

Gellért Nagy*

THE PROTECTION OF CONSTITUTIONAL IDENTITY IN THE CASE LAW OF THE CONSTITUTIONAL COURTS OF ROMANIA AND HUNGARY – COMPARATIVE ANALYSIS

Abstract

The constitutional identity of a state reflects the set of values by which a state identifies and distinguishes itself from other states. The concrete elements of constitutional identity are essentially derived from constitutions, but constitutional justice also plays a salient role, since the case law of each national constitutional court is intended to determine the framework of the constitutional identity of the given state. This contribution aims to compare the relevant case law of the constitutional courts of Romania and Hungary. One can observe that both constitutional courts give paramount importance to the protection of constitutional identity against the primacy of EU law; however, differences can also be identified between the elements of the Romanian and Hungarian constitutional identity. In what follows, after presenting some of the particularities of the concept of constitutional identity, the contribution will reflect on all these issues.

Keywords

Constitutional identity; eternity clause; achievements of the historical constitution; Constitutional Court of Romania; Constitutional Court of Hungary

* PhD student at the Ferenc Deák Doctoral School of Faculty of Law of the University of Miskolc, Intern at the Central European Academy, ORCID: 0000-0002-8633-3038; email: nagy.gellert@centraleuropeanacademy.hu.

INTRODUCTION – SOME CHARACTERISTICS OF THE CONCEPT OF CONSTITUTIONAL IDENTITY THROUGH THE LENS OF THE RELATIONSHIP BETWEEN THE EUROPEAN UNION AND ITS MEMBER STATES

Constitutional identity has recently become one of the most researched areas of constitutional law. By definition, it is nothing other than “*a set of norms that allow the national identity to assert itself and to oppose interference by principles or values that would be contrary to it, but also to hold dialogue with other identities.*”¹ According to another definition expressed in the legal literature, “*constitutional identity could be seen as the spirit of the constitutional culture permeating a given legal order.*”² Already, these definitions raise a number of questions. Currently, the concept of constitutional identity, its relationship to sovereignty, and its role in the European legal order are subject to interpretation, which is further hindered by the evolving case law of the constitutional courts on the subject.³

On the one hand, the issue arises as to whether the terms of constitutional identity and national identity refer to the same concept. According to some legal scholars, national identity is expressed in the process of constitution-making, and thus one can observe an “antecedent-consequence” relationship between national and constitutional identity.⁴ According to other jurists, constitutional identity is – precisely because of

¹ B. Mathieu, “Constitutional Identity”, in A. Raisz (ed.), *International Law from a Central European Perspective*, Miskolc–Budapest: CEA Publishing, 2022, p. 22.

² A. Syryt, “Impact of the European Integration Process on the amendments in the Constitutional System of Public Authorities: between integration and sovereignty. The role of the constitutional identity”, in B. Schanda (ed.), *The Character of Legislative Process Adopted to Amend the Constitution*, Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2024, p. 52. In the words of Syryt, constitutional identity is “*is a kind of system ID*”. *Ibid.*, p. 80.

³ N. Tribl, “Az alkotmányos identitás múltja és jövője Európában”, in Cs. Erdős, B. Orbán, P. Smuk (eds), *Gubernatio, Constitutio, Communitas. Ünnepi írások a 65 éves Stumpf István tiszteletére*, Budapest: Századvég Kiadó, 2022, p. 496.

⁴ T. Drinóczi, “Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach”, *German Law Journal*, 2020, Issue 2, p. 118.

this relationship – the legal expression of national identity.⁵ Although cultural and social factors should not be ignored, the “concept of national identity does focus on the structures of the state (political and constitutional), thus emphasizing constitutional identity.”⁶ While considering this approach to be accurate, I believe that in the relationship under consideration (the relationship between the European Union and its Member States), the terms of constitutional identity and national identity refer to the same set of values.⁷ One can observe that – in this context – a significant part of the legal literature on the subject also identifies national identity with constitutional identity.⁸

On the other hand, it is clear from the above definition that constitutional identity is in a complex relationship with certain elements of it (ethnicity, language, religion etc.). Moreover, it is also necessary to reflect on other forms of identity to the extent that constitutional identity can be defined.⁹ For this reason, a balance needs to be struck in the relationship between constitutional identity and other forms of identity:

⁵ Mathieu, *supra* note 1, p. 22. The incorporation of national identity in the constitution became essentially noticeable after the First World War. For details see: A. Varga Zs., “Az alkotmánybíróságok szerepe a nemzeti/alkotmányos önazonosság védelmében”, *Iustum Aequum Salutare*, 2018, Issue 2, p. 22.

⁶ H. Dumbravă, “The effects of Constitutional Court Judgments in the context of EU integration: the case of Romania as an EU Member State”, *ERA Forum*, 2024, Issue 1, p. 64.

⁷ According to some legal scholars, constitutional identity and national identity are essentially two parallel definitions of the same concept. The term constitutional identity, as used in national legal systems, defines the limits to the delegation of competences, whilst the term national identity, as used in the EU legal system, refers to the limits of EU competences. For details see A. A. Śledzińska-Simon, M. Ziolkowski, “Constitutional Identity in Poland”, in C. Callies, G. van der Schyf (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge: Cambridge University Press, 2020, p. 254.

⁸ E. Orbán, *Alkotmányos identitás az Európai Unióban*, Társadalomtudományi Kutatóközpont Jogtudományi Intézete, 2020, p. 102.; A. Schnettger, “Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System”, in C. Callies, G. van der Schyf (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge: Cambridge University Press, 2020, p. 16. However, opposing views can also be found in the legal literature. For example, Syryt argues that “[t]he scopes of the EU injunction to respect the national identity and the constitutional injunction to respect constitutional identity are not identical.” Syryt, *supra* note 2, p. 85.

