hand and the German constitutional law on the other hand. It indicated that that it would review the EC law, and potentially disregard it, only if, and to the extent that, this law did not grant protection of human rights equivalent to that under the Basic Law.

These two cases predate the adoption of the TEU with its clause on national identity. Since then, other important decisions have been rendered by the GFCC, especially the Lisbon decision of 2009 In this case, the Court was asked to assess the compatibility with the Basic Law of the acts approving the EU Lisbon Treaty. In its decision, it explicitly invoked the concept of constitutional identity. It confirmed that this identity was an inalienable element of the democratic self-determination of a people. It also stressed that when assessing instruments of European integration, the Court was competent to engage in the identity review, i.e. the review of “*whether the inviolable core content of the constitutional identity of the Basic Law /.../ is respected*”. At the same time, the Court invoked the principle of sincere cooperation. It noted that “*the constitutional state commits itself to other states with the same foundation of values /.../. Democratic constitutional states can only gain a formative influence on an increasingly mobile society /.../ through sensible cooperation which takes account of their*

own interest as well as of their common interest". This is a clear expression of the need to balance constitutional identity and sincere cooperation and to do so within the framework set by common values. Thus, the GFCC uses the concept of constitutional identity as a shield making sure that the application of the EU law would not lower the standard of protection granted at the domestic level.

Yet, constitutional identity can also become a *sword*, when it is used in an attempt to justify national measures which actually decrease, rather than increase, the standard of protection. This is unfortunately what seems to be happening in certain Central European countries, such as Hungary. In Hungary, the concept of constitutional identity has been, since 2018, enshrined in the Fundamental Law, which, in its Article R(4) stipulates that *"the protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State"*. Yet, it was originally introduced by the Constitutional Court in 2016. In its Decision 22/2016, relating to the EU refugee relocation scheme, the Court declared that *"the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State"* and that *"respecting and safeguarding the constitutional identity /.../ is a must for everybody"*. The decision is quite interesting because when introducing the concept of constitutional identity and of the identity review, the Court explicitly relied on Solange, Lisbon and other foreign cases.

The Hungarian approach has thus been inspired by the German approach and at the first sight, the two might appear rather similar. Yet, there are at least two important differences. First, the very understanding of the constitutional identity is not the same. The German FCC links the concept to the Basic Law and, more specifically, to the so called eternity clause enshrined in its Article 79(3). The values, principles and rules indicated in this clause could be considered to define the constitutional identity of Germany. In Hungary, there is no eternity clause in the Fundamental Law and, in fact, when speaking about the constitutional identity, the Court does not seem to refer to this Law but, rather, to what it labels as the historical constitution. And while the Court has included some common values, such as the separation of powers and equal rights under this historical constitution, the concept is much more fluid than in Germany. That made scholars (Kochenov and Bárd) note that the Court's understanding of constitutional identity is *"so vague that it can be considered as an attempt at granting a carte blanche type of derogation to the executive and the legislative from Hungary's obligations under EU law"*. The second difference pertains to the relationship between the constitutional identity and common EU values. In Germany, this relationship is seen as complementary and the former could prevail only in cases when the EU level risks lowering the legal standards, as we saw in Solange. In Hungary, the constitutional identity is construed largely in opposition to the EU values and it could prevail over them even if it actually granted a lower standard of protection. This is confirmed in the recent decision 2/2019, in which the Hungarian Constitutional Court reserved for itself the final say over the compatibility with the EU law of the anti-immigrant provisions introduced into the Fundamental Law last year.

As far back as in 2013, the European Parliament, in its resolution on Hungary, noted that whereas respect for the EU common values goes hand in hand with the EU's commitment to diversity, *"a violation of the Union's common principles and values /.../ cannot be justified by national traditions nor by the expression of a national identity /.../ a referral to Article 4(2) TEU is applicable only in so far as a Member State respects the values*

enshrined in Article 2 TEU". This is the crucial idea that we should keep in mind. The concept of constitutional identity has a legitimate place in the legal argumentation. Yet it has this place only when it is used in good faith, by judicial organs operating independently of the political power, within the framework set by common values and with the aim of promoting these values. If these conditions are met, constitutional identity is a useful shield. When, on the contrary they are not met, it becomes a dangerous sword. This is increasingly the case in countries relapsing to autocracy due to the rise of populism which use the concept to undermine common values, decrease the standard of legal protection and strengthen the political elites. Yet, it is well known from the Latin maxim *Inter arma silent musae* that when sword is used, no art can be displayed. Not even the art of balancing.

Thank you for your attention.