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Shaping the Doctrine of European and Constitutional Identity into the Context of the European Integration of Ukraine

ABSTRACT: *The concept of constitutional identity is a fundamental idea that was developed into the jurisprudence of the Federal Constitutional Court of Germany and other European constitutional courts. It reflects the trends that have developed into the national constitutional law of the EU Member States as a result of determining the role and significance of national constitutions in the process of European integration. As a rule, national constitutions have the highest legal force within national legal systems, which in turn is closely related to the principle of state sovereignty and the priority of the constituent power of the people.*

The modern concept of constitutional identity defines the boundaries of state sovereignty and the need for national constitutional control over the state powers delegated to European institutions. In addition, national European constitutions have their own special nature, core and eternal values that cannot be replaced or abolished even in the process of constitutional changes. Fundamental rights and freedoms also retain their identity, their essential content, which must be protected from laws, politicians and European institutions by CJEU and national judiciary (constitutional courts).

Ukraine not only announced its desire to join the EU, but also established in the Preamble to the Constitution its European geopolitical choice and the European identity of the Ukrainian people. Negotiations on joining the EU will soon begin, thus the issue of the exact meaning of both the conceptions of constitutional and European identities for the doctrinal and practical needs will soon surface.

This paper aims to analyse constitutional changes to the Constitution of Ukraine on the European and Euro-Atlantic choice of Ukraine from the perspective of European and comparative constitutional law, the meaning and content of the concepts of European and constitutional identity as developed in the European primary legal act and rich constitutional jurisprudence of the national constitutional courts, in particular the

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German FCC (German Federal Constitutional Court), developed from the application of national constitutions, the role of the Preamble and its normative content, and the way the constitutional identity can be protected within the process of constitutional changes. This paper provides a deep research of the various scholarly opinions on the constitutional identity.

It comprises seven sections, each addressing some facets of the European and constitutional identity including an introduction and a conclusion: (1) Constitutional changes regarding Ukraine's European choice and the European identity of the Ukrainian people (2) An idea and concept of constitutional and European identity (3) Constitutional identity concept in the Ukrainian and foreign literature (4) the German concept of constitutional identity as developed by the Federal Constitutional Court of Germany (5) Constitutional identity in the jurisprudence of other European constitutional courts (6) Preamble to the Constitution – the core of constitutional identity (7) Protection of constitutional identity in the process of amending the Constitution.

KEYWORDS: *Constitutional Identity, European Identity, Constitutional Traditions, Preamble to the Constitution, Identity Review, Federal Constitutional Court of Germany, European integration of Ukraine.*

1. Introduction

The concept of constitutional identity is relatively new in the practice of the Constitutional Court of Ukraine and in Ukrainian doctrinal sources. During the period after Ukraine gained its independence, discussions on constitutional identity were practically absent in scholarly circles due to the traditional post-Soviet understanding of the legal character of the constitution, which was largely political in nature, and the direct application of its norms as norms of direct effect and as the highest legal force was perceived only from narrow positivist positions.

The situation began to develop rapidly from February 7, 2019, when constitutional amendments regarding Ukraine's geopolitical choice came into force and were introduced to the relevant sections of the Ukrainian Constitution, including the Preamble.

Now the Constitution of Ukraine confirms the “European identity of the Ukrainian people and the irreversibility of Ukraine's European and Euro-Atlantic course” (paragraph five of the Preamble), according to which the powers of the Verkhovna Rada of Ukraine include “determining the principles of implementing the state's strategic course for Ukraine's full membership in the European Union and the North Atlantic Treaty Organization” (paragraph 5 of part one of Article 85), the powers of

the Cabinet of Ministers of Ukraine include ensuring the implementation of “the state’s strategic course for Ukraine’s full membership in the European Union and the North Atlantic Treaty Organization” (paragraph 1–1 of Article 116), and the President of Ukraine is assigned the role of guarantor of “implementing the state’s strategic course for Ukraine’s full membership in the European Union and the North Atlantic Treaty Organization” (part three of Article 102).

In light of these changes, the term “European identity” first appeared in the text of the Constitution in relation to the protection of the principles and values it guarantees. These include territorial integrity, a democratic and law-based state, sovereignty, the rule of law, and human rights. These principles form the foundation of our constitutional identity and are essential for defending it against Russian aggression. The significance of our Constitution in uniting Ukrainians around its fundamental principles – what is referred to as constitutional identity – becomes evident. Constitutional identity, unlike European identity, is not directly enshrined in the text of the constitution, but rather derives from it implicitly.

It should also be kept in mind that our enemy, the aggressive Russian Federation is attacking our national, constitutional and European identity each and every day, with the aim of the country’s destruction and the disruption of the thousand-year-old Ukrainian statehood.

This explains the need for further research into this issue, the implementation of a new doctrinal view on the concepts of European and constitutional identity due to the important practical significance of uncovering the true legal nature of our fundamental law – the Constitution of Ukraine.

2.

Constitutional Changes Regarding Ukraine’s European Choice and the European Identity of the Ukrainian People

Ukraine confirmed its European choice at the highest legal level – by amending the Preamble to the Constitution of Ukraine by the Law on Amendments to the Constitution of Ukraine dated February 7, 2019. These European aspirations were reflected in the following constitutional formula – “confirming the European identity of the Ukrainian people and the irreversibility of Ukraine’s European and Euro-Atlantic course”.