⁹ M. Rosenfeld, “Identity of the Constitutional Subject”, *Cardozo Law Review*, 1995, Issue 16, pp. 1051–1052.

constitutional identity cannot merge with, but neither can it reject, the relationship with other identities.¹⁰

In terms of its content, constitutional identity can be examined from a number of perspectives: historical, linguistic, political, social, etc.¹¹ Constitutional identity is approached by national constitutional courts usually from two perspectives: one looks for constitutional identity in the constitution (in the so-called "*eternity clauses*"), whilst the other takes into account traditional, historical, and cultural factors (known as "*pre-, supra- or extra-constitutional factors*") as well.¹² Whilst constitutions contain the static elements of constitutional identity, their dynamic elements can be deduced from the supra-constitutional factors.¹³ It goes without saying that the content of constitutional identity must be sought primarily in the text of national constitutions. At the same time, the text of national constitutions is far from being "complete", hence constitutional identity cannot be deduced solely from these provisions, but one must also take into account the case law of national constitutional courts as well.¹⁴ Nevertheless, it is pivotal to point out that it is often the preamble of constitutions that provides the framework for the interpretation of constitutional identity.¹⁵ Besides, one can observe that history always shapes the content of this identity.¹⁶ Therefore, constitutional identity must always be understood in the context of the history of the given nation, since the same constitutional provisions can lead to different outcomes in different societies with divergent historical foundations.¹⁷ That is why the historical specificities of each state play a salient role in the formation, content and interpretation of its constitutional

¹⁰ *Ibid.*, p. 1055.

¹¹ A. Groza, "O analiză a articolului 4 alineatul (2) din Tratatul privind Uniunea Europeană referitor la identitatea națională a statelor membre, în contextul Hotărârii Curții de Justiție a Uniunii Europene din 18 mai 2021, Asociația „Forumul Judecătorilor din România” și alții, și al Decizie Curții Constituționale a României nr. 390 din 8 iunie 2021", *Revista Română de Drept European*, 2021, Issue 3, p. 53.

¹² Dumbravă, *supra* note 6, p. 66.

¹³ Syryt, *supra* note 2, p. 95.

¹⁴ Rosenfeld, *supra* note 9, p. 1050.

¹⁵ G. J. Jacobsohn, "Az alkotmányos identitás változásai", *Fundamentum*, 2013, Issue 1, p. 6.

¹⁶ Mathieu, *supra* note 1, pp. 30–31.

¹⁷ Rosenfeld, *supra* note 9, p. 1063.

identity. The influence of history can be observed, for example, in relation to the Romanian constitutional identity, which – according to some legal scholars – is at the same time ethnocentric and eurocentric owing to some historical reasons (e.g., the desire for union or the vicissitudes of the Phanariot rule).¹⁸ The 1866 Constitution of Romania, for example, assumed an eurocentric identity (as its main source was the Belgian Constitution) however, certain of its provisions had an ethnocentric sense (for example, its Article 7, that linked Romanian citizenship to Christian faith and which had to be amended in 1879).¹⁹ This Janus-faced character of Romanian constitutional identity was present throughout the constitutional history of Romania, with the approach that proved to be more suitable in given circumstances always taking precedence. The role of historical factors in shaping the content of Hungarian constitutional identity is even more significant, since – as it will be reflected below – Hungarian constitutional identity is closely linked to the historical constitution.

On the basis of these different approaches, constitutional identity can be defined both as the philosophical background of a constitution²⁰ (represented mainly by its historical roots, and cultural and social factors) and as concrete constitutional provisions (represented by those norms that are protected by an eternity clause).

In connection with this latter approach, one can observe a simultaneous need for internal protection (how to amend the constitution without affecting constitutional identity²¹) and external protection (what

¹⁸ M. Guțan, "Este Curtea Constituțională a României un portdrapeal al identității constituționale naționale?", *Revista Română de Drept European*, 2022, Issue 1, pp. 32-39. Similarly, the Constitution of Turkey protects the flag, the hymn, and the capital city of the country by means of an eternity clause for reasons that are typically historical. For details see: Z. J. Tóth, "The Protection of State and National Symbols Across Europe", in Z. J. Tóth (ed.), *Constitutional and Legal Protection of State and National Symbols in Central Europe*, Miskolc-Budapest: CEA Publishing, 2022, p. 32.

¹⁹ Guțan, *supra* note 18, p. 33.

²⁰ Nonetheless, one has to mention that the exact ways in which all these core values, that are elements of constitutional identity, are protected can vary widely from one state to another. B. Iancu, "Pe aici nu se trece! Identitate și prioritate la București – Varșovia – Karlsruhe – Roma – Madrid – Luxemburg", in B. Dima, V. Perju (eds), *După 30 de ani: justiția constitutională în România*, București: Editura Humanitas, 2023, p. 274.

²¹ The contrary can be also observed in some cases. For example, the constitutional identity of Spain is not linked to an eternity clause, since, according to the case law of the

kind of international obligations a state can assume without affecting its constitutional identity). These two dimensions of the protection of constitutional identity have led to the creation of the concepts of unconstitutional constitutional amendment and identity control.²²

Of the two dimensions, the need for the internal protection of constitutional identity emerged earlier. The basis for this protection lies in the separation of the original and derived constituent powers. The *pouvoir constituant* does not merely create the constitutional amending power, but must also define its specific powers.²³ Hence, in order to limit the competences of the constitutional amending power, the *pouvoir constituant* protects certain constitutional values with an eternity clause, excluding them from the scope of future amendments. In practice, eternity clauses can be divided into two main categories. On the one hand, there are explicit eternity clauses, that are directly set out in the text of the constitution, and on the other hand, implicit eternity clauses, in cases of which national constitutional courts determine – in their case law – which constitutional values are unamendable.²⁴ With respect to explicit eternity clauses, the legal literature distinguishes two main categories: clauses that provide for the unamendability of certain constitutional provisions (“*unamendable provisions*”) and clauses that provide for the unamendability of certain principles (“*unamendable principles*”).²⁵ Al-

Constitutional Court of Spain, all provisions of the Constitution can be amended, including the core principles as well. See: J. M. Pérez de Nanclares, “Constitutional Identity in Spain”, in C. Callies, G. van der Schyf (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge: Cambridge University Press, 2020, p. 283.

²² Orbán, *supra* note 8, pp. 25–26.

²³ *Ibid.*, p. 26.

²⁴ Zs. Szakály, “Constitution-making and the Permanence of the Constitution”, in L. Csík, L. Trócsányi (eds), *Comparative Constitutionalism in Central Europe*, Miskolc-Budapest: CEA Publishing, 2022, p. 208.; Zs. Szakály, “Two Sides of the Same Coin: Internal and External Protection of the Material Core of the Constitution – The Eternity Clauses as the Internal Protection”, in A. Szakács, T. Hlinka (eds), *Collection of Papers from the International Academic Conference 6th–7th February 2020. The Rule of Law as a Part of the Material Core of the Constitution*, Bratislava: Comenius University Faculty of Law, 2020, pp. 8–9.

²⁵ S. R. Dürr, “Unconstitutional Constitutional Amendments and Basic Structure Doctrine in the Case-law of European Constitutional Courts – Venice Commission Report on Constitutional Amendment”, in E. Yıldırım, Y. S. Hakyemez, M. Sen, Ö. Gedik (eds), *Prof. Dr. Zühtü Arslan'a Arşagan. Essays in Honor of Prof. Dr. Zühtü Arslan*, Ankara:

though the present article aims to examine the practical manifestation of the external protection of constitutional identity, I consider it necessary to briefly mention that while, in Romania, an explicit eternity clause is enshrined in the Constitution (Article 152 of the Constitution of Romania), in Hungary there is no such explicit clause. However, a number of jurists consider that by protecting the achievements (*acquis*) of the historical constitution, the Constitutional Court of Hungary has, in fact, created an implicit eternity clause.²⁶ A similar conclusion has been reached by the Constitutional Court of Hungary as well in its case law, when it held that "*[t]he values that make up Hungary's constitutional identity [...] are legal facts that can be waived neither by way of an international treaty nor with the amendment of the Fundamental Law, because legal facts cannot be changed through legislation.*"²⁷

The external dimension of protection of constitutional identity is essentially expressed in the relationship between European Union law (hereinafter: EU law) and national constitutions. It goes without saying that EU law has primacy over national provisions. However, Member States have different approaches on the recognition of the absolute nature of this primacy, and thus can be divided into three main groups: "*those in which Community law enjoys full primacy, States in which Community law has limited primacy and those in which national constitutional law takes primacy over Community law.*"²⁸ In those Member States which do not recognise the absolute primacy of EU law – in order to externally protect constitutional identity – national constitutional courts have created identity control. The development of identity control – although it first appeared in the case law of the Constitutional Court of Italy – was

Anayasa Makhemesi, 2024, p. 799; A. Mázi, "Procedural and substantive limitations on constitutional amendments", in B. Schanda (ed.), *The Character of Legislative Process Adopted to Amend the Constitution*, Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2024, p. 28.

²⁶ Szakály, *Constitution*, *supra note* 22, p. 208; Zs. Zétényi, "A magyar örökkévalósági klauzula: az állami és nemzeti függetlenség", *Hitel*, 2023, Issue 3, p. 64.

²⁷ Decision 32/2021. (XII. 20.) AB on the interpretation of Articles E) (2) and XIV (4) of the Fundamental Law. Reasoning [101].

²⁸ C. Grabenwarter, "National Constitutional Law Relating to the European Union", in A. von Bogdandy, J. Bast (eds), *Principles of European Constitutional Law*, Oxford-München: Hart-CH Beck-Nomos, 2010, p. 85.

mostly influenced by the decisions of the Federal Constitutional Court of Germany.²⁹

At the same time, the protection of constitutional identity, in the context of the relationship between the EU and its Member States, has not only been reflected in the practice of national constitutional courts. Under Article 4 (2) of the Treaty on European Union (hereinafter: TEU) “[t]he 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.”³⁰ This provision provides a basis for the concept that the common European constitutional tradition cannot be set against national constitutional identity and vice versa, but that they must remain in balance.³¹ Moreover, according to some legal scholars, Article 4 (2) means “that the process of constitutional integration within the EU is limited precisely by the fundamental political and constitutional structures of the Member States.”³² However, according to some legal scholars, the protection of constitutional identity and its consequences must in any case seek proportionality with the principle of the unitary application of EU law.³³

At the same time, it goes without saying that Article 4 (2) provides a framework for dialogue between the constitutional courts of the Member States and the Court of Justice of the European Union.³⁴ The protection of the national identity of the Member States under Article 4 (2) TEU can only be achieved in close cooperation between the Court of Justice of the European Union and national constitutional courts. While it is true that the Court of Justice of the European Unions is the sole interpreter of EU law, including Article 4 (2) TEU, the role of national constitutional courts in defining constitutional identity cannot be neglected, as they are the courts best placed to define the constitutional specificity

²⁹ A. R. Lupu, *Constituția și dreptul Uniunii Europene*, Editura C.H. Beck, 2022, p. 215.

³⁰ Article 4 (2) of the Treaty on European Union.

³¹ Varga Zs., *supra* note 5, p. 27.

³² E. Veress, “Reform of the Romanian Judiciary and the Cooperation and Verification Mechanism - Considering the Practice of the Romanian Constitutional Court”, *Central European Journal of Comparative Law*, 2023, Issue 2, p. 345.

³³ Schnettger, *supra* note 8, p. 33.

³⁴ L. Bojin, “Curtea Constituțională și teoria dreptului internaționalca sport periculos”, in B. Dima, V. Perju (eds), *După 30 de ani: justiția constituțională în România*, București: Editura Humanitas, 2023, p. 215.

of a given State.³⁵ Moreover, the Court of Justice of the European Union “is not in the position to determine what is and what is not part of the constitutional identity of a Member State, even if this is to determine whether EU law remains within the limits of Article 4(2).”³⁶ The preliminary ruling procedure may be an appropriate channel for cooperation between the two courts, but this must also be marked by mutual respect.³⁷ Against this background, „[i]t is the EU’s right to define the general framework of what the Member States’ national identity, inherent in their fundamental structures, political and constitutional, could be. Within this general framework, it is the Member States’ right to specify what it actually is.”³⁸ Or, according to another view, it is up to the constitutional courts of the Member States to define the content of their constitutional identity, even if the scope of application is determined by the EU institutions.³⁹

In addition, it is pivotal to underline that the value-based concept of the constitutional identity of the Member States (i.e. that takes into account historical and cultural factors as well) does not preclude them from sharing certain values with other Member States.⁴⁰ Thus, the constitutional identity of the Member States and the European identity are not mutually exclusive, but rather complementary.⁴¹ According to some legal scholars, the common European identity is fundamentally built around three symbols: the Acropolis, that represents the ancient heritage of Europe; Golgotha, referring to the religious heritage; and Roman Law as a heritage of law.⁴² At the same time, already the TEU attempts to define European identity, stating in Article 2 that

[t]he 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 com-

³⁵ S. Simon, “Constitutional Identity and Ultra Vires Review in Germany”, *Central European Journal of Comparative Law*, 2021, Issue 1, pp. 197–201.