As the Ukrainian constitutionalist, former judge of the Constitutional Court of Ukraine, Professor Mykola Kozubra rightly commented on this occasion:

‘...the changes of the preamble to the Constitution of Ukraine does not testify to the correction of the historical past of the Ukrainian people and

the moment (prerequisites, motives and goals) of its adoption, but rather to the confirmation of the Ukrainian people of their European identity, conditioned by all the previous constitutional and legal development of Ukraine. The Revolution of Dignity became the “constitutional moment” that strengthened the sense of identity and actualised these changes. The first significant step towards the implementation of the mentioned course has been made – Ukraine has officially become a candidate for membership of the European Union.¹

According to the former Chairman of the Constitutional Court of Lithuania, D. Žalimas, the introduction of these amendments to the Constitution of Ukraine regarding the Western geopolitical orientation leads not only to the constitutional orientation of the Ukrainian state towards the Euro-Atlantic community of states, based on common democratic values, common heritage and goals, but also symbolises six basic ideas for the further development in national law:

1. Rejection of the Soviet legacy, as these changes reject the Soviet system as being alien and incompatible with the national constitutional identity, traditions and aspirations.
2. The principle of Western geopolitical orientation can be applied as one of the criteria for the constitutionality of any other constitutional amendments, together with such constitutional principles as independence, territorial integrity and respect for human rights.
3. Ukraine can no longer join any organizations incompatible with the EU and NATO, primarily entities created by the former republics of the USSR with the aim of preserving Russian domination.
4. Universality of the principle of Western geopolitical orientation - the main task for the Constitutional Court of Ukraine is to perceive, interpret and apply other provisions of the Constitution in the context of the constitutionally confirmed irreversible Euro-Atlantic course towards full membership in the EU and NATO.
5. EU law, including the case law of the Court of Justice of the EU, including the proper practice of the national courts of the EU and NATO countries should be perceived as sources for interpreting the Ukrainian national Constitution.
6. Unconditional implementation of European human rights standards – any person, relying on the Constitution of Ukraine, may have the right to demand the same treatment from judicial and law enforcement bodies, that the person would receive under EU law.²

1 Koziubra, 2024, p.760.

2 Zalimas, 2024, pp. 9-15

As the Constitutional Court of Ukraine stated in its Decision no. 1-r/2021 of July 14, 2021 in the case on the constitutional petition of 51 People's Deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On Ensuring the Functioning of the Ukrainian Language as the State Language" in the context of these constitutional amendments:

*'The confirmation by the constituent people, in particular, of the "irreversibility of Ukraine's European course" and the definition of "the state's course towards gaining full membership of Ukraine in the European Union as strategic" indicates Ukraine's desire to move towards the values of a united Europe. The European Union is an international organisation based on the triad of principles of the common heritage of European peoples. The same triad of principles underlies the establishment of the Council of Europe, of which Ukraine has been a member with the corresponding duties and obligations since 1995.'*³

Therefore, such changes in European identity have far-reaching consequences, especially in the context of the further development of Ukrainian constitutional jurisprudence, which must be imbued with European fundamental values and principles. At the centre of constitutional protection should be the person having his/her right to dignity respected, along with other constitutional rights and freedoms.

3.

An Idea and Concept of Constitutional and European Identity

On February 24, 2022 Russia started a full scale war in Ukraine with the purpose of destroying Ukraine as independent, western oriented state, founded on the constitutional values of freedom, democracy and the rule of law, attempting to erase any mention of the fact that the Ukrainian people have a European identity and desire to join the EU, which is reflected in the Preamble to our Constitution.

A significant part of empirical research on the European collective identity examines whether, to what extent and for what reasons European citizens identify themselves with the European Union as a community or with European people in general. There are also contributions that similarly observe the substance of European collective identity, deducing it from philosophical arguments (the inheritance from the Enlightenment), historical and sociological studies (on modernisation),

3 Decision of the Constitutional Court of Ukraine of July 14, 2021 no. 1-p/2021, para. 13.3.

normative principles of constitutions, and analysis of the content of the elite's discourse, generated by popular culture and by both the traditional and digital mass media.⁴

The idea and concept of European identity on the level of European institutions were first reflected in the Declaration on European Identity (Copenhagen, 14 December 1973),⁵ when The Nine Member Countries of the European Communities have decided that the time has come to draw up a document on the European Identity as the vision of European unity based on common heritage, interests and special obligations. This Declaration focused not only on close inner relations within the Community, but the Nine were also acting together in relation to the rest of the world and fulfilling the responsibilities that arose as a result.

According to this Declaration, European identity was based on the mutual values of the legal, political and moral order of the Nine, and on preserving the rich diversity of their national cultures. Sharing, as they do, the same attitudes to life, based on the determination to build a society which measures up to the needs of the individual, they strive to defend the principles of representative democracy, of the rule of law, of social justice, respect for human rights, a common market, based on a customs union, and have established institutions, common policies and tools for co-operation, a system of political collaboration with a view to determining common attitudes and common action. These are fundamental elements of the European Identity as emphasised in this Declaration.

Here, the Nine also focused on their own security:

'there is no alternative to the security provided by the nuclear weapons of the United States and by the presence of North American forces in Europe: and they agree that in the light of the relative military vulnerability of Europe, Europeans should, if they wish to preserve their independence, hold to their commitments and make constant efforts to ensure that they have adequate means of defence at their disposal.'

Now these European identity values of the Declaration of the Nine are wholly reflected in Article 2 (1) of the Treaty on European Union:

'The Union is founded on the values of respect for human dignity, freedom, democracy and equality, along with the rule of law and respect for human rights, including the rights of persons belonging to minorities. These are

4 Martinelly, 2017, pp. 1–35.

5 Bulletin of the European Communities. December 1973, No 12. Luxembourg: Office for official publications of the European Communities. "Declaration on European Identity", pp. 118–122.

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common to Member States and create a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

In turn, Article 2 (2) TEU focused on national (constitutional) identities of member states:

'...inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government", equality of Member States before the Treaties with "respect to their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security.'

Member states also respect the national and regional diversity of each other as a common identity of European culture. The concept of identity refers to an aggregating and motivating nucleus of values, symbols and meanings that translate into norms of coexistence, political and social institutions, as well as life practices.⁶

Under Article 6 (1) TEU, the Charter of Fundamental Rights of the European Union shall have the same legal value as the Treaties. According to Article 6 (3) of TEU, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. The EU Charter of Fundamental Rights reaffirms, in its Preamble, the rights that, in particular, ensue from "the constitutional traditions and international obligations common to the Member States."