³⁶ L.F. M. Besselink, “National and Constitutional Identity Before and After Lisbon”, *Utrecht Law Review*, 2010, Issue 3, p. 45.

³⁷ For details see: Simon, *supra* note 33, pp. 201–202.

³⁸ Schnettger, *supra* note 8, p. 15.

³⁹ Groza, *supra* note 11, p. 54.

⁴⁰ Mathieu, *supra* note 1, p. 22.

⁴¹ Drinóczi, *supra* note 4, p. 114.

⁴² J. Martonyi, *Nemzet és Európa*, Ludovika Egyetemi Kiadó, 2021, p. 167.

mon to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.⁴³

All in all, taking into account the different approaches, constitutional identity refers to the values by which a state identifies and distinguishes itself, and at the same time, to that set of norms which it seeks to protect both against future constitutional amendments and against the principle of primacy of EU law. In the following, the present article will examine the external aspect of the protection of constitutional identity through the case law of the constitutional courts of Romania and Hungary. At the very outset, it should be stressed that the constitutional courts of both states attach great importance to this issue.

I. THE PROTECTION OF CONSTITUTIONAL IDENTITY IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF ROMANIA

The protection of constitutional identity has undergone a noticeable evolution in the case law of the Constitutional Court of Romania, since it first referred to identity control in Decision No 683 of 2012.⁴⁴ In the given Decision, the Constitutional Court solved a legal dispute of a constitutional nature between public authorities, the core issue of which was whether the President of Romania or the Prime Minister should represent the State at meetings of the European Council. In its reasoning the Constitutional Court underlined that the essence of the European Union lies in the fact that the Member States have delegated certain competences to the Union in order to achieve common goals. However, this delegation must not ultimately lead to a violation of national constitutional identity.

The Constitutional Court also pointed out that

⁴³ Article 2 of the Treaty on European Union.

⁴⁴ Published in Official Gazette No 479/2012.

Member States retain competences that are inherent in the preservation of their constitutional identity, and the transfer of competences, as well as the rethinking, accentuation, or establishment of new guidelines within the framework of competences already transferred, is within the constitutional margin of appreciation of the Member States.⁴⁵

By this principle, the Constitutional Court has not only declared the protection of constitutional identity, but has also determined that the future transfer of competences or the reconsideration of competences already transferred is a task of the Member States. In essence, therefore, it is only the delegation of competences that is allowed, not the unilateral acquisition of competences by the European Union.

The specificity of this first decision on the subject is that – in relation to European integration – the protection of constitutional identity was raised in solving a legal conflict between national public authorities. Furthermore, it is salient to note that the Constitutional Court has significantly relied on the case law of the Federal Constitutional Court of Germany (e.g., the decision on the Treaty of Lisbon was referred to in the reasoning).

Although the provisions of EU law are not subject to the review of the Constitutional Court, according to some jurists – by referring to the protection of constitutional identity – the Constitutional Court created a specific procedure to prevent the violation of this identity by EU law norms.⁴⁶ At the same time, one should note *“that not every conflict with the Constitution can lead to the application of this constitutional limit, but only those that reveal a certain level of severity in relation to the identity and sovereign existence of the State.”*⁴⁷

In another Decision, also issued in 2012, the Constitutional Court examined the constitutionality of the provisions amending the pensions

⁴⁵ Decision No 683 of 2012 of the Constitutional Court of Romania. Reasoning II.1.

⁴⁶ K. Benke, A. Costin, “Consecințe ale receptării jurisprudenței Curții de Justiție a Uniunii Europene și a Curții Europene a Drepturilor Omului în jurisprudența Curtii Constituționale în materie administrativă” *Revista Română de Drept European*, 2016, Issue 3, p. 92.

⁴⁷ *Ibid.*, 92. According to a similar opinion *“this exception to the primacy of EU law would seem to be restricted to issues of constitutional identity, which would suggest that constitutional provisions which are not fundamental and hence do not contribute to the very identity of the constitution do not share in that privileged position vis-à-vis EU law.”* Besselink, *supra* note 34, p. 48.

of the Members of Parliament.⁴⁸ In this context it underlined that “*each Member State, by virtue of the principle of national constitutional identity, enjoys complete freedom to lay down the regulatory framework governing the status of Members of Parliament who serve the national legislature, including the legal regime governing the property rights attached to the exercise of these public functions.*”⁴⁹ Thus, in essence, the Constitutional Court held that the status of Members of Parliament is an inherent part of the constitutional identity of the Member States. One can observe that the Constitutional Court of Romania, in its first decisions on this issue, established that some state competences form part of the constitutional identity of Romania.

The next Decision in which the Constitutional Court invoked the concept of constitutional identity was issued in 2015,⁵⁰ when it examined the constitutionality of the provisions on collective dismissals of the Law on insolvency proceedings in the context of an *ex post* review of constitutionality. Within the framework of this Decision, the Constitutional Court – when examining the constitutional relevance of the provisions of Article 153 (1) (e) of the Treaty on the Functioning of the European Union, of Article 27 of the Charter of Fundamental Rights of the European Union, and of Council Directive 98/59/EC – noted that these provisions of EU law do not infringe the Romanian national constitutional identity.⁵¹ On this basis, the national provisions on collective dismissals should be in line with the relevant EU law norms and, as a consequence, employees should be guaranteed the right to information in the event of a collective dismissal.

It is worth noting that, in all these initial decisions relating to the protection of constitutional identity, “*unlike the French or German cases, the Romanian Constitutional Court did not define constitutional identity, but it made clear that aspects relating to the exercise of sovereignty [...] will be protected in relation to the principle of primacy of EU law.*”⁵²

⁴⁸ Decision No 964 of 2012 of the Constitutional Court of Romania. Published in Official Gazette No 23/2013.

⁴⁹ *Ibid.*

⁵⁰ Decision No 64 of 2015 of the Constitutional Court of Romania. Published in Official Gazette No 286/2015.

⁵¹ *Ibid.*, Reasoning 32.

⁵² Lupu, *supra* note 28, p. 235.

In another Decision, pronounced in 2018,⁵³ the Constitutional Court essentially reiterated the principles set out in its previous case law. In the given Decision – in which it ruled that the abolition of certain situations of conflict of interest of persons holding public office was unconstitutional – the Constitutional Court reaffirmed that, under the Treaty of Accession, Romania had undertaken to fulfil in good faith its obligations arising from accession and not to interfere in the regulation of areas where the European Union has exclusive competence. However, there is a clear constitutional limit to all these obligations, which is marked by national constitutional identity. Moreover, the Constitutional Court emphasized that *“the Fundamental Law of the State – the Constitution – is the expression of the will of the people, i.e. it cannot lose its binding force simply because of a divergence between its provisions and the European one.”*⁵⁴ With regard to this latter conclusion, the Constitutional Court referred to the case law of the Constitutional Tribunal of Poland.

Last, but not least, one has to reflect on the recent decisions of the Constitutional Court concerning the operationalization of the Section for the Investigation of Offences in the Judiciary (hereinafter: SIOJ, in Romanian: *Secția pentru investigarea infracțiunilor din justiție*). When Romania acceded to the EU, it devoted itself to meeting certain commitments concerning the judiciary and the fight against corruption. To monitor these commitments, a Cooperation and Verification Mechanism was established by Decision 2006/928/EC. Romania in 2018 set up a special authority, namely the SIOJ, to investigate certain criminal offences committed by judges and prosecutors. The Constitutional Court of Romania examined in two decisions the constitutionality of the government’s emergency ordinance on the operationalization of this authority. In the course of these constitutional reviews, the Constitutional Court also examined, along the lines of the objections and exceptions raised by the petitioners, the relationship between the provisions on the operationalization and functioning of the SIOJ and the reports issued under the Cooperation and Verification Mechanism.

⁵³ Decision No 104 of 2018 of the Constitutional Court of Romania. Published in Official Gazette No 446/2018.

⁵⁴ *Ibid.*, Reasoning 90.

In its first Decision⁵⁵ on this issue – in 2019 – the Constitutional Court highlighted that the reports issued under the Cooperation and Verification Mechanism are merely recommendations and that neither these reports nor Decision 2006/928/EC have a certain level of constitutional relevance, therefore these provisions cannot be direct norms of reference in constitutional review.⁵⁶ Concerning the protection of constitutional identity, the Constitutional Court emphasized that, by the accession, Romania undertook to respect the exclusive competence of the EU in certain areas and not to adopt national provisions that would be in conflict with its obligations as a Member State. At the same time, all these commitments must not infringe Romanian constitutional identity.⁵⁷ Moreover, *“it is within the exclusive competence of the Member State to determine the organization, functioning and delimitation of powers between the different bodies of the prosecution authorities.”*⁵⁸

This decision brought significant novelty into the protection of Romanian constitutional identity. Although the Constitutional Court has still not defined the exact areas or elements that are part of this identity, by highlighting the organization and functioning of the different bodies of the prosecution authorities it anticipated that the organization of the judiciary is considered to be part of it.

The elements of the Romanian constitutional identity were somewhat nuanced in Decision No 390 of 2021.⁵⁹ In the given Decision, the Constitutional Court – again examining the constitutionality of the government emergency ordinance on the operationalization of the SIOJ – pointed out that it goes without saying that, under Articles 148 (2) and (4) of the Constitution, EU law takes primacy over conflicting provisions of national law. However, according to the Constitutional Court, *“this precedence of application must not be perceived as removing or disregarding the national constitutional identity enshrined in Article 11 (3) in conjunction with Article 152 of the Fundamental Law, as a guarantee of the fundamental core*

⁵⁵ Decision No 137 of 2019 of the Constitutional Court of Romania. Published in Official Gazette No 295/2019.

⁵⁶ *Ibid.*, Reasoning 78.

⁵⁷ *Ibid.*, Reasoning 98.

⁵⁸ *Ibid.*, Reasoning 101.

⁵⁹ Decision No 390 of 2021 of the Constitutional Court of Romania. Published in Official Gazette No 612/2021.

identity of the Romanian Constitution and which must not be relativized in the process of European integration.”⁶⁰

Hence, according to this reasoning of the Constitutional Court, any EU law provision that is contrary to the Constitution of Romania does not take primacy over it and can be applied – in accordance with Article 11 (3) – only after the amendment of the Constitution. However, the limits of this amendment are set out in Article 152 of the Constitution, in the form of an eternity clause.⁶¹

On the basis of these principles, one can state that the Constitutional Court considers as elements of the Romanian constitutional identity all those constitutional provisions that are protected by means of an eternity clause under Article 152 of the Constitution. According to this Article, it is protected by an eternity clause, thus – according to the reasoning of the Constitutional Court – it is an element of Romanian Constitutional identity “*the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and the official language.*”⁶² In addition, under paragraph (2) of the same Article, the current level of guarantee of fundamental human rights and freedoms is also protected, and thus is an element of the Romanian constitutional identity. This approach of the Constitutional Court “*seems to endorse the German Constitutional Tribunal’s perspective on the ‘eternity clause’.*”⁶³

According to some legal scholars, Article 152 of the Constitution provides for some fundamental constitutional principles, values, institutions which become intangible even for the derived constituent power [...]. Consequently, by declaring them, the essential and intangible constitutional core of identity is created, as it provides them with special constitutional protection, a preservation and conservation for ‘eternity’, so that only a new original constituent power would have the right to issue another regulation.⁶⁴

⁶⁰ *Ibid.*, Reasoning 81.

⁶¹ Guțan, *supra* note 18, p. 31.

⁶² Article 152 (1) of the Constitution of Romania.

⁶³ A. R. Lupu, “Identitatea constituțională națională și dreptul Uniunii Europene”, in V. Stoica (ed.), *CJUE și CCR, identități în dialog*, București: Universul Juridic, 2022, p. 295.