As for the constitutional traditions as it is stated in Article 6 (3) TEU and in the Preamble CFREU, Martin Krygier noted in relation to this, that we use the language of a legal tradition when we attempt to describe how the legal past is relevant to the legal present.⁷ Professor W. Sadurski stressed an interesting aspect regarding the impact of the past on the present European legal system: *'When we talk about our constitutional tradition, we hasten to discard those ingredients of the "tradition" which we find useless, embarrassing or distasteful. The past speaks to us in many voices but we select only those which resonate with our current values and preferences.'*⁸

When the term "constitutional traditions common to the Member States" is mentioned in the primary legislation of the European Union (TEU and CFREU), it is mostly about the influence of the legal past on the present, while constitutional identity is a

6 See Smith, 1991.

7 Krygier 1986, pp. 237-262.

8 See Sadurski, 2006.

modern phenomenon that emerged as a result of the dialogue of the Member States with the European institutions on the protection of the principle of national and state sovereignty. But still, what do we understand by the term “constitutional identity”? In the Oxford Academic English Dictionary, identity is the characteristic that makes a person or thing who or what they are, and makes them different from others.⁹ In procedural law, as pointed out in Black’s Law Dictionary, identity means the fact that a subject, person, or thing before a court is the same as it is represented, claimed or charged to be.¹⁰

National identity, as it comes from Article 4 (2) TEU, restricts the competence of the European Union. In my opinion, the concept of national and constitutional identity is not the same, in academic and judicial circles there is a view that this concept has common features and serves as a basis for giving priority to the national constitution in legal competence and human rights disputes with the EU institutions. In any case, the content of these concepts, and the main features and differences should be determined by the case law of the European Court of Justice and national constitutional courts.

As Egils Levits, President of the Republic of Latvia, declared in his speech “On primacy, common constitutional traditions and national identity in the common European constitutional space” at the International Conference held at the Constitutional Court of Latvia (Riga, September 2, 2021), the concept of national identity in Article 4(2) TEU is very similar to the concept of constitutional identity or constitutional core (*Verfassungskern*) of many national constitutional laws and practices in the Member States. The concept of the constitutional core means fundamental, legally unchangeable provisions and principles of the national constitution. This concept originated from Article 79(3) of the Grundgesetz (Basic Law of the Federal Republic of Germany) in 1949. It is used by several other Member States, including in the Preamble to the Latvijas Republikas Satversme (Constitution of the Latvian Republic) which defines the constitutional core and its integrity. Consequently, in a specific situation where the national identity of a Member State opposes European Union law, the principle of the primacy of European Union law is not applicable.¹¹ From this perspective, constitutional identity aims at protecting the choices of national constituent power against encroachments by supranational institutions.¹²

As researcher L. Allezard noted in this context, ‘Constitutional Identity’, *per se*, is a notion constructed by constituent power and even more frequently by constitutional

9 See Oxford Learner’s Dictionaries.

10 Black’s Law Dictionary, 1991.

11 “EUnited in diversity: between common constitutional traditions and national identities”, International Conference of The Court of Justice of the European Union together with the Constitutional Court of the Republic of Latvia, Riga, Latvia, 2-3 September 2021, p. 30.

12 See Kumm, 2023.

courts, generally in order to regulate the relationship between national and European legal orders. The revelation of Constitutional Identity mostly takes place when there is a conflict between a constitutional norm and a European norm. The term ‘national identity’ as referred to in Article 4 (2) of the TEU is not the exact equivalent of ‘Constitutional Identity’. There is something else which is broader than the Constitutional Identity guaranteed by some courts. In reality, Article 4 (2) TEU states that any constitutional system bears an ‘identity’. According to European Union law, identity is present in all national constitutions.¹³

The issue of constitutional identity at the level of the European Union has a double meaning. In the absence of an EU constitution, there is a search for a constitutional identity that unites all the constitutional systems of the EU Member States in the form of common, inalienable and fundamental principles that come “from the constitutional traditions common to the Member States” (Article 6 (3) of the Treaty on European Union). In addition, the issue of constitutional identity is very relevant in the dialogue between EU institutions and Member States regarding the permissibility or impermissibility of delegating state sovereign power to supranational EU institutions. According to the constitutional courts of the EU Member States, constitutional identity prohibits states from transferring their sovereign constitutional powers, the only question being what the concept covers and what is essential or not for national constitutions.

As it follows from the wording in the Lisbon Treaty that constitutional identity is part of the “national identity of the state”, Article 4 (2) TEU should mention constitutional and political structures. What is meant by political structures and how they differ from constitutional ones – it is not clear whether the activities of political structures are regulated by constitutional law, that is, if they should coincide. Therefore, the provisions of the Lisbon Treaty are clearly insufficient for the distinction: in addition to the above, it should be mentioned that “structures” as the basis of identity cover not only the institutional dimension of the constitutional order, but also the functioning of this institution.¹⁴

The concept of constitutional identity comes from Aristotle, his idea was that the identity of a state did not depend on physical characteristics, but on its constitution.¹⁵

‘The word amend, which comes from the Latin emendare, means to correct or improve; amend does not mean ‘to deconstitute or reconstitute’, to replace one system with another or abandon its primary principles. Thus, changes

13 Allezard, 2022, pp. 58–77.

14 Rainer, 2016, pp. 17–29.

15 See Aristotle, 1962.

*that would make a polity into another kind of political system would not be amendments whatsoever, but rather revisions or transformations.*¹⁶

These ideas that came from the ancient world of Greece and Rome were reflected in the judgement of the Supreme Court of India: “The Constitution is a precious heritage; therefore, you cannot destroy its identity”,¹⁷ that is why “the personality of the Constitution must remain unchanged.”¹⁸

As G. Jacobson correctly noted on this occasion, the Supreme Court of India has confronted the problem of constitutional identity much more explicitly and directly than have the courts in most countries. The principal occasions for doing so have been cases involving constitutional amendments that was considered by many to have in substance violated the constitution. In the years of wrestling with the recurring question of the unconstitutional constitutional amendment, The Court developed the basic structure doctrine, according to which specific features of the constitution were deemed sufficiently fundamental to the integrity of the constitutional project as to warrant immunity from significant change. The doctrine had its roots in German constitutional jurisprudence, which have accepted the idea of implied and enforceable limits to constitutional change through the amendment process.¹⁹

Based on the analysis of these sources regarding the origin of the concept of constitutional identity, we can follow the opinion of L. Tribe: ‘*The very identity of the Constitution – the body of textual and historical materials from which (fundamental constitutional) norms are to be extracted and by which their application is to be guided.*’²⁰ Professor M. Troper focused on the issue of constitutional integrity in conjunction with constitutional identity – this is the result of the process of the extraction of certain principles which can be posited as essential and as such, distinguishable from other constitutional norms and which can be relied upon to protect the integrity of the constitution in cases in which it confronts threads that might erode its vital bond to the people or nation.²¹

Constitutional identity includes all those basic ideas of constitutionalism that are embodied in the practice of constitutional democracies and are common to all states where their authority is under and is derived from their constitutions. As noted in this regard by professor M. Rosenfeld, the ideal of constitutionalism requires constitutions to provide a definition and limitation of the powers of government, commitment

16 Murphy, 1995, p. 1777.

17 *Minerva Mills Ltd v. Union of India*, AIR 1980 SC 1789.

18 *Kesavananda Bharati v. State of Kerala*, 1973 SC 1461 (1973), 1624

19 Jacobson, 2006, pp. 361–397.

20 Tribe, 1983, p. 440.

21 See Troper, 2010.

to adherence to the rule of law and protection of fundamental rights. All constitutions that comply with those prescriptions can be said to share a common identity.²²

Thus, Constitutional and European identity are interconnected concepts, and if the first is closely related to the identity of the constitutions of European countries participating in European integration and their core and fundamental values, then the second is a set of principles, values, cultural and social characteristics that unite Europeans into a single community. In turn, the constitutional traditions common to the EU Member States of European countries play an important role in creating a solid foundation for constitutional identity from a historical perspective, symbolise a certain continuity and stability of the constitutional order, and at the same time serve as an additional factor of European identity through mutual understanding of the basic concepts and categories of constitutional law by European constitutional courts, the CJEU, and the European and national political structures.

4.

Constitutional Identity Concept in the Ukrainian and Foreign Literature

The concept of constitutional identity has only recently gained attention from Ukrainian scholars and the Constitutional Court. This can be explained by the fact that the issue of EU accession has gained particular importance after the introduction of European integration amendments to the Constitution of Ukraine on February 7, 2019 and from February 28, 2022, five days after the Russian invasion, when Ukraine submitted its application for EU membership. At the same time, the issue of constitutional identity will be repeatedly addressed by the Constitutional Court in the context of protecting the constitutional core regarding the basic structure of the constitution and the very essence of human rights from politicians (Parliament) in the context of when they are to amend the constitution or adopt laws to counter the restriction of human rights. It was the Constitutional Court that first pointed to the principle of constitutional identity in its Decision dated July 14, 2021 on the constitutionality of the Law "On Ensuring the Functioning of the Ukrainian Language as the State Language". This concept protects the constitution from laws that violate the essence of the Ukrainian Constitution, in this case, the legal status of the Ukrainian language as the state language according to Article 10 of the Constitution of Ukraine, which has "a fundamental constitutional value, a specific feature and key factor of

22 Rosenfeld, 2012, pp. 756-776.

the unity (sobornosti) of the Ukrainian state and an integral part of its constitutional identity.”²³

In Ukrainian scientific literature, the category of “constitutional identity” is considered both in a broad and a narrow sense. In the first case, it refers to a set of certain principles, institutions and traditions that underlie norm-setting and law-making activities. A narrow approach to understanding this concept means the presence of immutable provisions of the Basic Law. In addition, when making amendments to the Basic Law, understanding the content and meaning of constitutional national identity is one of the key aspects, because this principle acts as a kind of guardian that stands in the way of certain changes, separating those that are acceptable for the national legal system from those that may be destructive for it.²⁴

Professor Y. Barabash notes that the essence of the concept of constitutional identity is that the Constitution contains fundamental values and principles that define the “identity of the Constitution”, the essence of which is acceptable in a democratic state based on the rule of law. Given this, the task of the court is to block all constitutional initiatives directed against the aforementioned values and principles in order to prevent “replacing the Constitution” in this way. In the context of the above, according to the scholar it is important for the Constitutional Court to include human rights, the rule of law, the separation of powers and deliberative democracy among the provisions that define constitutional identity. It should be recognised that such doctrines of “constitutional identity” are actually a weapon used by courts that demonstrate activism in protecting constitutional values in the formal absence of appropriate tools.²⁵

Professor M. Savchyn believes that the concept of constitutional identity includes the following main elements: a) national constitutional culture and doctrine; b) legal style of legal decision-making; c) system of judicial constitutional control; d) institutional design: horizontal and vertical separation of powers; e) elections and control over power.²⁶

According to Professor O. Shcherbaniuk, constitutional identity is a system of interpretative arguments used by constitutional courts to justify decisions made in cases regarding the establishment of compliance with the national specificity of

23 Decision of the Constitutional Court of Ukraine dated July 14, 2021 No. 1-p/2021.

24 Slinko and Tkachenko, 2023, pp. 70–84.

25 Barabash, Rol akademichnoi dumky u formuvanni ofitsiynoi konstytutsii doktryny v Vzaiemni zdobutky Yevropejskoi Komisii “Za demokratiu cherez pravo” i orhaniv konstytutsiynoi yustyttsii ta problemy tlumachennia u konstytutsiynomu sudochynstvi: zb. materialiv i tez Mizhnar. onlain-konf, 2020, pp. 39–44.