⁶⁴ A. Varga, “Identitatea constituțională națională – sursă de conflicte sau de soluții? Unele aspecte doctrinare și jurisprudențiale”, in Ș. Deaconu, E. S. Tănărescu (eds), *In*

With regard to these norms protected by an eternity clause, however, it is pivotal to underline that “[t]hese constitutional institutions and values are not elements of constitutional identity because they are protected by eternity clause, but they are protected by eternity clause because they are elements of Romanian constitutional identity.”⁶⁵

According to a criticism expressed in the legal literature, although it is a fact that the Constitutional Court has indicated the source of the elements of the Romanian constitutional identity, it has not justified its choice, nor how the eternity clause can be interpreted as a source of constitutional identity.⁶⁶

At the same time, the conclusion that, by issuing the above Decision, the Constitutional Court precisely defined, as a closed list, the elements of Romanian constitutional identity is disputed in the legal literature. According to some legal scholars, the provisions protected by the eternity clause “represent only a ‘core identity’.”⁶⁷ In a series of decisions, the Constitutional Court itself found that some other aspects and/or competences also form part of Romanian constitutional identity.⁶⁸ Based on these observations, according to Manuel Guțan, it would be erroneous to limit the Romanian constitutional identity solely to the elements protected by the eternity clause.⁶⁹ Other jurists have taken an even more strident view, concluding that the Constitutional Court used constitutional identity as a *carte blanche* against the absolute primacy of EU law, without even defining it.⁷⁰

Honorem Ioan Muraru. *Despre Constituție în mileniul III*, București: Editura Hamangiu, 2019, p. 455.

⁶⁵ M. Guțan, “Curtea Constituțională a României în căutarea identității (constituționale) pierdute”, in B. Dima, V. Perju (eds), *După 30 de ani: justiția constituțională în România*, București: Editura Humanitas, 2023, p. 270.

⁶⁶ Guțan, *supra* note 18, pp. 30, 32.

⁶⁷ T. Toader, M. Safta, “Constitutional Identity and Relations Between EU Law and Romanian Law”, in A. Varga Zs., L. Berkes (eds), *Common Values and Constitutional Identity. Can Separate Gears Be Synchronised?*, Miskolc-Budapest: CEA Publishing, 2023, p. 299.

⁶⁸ *Ibid.*

⁶⁹ Guțan, *supra* note 18, p. 39.

⁷⁰ R. Bercea, “Cântecul sirenelor. Curtea Constituțională a României ca ulise dezvăluit”, in V. Stoica (ed.), *CJUE și CCR, identități în dialog*, București: Universul Juridic, 2022, p. 76.; R. Bercea, “Un interlop prins în conversație”, in B. Dima, V. Perju (eds), *După 30 de ani: justiția constituțională în România*, București: Editura Humanitas, 2023, p. 191.

Moreover – although the Constitutional Court of Romania defined constitutional identity from the perspective of the constitutional norms that are protected by an eternity clause – when examining constitutional identity, one has to take into account the value-based approach as well. For example, Article 1 (3) of the Constitution states that “*Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values.*”⁷¹ These core values, in my opinion, are also part of the constitutional identity of Romania, and the Constitutional Court has ruled on their protection in several cases. Furthermore, the Romanian constitutional identity should also reflect the identity of the national minorities living on its territory.⁷² Moreover, it is worth mentioning that Marian Enache, the President of the Constitutional Court of Romania, expressed in a communiqué in 2025 that there is a constitutional order resulting from EU and Nato membership, and from belonging to Western democracies, that must be protected, among others, due to constitutional identity.⁷³ It is clear from this statement that the shared European and Western values form part of the constitutional identity of Romania. Against this background, it is expected that the case law of the Constitutional Court will be further enriched with relevant principles in the near future.

In its Decision, the Constitutional Court also commented on the provisions of Article 4 (2) of the TEU. In this respect, it pointed out that the relevant provision of the TEU “*means that the process of constitutional integration within the EU is limited precisely by the fundamental political and constitutional structures of the Member States.*”⁷⁴ Consequently, similarly to what has been stated in the legal literature, the Constitutional Court also held that Article 4 (2) of the TEU sets the limits of the competences of the EU and of the primacy of EU law.

⁷¹ Article 1 (3) of the Constitution of Romania.

⁷² For details see: Guțan, *supra* note 18, pp. 41–43. For details on the protection of the identity of national minorities, see: Besselink, *supra* note 34, pp. 42–43.

⁷³ Communiqué of the President of the Constitutional Court of Romania on the publication of Decision No 7 of 2025 on the appeals lodged against the Decision of the Central Electoral Bureau No 18D of March 9, 2025.

⁷⁴ Decision No 390 of 2021 of the Constitutional Court of Romania. Reasoning 82.

Briefly summarizing the case law of the Constitutional Court, one can note that the protection of constitutional identity has been invoked for more than ten years, but some of its elements were only nuanced in Decision No. 390 of 2021. Furthermore, it can also be noted that the Constitutional Court has a preference for referring to the constitutional practice of other states (e.g., Germany, Poland) when examining the protection of constitutional identity. Last, but not least, one should also outline that the Constitutional Court seeks to protect constitutional identity both in the context of the exercise of some competences by the EU and the absolute primacy of EU law. According to some legal scholars, in the case law of the Constitutional Court, constitutional identity appears as a “red line” in the context of the transfer of sovereign competences.⁷⁵

II. THE PROTECTION OF CONSTITUTIONAL IDENTITY IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF HUNGARY

In Hungary, the protection of constitutional identity has taken a somewhat different path compared to Romania. Concerning this issue, two decisions of the Constitutional Court of Hungary are salient to highlight. The Constitutional Court explicitly referred to the identity control in a Decision issued in 2016,⁷⁶ whilst it interpreted the provisions of Article E) (2) of the Fundamental Law that stipulates the exercise of certain national competences through the institutions of the EU. The referral was made in relation to Council Decision (EU) 2015/1601, under which 1294 persons would have been transported to Hungary.

In applying the identity control, the Constitutional Court underlined that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by

⁷⁵ At the same time, the legal scholars referred to also emphasized that further clarification of the concept of constitutional identity by the Constitutional Court is pivotal. Iancu, *supra* note 20, p. 286.