26 Savchyn, 2020, p. 462.

constitutional norms. Naturally, this applies to the categories of so-called “complex cases”, the argumentation of which requires a system of weighty arguments.²⁷

Professor O. Borislavskaya believes that there is no difference between constitutional and national identity because of the peculiarities of the constituent power: “National identity, as the identity of a community, which is the source of constituent power, forms the foundation of constitutional identity. Constituent power is implemented in the constitution, so elements of national identity (such as language, culture, traditions, symbols, etc.) become components of constitutional identity.”²⁸ States of Central and Eastern Europe significantly influenced the formation of their constitutional identity by a unified system of constitutional values, which are reflected both in national constitutions and in documents of the Council of Europe (human dignity, human freedom and rights, the rule of law, democracy, justice, equality, peace).²⁹

As Ukrainian researcher, O. Nykorak pointed out:

‘Constitutional identity as a counter-limit to EU law in the context of the relationship between national and supranational law; as a set of fundamental national constitutional values (“eternal provisions”) that courts must take into account in international legal disputes; as the identity of the constitution to itself, its continuity and stability over time – the legal concept of the “core of the constitution”, which cannot be changed; as the relationship between national tradition and the constitution; as a special collective identity of a people or nation, which is also expressed, defined or formed by the constitution, self-identification of a nation based on constitutional values; as the preservation of national constitutional identity in the context of global migration. The specific content of the concept under study is reviewed for each state separately, based on the explicit and implicit provisions of the constitutions, by bodies of constitutional interpretation (in particular, national bodies of constitutional jurisdiction and the Court of Justice of the EU).’³⁰

The concept of constitutional identity was deliberated by Ukrainian leading scholars V. Kolisnyk, H. Berchenko, T.Slinko in two aspects:

‘If we start with the formulation of approaches to constitutional identity, we will see that two main approaches to understanding constitutional identity have developed in the literature: broad and narrow. In the first case, it is

27 Shcherbaniuk, 2020, pp. 77–84.

28 Boryslavska, 2023, pp. 3–15.

29 Boryslavska, 2015, pp. 54–58.

30 Nykorak, 2023, p. 248.

*more about the constancy of certain principles, institutions and traditions that are embodied at the regulatory and law-enforcement (judicial) levels, in the legal customs and practice of implementing the constitution. In the second case, it is about the presence of unchangeable provisions of the constitution, which is combined with judicial control over changes to the constitution, as well as constitutional control over the provisions of EU law.*³¹

Constitutional identity is used mainly by the constitutional courts with regard to the immutable provisions of the constitution, i.e. in a narrow sense. At the same time, the basis for the formation of certain implicit provisions, devised by constitutional courts as immutable provisions of the constitution, and, accordingly, provisions characterised by constitutional identity, may be a broad understanding of constitutional identity.³²

Judge of the Constitutional Court of Ukraine, professor V. Lemak identified three practical senses through which one can understand the constitutional identity of Ukrainians. Firstly, constitutional identity reflects the interaction of the text of the Constitution of Ukraine with national values. Secondly, it is the “core” of the Constitution of Ukraine, which, through human rights, defines the independence of the state and its territorial integrity. The Constitutional Court of Ukraine is responsible for protecting this “core”, and the protection of rights and freedoms is an important element of the constitutional identity of Ukraine. Thirdly, these are the challenges that Ukraine will face as it approaches accession to the European Union and NATO, in particular the issue of transferring part of its sovereignty.³³

As the former judge of the Polish Constitutional Tribunal, Professor M. Granat, notes that first of all, it is the Preamble of the Constitution that serves to express constitutional identity, and the identity of the Constitution opens up space for the interpretation of the Polish Constitution, and when the Preamble contains tasks (functions), then this is a concentrated expression of constitutional identity. In turn, in his opinion constitutional identity has three functions.

First of all, it indicates those provisions that are most important in the constitution, i.e. identity determines the “core” of any constitution, i.e. it consists of basic principles, provisions on human rights and the associated values.

31 Kolisnyk, Berchenko and Slinko, 2022, p. 73.

32 Ibid.

33 III Mariupol Constitutional Forum “Ukrainian Constitutional Identity in the Context of European Integration [III Маріупольський конституційний форум «Українська конституційна ідентичність в контексті європейської інтеграції», 2024, p. 11.

Secondly, constitutional identity sets the limits of possible changes to be made to the constitution, and plays the role of a kind of fuse in the event of intentions to revise the constitution.

Thirdly, identity plays the role of a kind of “barrier” regarding the relationship between national law and European Union law in order to determine which competences of Polish state authorities cannot be transferred to the EU.

Professor M. Granat makes an attempt to provide a definition of constitutional identity, which, in his opinion, is a set of permanent constitutional provisions that are not subject to change, i.e. identity is the “fixity” or “immutability” of its provisions. Identity allows for such changes to be made to the constitution that occur in “tangential” or, in Aristotle’s language, “accidental” elements, but do not affect its essence (“core”), that is, the essence of the constitution remains unchanged.³⁴

Constitutional preambles, eternity clauses, fundamental rights, the constitutional principles of democratic, social and law-based state may be considered as the sources of constitutional identity. Fundamental principles of the constitutional level, both written and unwritten, also form the basis of constitutional identity. All of these jointly protect the constitution as a living instrument in a changing social and political context. Constitutionalism as the doctrine of limitation of state power is also related – the limitations of constituted power as the idea of the existence of a normative core that must be protected at all times from the political process.³⁵

Constitutional identity as the legal concept developed by constitutional courts is a counter-measure against the excessive powers of EU institutions with the purpose of preserving national autonomy and constitutional authority. Constitutional identity can also be understood as a normative concept that is capable of either binding, or motivating constitutional actors and interpreters, such as constitutional legislators, governments and courts.³⁶

5.

The German Concept of Constitutional Identity as Developed by the Federal Constitutional Court of Germany

The constitutional jurisprudence of the Federal Constitutional Court serves as a certain benchmark for Ukrainian lawyers and judges to comprehend the concept of constitutional identity as the legal tool for the protection of sovereignty and fundamental human rights in the context of European integration. As Professor D.

34 Granat, 2021, pp. 3–7.

35 Maes, 2024, p. 12.

36 Scholtes, 2023, p. 3.

Kommers pointed out, the Federal Constitutional Court (FCC) sees in the Basic Law a fundamental commitment to national sovereignty. This “sovereigntism” has obliged the Court to guard the Constitution from the trivialisation that deeper international integration might produce. Thus, the Constitutional Court has declined to interpret the Basic Law’s call for openness as an invitation to disregard or dissolve the sovereign German State and its constitutional order.³⁷ It should be borne in mind that German constitutional doctrine is based on the principle of the supremacy of the Basic Law, therefore the relationship between national and international, as well as European law will always be determined from the standpoint of national law within the scope of the German Constitution. The Basic Law aims to achieve the opening of the domestic legal system for public international law and international cooperation in the form of a supervised binding effect; it does not provide that the German legal system should be subordinated to the system of public international law and that public international law should have absolute priority over constitutional law.³⁸ As FCC noted in the *Gorgulu Case*, that the commitment to international law takes effect only within the democratic and constitutional system of the Basic Law.³⁹

According to the opinion of Professor R. Arnold, the constitutional identity concept which FCC has developed during the last decades has two main elements: 1. The German Constitution does not allow the abolishment of the German State by integrating it into a European Federal State, this is the so-called “remaining statehood”. 2. Constitutional identity has been connected by the FCC to the so-called “eternity clause” (Article 79.3 BL) – according to this provision of the BL, certain issues are excluded from being changed by the constitutional reform. These are those put in writing in Article 1 BL (dignity of human being) and Article 20 BL (the State defining principles concerning the Federation, the Republic, the Social State Orientation and the rule of law). The principle of “open statehood” constitutional identity is not only defined by internal constitutional law but also by international and in particular, supranational law. National constitutional identity is the identity of the “integrated state” whose sovereignty is relative and based on a legal order composed of national and supranational law.⁴⁰

The FCC, in its 1974 decision in the *Solange I* case emphasised the lack of protection of fundamental rights at the supranational level, i.e. at the level of European institutions, and therefore takes on the duty to apply the German fundamental rights guaranteed by the Basic Law in order not to leave an individual without protection if his/her rights are violated by a supranational legal act. The FCC declared the national system of protection of human rights against the acts of European institutions to be

37 See Kommers, 2012.

38 Land Reform III Case (2004), 112 BVerfGE 1, 25.

39 *Gorgulu Case*, 111 BVerfGE 307, 318, 2004.

40 Arnold, 2017, pp. 72–85.

temporary measure, until the supranational organisation creates its own system of protection of fundamental rights, which in content and functions is consistent with the system of the German constitutional order.⁴¹ If the sovereign power is transferred to an international institution, and if that international institution then has the power to encroach upon the essential content of the fundamental rights recognised by the Basic law, then it is necessary for the international institution to ensure the substance and effectiveness of those rights in a form and scope essentially similar to the unconditional protection enjoyed under the Basic Law.⁴²

Furthermore, regarding constitutional identity, the *Solange II* concept steps back. It should be noted that according to this concept, the FCC has limited its jurisdiction in the field of EU (secondary) law executed by German authorities. In such cases it does no longer apply the German fundamental rights but leaves fundamental rights protection to the supranational order. The judicial protection is, to this point, left to the supranational courts, the General Court and the EU Court of Justice. This concept essentially corresponds to the rule embodied by Article 51.1 of the EU Charter. Additionally, from the aspect of the *Solange II* concept, constitutional identity opens the way to German constitutional law, including the field of fundamental rights.⁴³

FCC also introduced an “*ultra vires*” review regarding the concept of constitutional identity. Supranational institutions can act only within the competences attributed to them by the integration treaties to which the national Acts of approval refer. If they act beyond the transferred competences, they act “*ultra vires*” in violation of this national sovereignty. The “*ultra vires*” problem which has been a main aspect of the Maastricht decision has been mitigated in the *Mangold* decision: only a manifest and serious infringement of the competence distribution system between EU and Member States would be a qualified violation leading to the *ultra vires* statement. In the Lisbon Treaty decision, the FCC has introduced the constitutional identity of the Member State as the main argument for the limitation of the integration power. The Court recognises German constitutional identity in a rather limited form by deriving the concept from the “intangibility clause” of Article 79.3 BL.⁴⁴

In its Decision of December 1, 2020, the FCC focused on the relationship between the German identity clause (Article 1 (1) of the Basic law, the guarantee of human dignity) and the EU Charter of Fundamental Rights:

“However, an identity check can only be taken into consideration if the requirements following from the Charter of Fundamental Rights of the European Union, as expressed in the case law of the Court of Justice of the

41 Ibid.

42 *Solange II Case* (1986), 73 BVerfGE 339.

43 Arnold, 2017, pp. 72–85.

44 Ibid.

European Union, do not satisfy the indispensable level of protection of fundamental rights in Article 1 (1) of the Basic Law.”⁴⁵

This doctrine of constitutional identity was fully expressed in the FCC decision of June 30, 2009 regarding the Lisbon Treaty: “Moreover, pursuant to the third sentence of Article 23(1), in conjunction with Article 79(3) of the Basic Law, the Federal Constitutional Court reviews whether the Basic Law’s constitutional identity, its inviolable core, is respected. The Federal Constitutional Court exercises this jurisdiction, which follows from constitutional law, in accordance with the principle of the Basic Law’s openness to European integration; it therefore does not contradict the principle of sincere cooperation (Article 4(3) TEU: Lisbon). There is no other way to safeguard the fundamental political and constitutional structures of sovereign Member States recognised by the first sentence of Article 4(2) of the Treaty on European Union: Lisbon. In this respect, the Constitution’s guarantee to uphold the national constitutional identity and the corresponding guarantee under EU law go hand in hand in the European legal sphere. The instrument of identity review makes it possible to examine whether the acts of EU institutions violate the principles enshrined in Articles 1 and 20 of the Basic Law, which are declared inviolable by Article 79(3) of the Basic Law. This serves to ensure that the precedence of EU law only applies by virtue of and within the framework of the continued constitutional authorisation.”⁴⁶

To protect Germany’s constitutional identity, in the Lisbon case the FCC granted a new form of review over EU institutions including decisions of the European Court of Justice or “identity review”: long-dormant authority to review fundamental rights deficiencies at the European level and *ultra vires* review announced in THE Maastricht Case.⁴⁷ In the Maastricht Case (1993) the FCC formed an *ultra vires* review on a strict sovereignty-based interpretation.⁴⁸