⁷⁶ Decision 22/2016. (XII.5.) AB on the interpretation of Article E) (2) of the Fundamental Law.

way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood.⁷⁷

On this basis, the Constitutional Court pointed out that it has the obligation to protect the Hungarian constitutional identity as long as it continues to be a sovereign State.⁷⁸

Furthermore, the Constitutional Court also expressed its view on the values that fall within the scope of Hungarian constitutional identity. Accordingly, it examines this set of values on a case-by-case basis, taking into account the provisions of the Fundamental Law, the National Avowal, and the achievements (*acquis*) of the historical constitution.⁷⁹ With this finding, the Constitutional Court essentially establishes "*the right to interpret the content of Hungarian constitutional identity by interpretation.*"⁸⁰ Hence, the Hungarian constitutional identity, as interpreted by the Constitutional Court, is not a static and closed list of values.⁸¹

Nevertheless, by way of example, the Constitutional Court highlighted some values that it considers to be elements of the Hungarian constitutional identity, namely: "*freedoms, the division of powers, republic as the form of government, respect for autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of nationalities living with us.*"⁸²

The inclusion of the historical dimension in identity control is of paramount importance, as the constitutional identity of a State does not originate at a particular moment in time.⁸³ The Constitutional Court, by these principles, has – according to some legal scholars – identified the historical constitution (or more precisely the achievements of the historical constitution) as the specificity that distinguishes Hungary from

⁷⁷ *Ibid.*, Reasoning [67].

⁷⁸ *Ibid.*, Reasoning [67].

⁷⁹ *Ibid.*, Reasoning [64].

⁸⁰ I. Stumpf, *Alkotmányos hatalomgyakorlás és alkotmányos identitás*, Gondolat Kiadó – Társadalomtudományi Kutatóközpont, 2020, p. 236.

⁸¹ Decision 22/2016. (XII.5.) AB. Reasoning [65].

⁸² *Ibid.*, Reasoning [65].

⁸³ Stumpf, *supra* note 74, p. 233.

other states.⁸⁴ Furthermore, the Constitutional Court recognised the achievements of state autonomy and national independence as *acquis* that need to be protected in order to defend constitutional identity.⁸⁵ At the same time, this method of constitutional interpretation, based on the achievements of the historical constitution, is peculiarly Hungarian.⁸⁶ On the basis of all these principles, some jurists have deduced that the legal consequence of these findings of the Constitutional Court is that "*there is some kind of superior norm above the Fundamental Law*", which is based on the achievements of the historical constitution.⁸⁷

The protection of constitutional identity – as interpreted by the Constitutional Court – must be achieved through an informal dialogue between the Court of Justice of the European Union and the Constitutional Court, based on the principles of equality and collegiality.⁸⁸ By this principle, the Constitutional Court essentially emphasized the idea of loyal cooperation. A dialogue between the institutions of the EU and national authorities based on mutual respect is the foundation for ensuring the protection of constitutional identity. At the same time, it is pivotal to clarify that this dialogue on constitutional identity should not determine the relationship between the Court of Justice of the European Union and national constitutional courts,⁸⁹ and thus should not create a hierarchy between them.

According to one interpretation of the Decision, constitutional dialogue must not only be held by the Constitutional Court with the Court of Justice of the European Union, but also with the constitutional courts of other Member States.⁹⁰ This dialogue, in my opinion, becomes visible also in the light of the fact that the Constitutional Court also referred to foreign case law in its Decision (e.g., the Decision on the Treaty of Lis-

⁸⁴ N. Chronowski, A. Vincze, "Önazonosság és európai integráció – az Alkotmánybíróság az identitáskeresés útján", *Jogtudományi Közlöny*, 2017, Issue 3, p. 129.

⁸⁵ Zétényi, *supra* note 25, p. 64.

⁸⁶ *Ibid.*, 64. Moreover, according to the concurring opinion of judges Dr. András Varga Zs. and Dr. Béla Pokol Hungarian constitutional self-identity had existed even before the accession of Hungary to the EU. Decision 22/2016. (XII.5.) AB. Reasoning [111].

⁸⁷ A. Vincze, N. Chronowski, *Magyar alkotmányosság az európai integrációban*, HVG-Orac Lap- és Könyvkiadó, 2018, p. 303.

⁸⁸ Decision 22/2016. (XII.5.) AB. Reasoning [63].

⁸⁹ Tribl, *supra* note 3, p. 498.

⁹⁰ Chronowski and Vincze, *supra* note 78, p. 131.

bon issued by the Federal Constitutional Court of Germany). Moreover, in addition to referring to the case law of other Member States' constitutional courts in support of its own reasoning, the Constitutional Court collected and cited the relevant decisions of the different constitutional courts, thus providing a complete picture. In this way, the Estonian, French, Irish, Latvian, Polish, Spanish, Czech, British, and German case law is also reflected in Decision 22/2016. (XII.5.) AB of the Constitutional Court.⁹¹

It is pivotal to note that two years after this Decision, in 2018, by the seventh amendment, a new paragraph was added to Article R) of the Fundamental Law of Hungary, according to which: *"the protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State."*⁹² With this provision, Hungary became the first Member State to enshrine in its constitution the obligation to protect its constitutional identity.

In another Decision, delivered in 2021,⁹³ the Constitutional Court again interpreted the provisions of Article E (2) of the Fundamental Law, with the addition of Article XIV (4). The petitioner sought an interpretation of the two Articles of the Fundamental Law in the light of the judgment of the Court of Justice of the European Union of 17 December 2020 in case C-808/18. In the given judgment, the Court of Justice of the European Union held, *inter alia*, that Hungary had failed to fulfil its obligation to *"provide effective access to the procedure for granting international protection to third-country nationals seeking to enter the country across the Serbian-Hungarian border."*⁹⁴

The concrete question raised by the petitioner was whether, under the aforementioned provisions of the Fundamental Law, Hungary is

allowed to implement an EU legal obligation which, in the absence of the full *effet utile* [i.e. a way of interpretation that looks at the purpose of a pro-

⁹¹ Decision 22/2016. (XII.5.) AB. Reasoning [35]-[44].

⁹² Article R) (4) of the Constitution of Hungary. Available in English at: <https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178>.

⁹³ Decision 32/2021. (XII. 20.) AB on the interpretation of Articles E) (2) and XIV (4) of the Fundamental Law.

⁹⁴ *Ibid.*, Reasoning [4].

vision] of EU legislation, could lead to a situation where a foreign national illegally staying in Hungary continues to stay in the territory of the Member State for an indefinite period of time and, thus, de facto becomes a part of the country's population?⁹⁵

A particularly noteworthy aspect of this Decision is that the Constitutional Court drew a parallel between constitutional identity and sovereignty. It underlined that the two are far from being complementary, but are interconnected in several aspects, since on the one hand, the protection of constitutional identity is possible precisely because of the sovereignty of the State, and on the other hand, constitutional identity is manifested primarily in a sovereign act (the act of adopting the Fundamental Law). Moreover, the internationally recognised elements of sovereignty are closely linked to the Hungarian constitutional identity.⁹⁶

In addition, the Constitutional Court underlined that one of the foundations of the Hungarian constitutional identity lies in the achievements of the historical constitution, which include, among others, "*sovereignty, population, linguistic, historical and cultural traditions*".⁹⁷ In addition, as a matter of principle, the Constitutional Court established that "*the protection of the inalienable right of Hungary to determine its territorial unity, population, form of government and State structure*" is an inherent part of its constitutional identity.⁹⁸

It is also pivotal to note that in its Decision, the Constitutional Court also referred to the European identity, on one hand highlighting that Hungary has been part of Christian Europe since king Saint Stephen, and on the other hand emphasizing the contribution of Hungary to the creation of European unity ("*our national culture is a rich contribution to the diversity of European unity*").⁹⁹

As a brief synthesis of the relevant case law of the Constitutional Court of Hungary, one can summarize that the components of Hungarian constitutional identity can be found simultaneously in the Fundamental Law, the National Avowal, and the achievements of the his-

⁹⁵ *Ibid.*, Reasoning [10].

⁹⁶ *Ibid.*, Reasoning [99].

⁹⁷ *Ibid.*, Reasoning [106].

⁹⁸ *Ibid.*, Decisional part.

⁹⁹ *Ibid.*, Reasoning [96].

torical constitution. The precise content of constitutional identity is not a closed set of values, but is examined by the Constitutional Court on a case-by-case basis. At the same time, constitutional identity is also closely linked to sovereignty in a number of ways. In order to protect it, a constitutional dialogue based on loyal cooperation is needed, both between national constitutional courts and between these and the Court of Justice of the European Union.

III. COMPARISON OF ROMANIAN AND HUNGARIAN IDENTITY CONTROL

As one can observe from the previous two subchapters, both the Constitutional Court of Romania and the Constitutional Court of Hungary consider the protection of constitutional identity to be of paramount importance in the context of the absolute primacy of EU law and the exercise of some competences by the EU. However, in order to achieve these objectives, the two constitutional courts have chosen a somewhat different path. Whilst there are similarities between the case law of the two constitutional courts (e.g., the incorporation of the decisions of the Federal Constitutional Court of Germany), a series of differences can also be highlighted.

As a first difference, it is noteworthy that the Constitutional Court of Hungary, in the cited decisions, in addition to identity control, also referred to the other two control mechanisms that are widely used in relation to EU law. Hence, the fundamental right control, the sovereignty (or *ultra vires*) control, and the identity control can all be used in Hungarian constitutional justice.¹⁰⁰ According to some legal scholars, “*these three control areas create, at first glance, a kind of untouchable essence within the Fundamental Law.*”¹⁰¹ In contrast, the examined case law of the Con-

¹⁰⁰ The difference between these three control mechanisms is that whilst the fundamental right control and the sovereignty control are derived from the provisions of Article E (2) of the Fundamental Law, identity control is based on Article R (4). For details see: L. Grósz, “Jogértelmezési dilemmák az Alaptörvény hetedik módosításának európai integrációt érintő rendelkezéseivel kapcsolatban”, *Közjogi Szemle*, 2019, Issue 3, p. 51.

¹⁰¹ Vincze and Chronowski, *supra* note 81, p. 300.

stitutional Court of Romania does not explicitly mention fundamental right control and *ultra vires* control.

Substantial differences can also be observed with regard to the elements that the two constitutional courts consider to be part of the constitutional identity of the State. The Constitutional Court of Romania defines as part of the Romanian constitutional identity the constitutional provisions protected by the eternity clause. In this way, the Romanian constitutional identity has been somewhat circumscribed. It is a fact however, that the definition of these elements of constitutional identity took place almost ten years after the first application of identity control and was marked by a strong German influence. Contrary to this solution, the Constitutional Court of Hungary did not define the specific elements of constitutional identity, but stated that this set of values is not closed and static, but has to be examined on a case-to-case basis.¹⁰²

At the same time, the Constitutional Court provided some clarification, as it emphasized that the Hungarian constitutional identity is reflected in the provisions of the Fundamental Law, the National Avowal, and the achievements of the historical constitution. By incorporating the latter element, the Constitutional Court of Hungary essentially seeks to return to the historical foundations of constitutional identity, a perspective that is absent from the case law of the Constitutional Court of Romania.

On the basis of these different perspectives, the case law of the two constitutional courts shows further differences. Whilst the Constitutional Court of Romania defined the main elements of constitutional identity through certain state competences (e.g. organization of justice, regulating the status of the Members of the Parliament), the Constitutional Court of Hungary interpreted this content in a broader manner. As a result, while the Constitutional Court of Romania examines constitutional identity from the perspective of those constitutional norms that are protected by its eternity clause, the Constitutional Court of Hungary focuses more on values, approaching constitutional identity from the philosophical perspective.

¹⁰² This finding of the Constitutional Court of Hungary is in line with the opinion expressed in the legal literature, according to which "*the content of a Member State's constitutional identity, especially its normative basis, might change and is therefore not set in stone*". Schnettger, *supra* note 8, p. 23.

The case law of the two constitutional courts also differs in that, while the Constitutional Court of Romania merely ruled that the EU does not acquire its own sovereignty by the transfer of competences from the Member States,¹⁰³ the Constitutional Court of Hungary examined the relationship between constitutional identity and sovereignty in more depth. In this respect, it stated that the protection of constitutional identity can be ensured precisely because of the sovereignty of the State.

One can note that the identity control and the protection of constitutional identity exercised by the constitutional courts of Romania and Hungary show noteworthy differences. At the same time, there is a significant and essential similarity between the case law of the two nations: both constitutional courts seek to protect the values that are elements of constitutional identity in the context of contrary EU law provisions and an *ultra vires* interpretation of the competences of the EU. Nevertheless, it would be salient that the constitutional dialogue between each national constitutional court and the Court of Justice of the European Union not only developed along the lines of concrete cases, but also at a more theoretical level regarding the relationship between national constitutional identity and European identity.¹⁰⁴

¹⁰³ Decision No 683 of 2012 of the Constitutional Court of Romania. Reasoning II.1.

¹⁰⁴ Varga, *supra* note 61, p. 466.