Furthermore, the Court based the identity review on the eternity clause in Article 79(3) of the Basic Law, which prevents the German legislator from altering the “core” of the German Constitution. Constitutional amendments that affect the principles laid down in Articles 1 and 20 of the Basic Law are impermissible (Article 79(3) of the Basic Law). This so-called eternity clause means that the identity of the free constitutional order is beyond the reach of even the Constitution-amending legislator. Thus, the Basic Law does not just rest on the premise of Germany’s sovereign statehood, it also serves as its guarantee. Whether the constituent power is also subject to this

45 BVerfG, Order of the Second Senate of 1 December 2020 – 2 BvR 1845/18, paras. 1-85.

46 Judgement of the Bundesverfassungsgericht of 30 June 2009, Lissabon, BVerfGE, 2 BvE 2/08. Para 240.

47 See Kommers, 2012.

48 Judgement of the Bundesverfassungsgericht of 12 October 1993, BVerfGE, 2 BvR 2134/92 and 2 BvR 2159/92

limitation due to the universal nature of dignity, freedom and equality, which would become relevant if the German people, in free self-determination, but continuing the tradition of legality of the order under the Basic Law, adopted a new Constitution, need not be decided here. Under the order of the Basic Law, the fundamental principles that shape the state order and which follow from Article 20 of the Basic Law, namely, democracy, rule of law, social state, republicanism, federalism and the substance of essential fundamental rights that is indispensable to ensure respect for human dignity – are, in their principal quality, beyond the reach of any amendment.⁴⁹

While the Basic Law seeks to integrate Germany into the legal community of peaceful and democratic states, it does not relinquish sovereignty in relation to the final authority that ultimately belongs to the Constitution, as a right of the people to decide for themselves on fundamental questions of their own identity.⁵⁰

6. Constitutional Identity in the Jurisprudence of Other European Constitutional Courts

As pointed out earlier, the concept of constitutional identity was established by the Constitutional Court of Ukraine regarding constitutionality of the mid-summer of 2021. As the Constitutional Court declared in its Decision on the compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine “On Ensuring the Functioning of the Ukrainian Language as the State Language” dated July 14, 2021 No. 1-r/2021:

‘Taking into account the previous official interpretation of Article 10 of the Constitution of Ukraine and its development, the Constitutional Court of Ukraine notes that the legal status of the Ukrainian language as the state language, enshrined in the provisions of parts one and two of Article 10 of the Constitution of Ukraine, is at the same time a fundamental constitutional value, a specific feature and a key factor in the unity (соборності) of the Ukrainian state and an integral part of its constitutional identity.’⁵¹

Unlike the constitutional jurisprudence of the Federal Constitutional Court, the doctrine of constitutional identity in the decision of the Constitutional Court of Ukraine

49 Judgement of the Bundesverfassungsgericht of 30 June 2009, Lissabon, BVerfGE, 2 BvE 2/08, para 216-217.

50 Judgement of the Bundesverfassungsgericht of 30 June 2009, Lissabon, BVerfGE, 2 BvE 2/08, para 340.

51 Decision of the Constitutional Court of Ukraine dated July 14, 2021 No. 1-p/2021.

was not brought about by the European integration in the context of the interaction of the Ukrainian Constitution with the legal order of the European Union, but rather by the need to emphasise the importance of certain constitutional norms and principles of the fundamental level, in particular Article 10 of the Constitution, which is included in the Section “General Principles” and determines the state status of the Ukrainian language.

Constitutional courts of other European countries developed the concept of constitutional identity focusing on two main aspects: as a protection of national identity through the recognition of the inviolability and fundamentality of the core of the constitution in terms of protecting constitutional norms and values (as in the decision of the Constitutional Court on the state status of the Ukrainian language) and as a protection of national and state sovereignty in the context of European integration.

According to the Fundamental Law of Hungary⁵² respected and the state has the primary obligation to protect these rights. The state is bound by fundamental rights, and this binding force is also applicable to cases in which public power is exercised jointly with the EU institutions or other Member States. The *ultra vires* review is seen to be ultimately reserved for the Constitutional Court of Hungary which identified two main limits on the conferred or jointly exercised competence: they cannot infringe the sovereignty of Hungary (sovereignty review) and they cannot infringe the constitutional identity (identity review). In the opinion of the Court, constitutional identity as a fundamental value was not initiated, but only recognised by the FLH, and therefore could not be renounced by an international treaty, because it equates to the constitutional identity of Hungary. Its content is to be determined on a case-by-case basis; it did not include an exhaustive list of values such as freedoms, the division of power, the republican form of state, respect for public law autonomies, freedom of religion, legality, parliamentarianism, equality before the law, recognition of judicial power and the protection of other nationalities living in Hungary; these equate to modern and universal constitutional values and to achievements of the historical constitution on which the Hungarian legal system rests.⁵²

According to Article R (4) of the Fundamental Law of Hungary: *‘The protection of the constitutional identity and Christian culture of Hungary is the duty of every organ of the state’*⁵³. The Constitutional Court held that Hungary’s constitutional identity does not encompass an exhaustive list of “static and closed values” such as the division of powers, the republican form of government, parliamentarism, the freedom of religion, the principle of legality, equality, the recognition of judicial power and the protection of nationalities in Hungary⁵⁴ (the concept of “the open list”). Similar to

52 Drinoczi, 2020, pp. 105–130.

53 Constitution of Hungary.

54 Judgement of the Constitutional Court (Alkotmánybíróság) of 5 December 2016, no. 22/2016 (XII. 5.), CC, para. 63.

other European constitution courts, the Constitutional Court of Hungary exercises both the sovereignty and the identity review.⁵⁵

In its jurisprudence the Constitutional Court applies the concept of the historic constitution (national constitutional tradition) as part of the constitutional identity of Hungary. In view of András Zs. Varga '[...] *the Fundamental Law is similar to an hour-glass due to Article R(3), that is to say the historic constitution, which is at the top pours down into positive law at the bottom through the neck, which is the Fundamental Law*'.⁵⁶ This is clearly in line with the intentions of the Fundamental Law's drafters, i.e. that the constitution in a wider perception encompasses not only the written, or in other words, positive law: traditions are also part of the constitution. Thus, the Fundamental Law is not the constitution, it is only part of the system. That is why the drafters chose to name it Fundamental Law instead of constitution, while they did not alter the name of the constitutional court.⁵⁷

The decision of the Constitutional Tribunal of Poland of 24 November 2010, K 32/09, stated that the identity of the Constitution of the Republic of Poland is determined by the "non-transferable powers of state authorities" provided for in various provisions of this act. In addition, the Constitutional Tribunal stated that "non-transferable powers" also stem from the sovereignty of the state, the normative expression of which is the Constitution of the Republic of Poland itself. However, the point is that the competences disallowed from being transferred reflect the values on which the Constitution of Poland is based.⁵⁸

The Republic of Moldova has significantly developed the concept of constitutional identity in the decisions of its Constitutional Court. Thus, in its Resolution No. 36 of December 5, 2013 on the interpretation of Part 1 of Article 13 of the Constitution in relation to the Preamble to the Constitution and the Declaration of Independence of the Republic of Moldova, the Constitutional Court of Moldova indicated that it is the Declaration of Independence that defines the constitutional identity, which cannot be subject to any changes or additions, something by analogy with the eternal clauses in the German constitutional doctrine, and to change or cancel this declaration would mean destroying its identity. In its Resolution of October 9, 2014 No. 25 on the review of the constitutionality of the Association Agreement between the Republic of Moldova and the European Union and the European Atomic Energy Community and their Member States and Act No. 112 of 2 July 2014 on the ratification of the Association Agreement, the Constitutional Court of Moldova indicated that, according to

55 Judgement of the Constitutional Court (Alkotmánybíróság) of 5 December 2016, no. 22/2016 (XII. 5.), CC, paras. 34-46.

56 Varga, 2016, pp. 85-88.

57 Marinkás, 2024, pp. 461-522.

58 Wyrok Trybunału Konstytucyjnego z dnia 24 listopada 2010 r. sygn. akt K 32/09 [Judgment of the Constitutional Tribunal of 24 November 2010, file reference K 32/09].

the content of the Declaration of Independence and Article 1 of the Constitution, the country's orientation towards the European space of democratic values is a defining element of the constitutional identity of the Republic of Moldova.

7.

Preamble to the Constitution – The Core of Constitutional Identity

A comparative analysis of European constitutions, the decisions of constitutional courts on their application, as well as the opinions of scholars in the field of constitutional law, allows us to conclude that the preamble of the constitution is the core and foundation of constitutional identity, an inalienable part of the constitution. The Preamble comprises the fundamental principles and values, and constitutional courts have the duty to interpret the constitution in light of the principles and values enshrined in the preamble.

The Preamble of the Ukrainian Constitution enshrines the following fundamental principles: nationality (Ukrainian people – citizens of Ukraine of all nationalities); sovereign will of the people; centuries-old continuity of the national statehood; the guarantee of human rights and freedoms; the strengthening of civil unity on Ukrainian soil; responsibility before God; guidance by the Act of the Declaration of Independence of Ukraine of August 24, 1991. Amidst these fundamental principles that are shaping the vision of our national and constitutional identity, the preamble was amended (February 7, 2019) to include the principles of the European identity of the Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine.

It is relatively easy to extract these principles from the preamble to answer the question – what is the content of the constitutional identity of Ukraine and what are the highest values of the constitutional order. Indeed, *'preambles often comprise national aspirations, but also expressions of a nation's historical, social, political and religious accomplishments'*⁵⁹. But preambles are the symbol and normative sources of national and constitutional identity in their concentrated appearances to be applicable in domestic courts. Thus, constitutional identity receives its highest constitutional status as a result of the recognition and implementation of this doctrine by the constitutional court, including through the application of the preamble to the constitution in constitutional proceedings.

As Professor M. Kozyubra commented on this matter, the provisions of the preamble in a concentrated form express the initial political and legal ideas that

59 See Voermans, Stremmer and Cliteur, 2017.

permeate the entire content of the Constitution. It is the only document that is integral in its legal nature, and therefore there is no reason to separate the preamble from the main content of the Constitution, and even more so to oppose the legal nature of the preamble to it, as is sometimes the case in the literature. Like other provisions of the Constitution, the provisions of its preamble are normative in nature, although their normative nature is expressed in the most general form.⁶⁰

Article 159 of the Constitution of Ukraine prescribes the obligatory opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution. The Constitutional Court of Ukraine voted in favour of Opinion No. 3-v/2018 of November 22, 2018 on the constitutional amendments in the case of a constitutional appeal of the Verkhovna Rada of Ukraine on the provision of an opinion regarding the compliance of the draft law on amendments to the Constitution of Ukraine (regarding the strategic course of the state towards the acquisition of full membership of Ukraine in the European Union and the North Atlantic Treaty Organization) (reg. No. 9037),⁶¹ that these amendments are in conformity with the requirements of Articles 157 and 158 of the Constitution of Ukraine and may be adopted by Verkhovna Rada of Ukraine. In their separate opinions, five judges unexpectedly focused public attention to the view that the preamble to the constitution cannot be amended.

Judges M. Gultai, O. Kasminin and M. Melnyk emphasised that the preamble of the Constitution of Ukraine cannot be changed because it is objectively impossible to change the prerequisites, motives and goals of its adoption that existed at the time (i.e. at the time of the adoption of the Constitution of Ukraine in 1996). The proposed changes to the Preamble of the Constitution of Ukraine, as outlined in the Draft Law, are directly related to the principles of foreign policy. Therefore, these changes should be incorporated into Article 18, where they can be clearly defined and articulated using the appropriate wording.

Judge O. Lytvynov argued that given the fundamental importance of the preamble as the basic value of the Constitution of Ukraine and the foundation of the constitutional system in Ukraine, its amendment must be approved by the Ukrainian people in an all-Ukrainian referendum, that is, in the form of a direct, not representative democracy (not by the final voting of the Ukrainian Parliament).

According to Judge O. Tupytsky, the bill to amend the text of the Preamble of the Fundamental Law of Ukraine, although it does not contradict the requirements of its Articles 157, 158, will actually distort the reflection of the historical reality under

60 Koziubra, 2024, p. 760.

61 An opinion on the compliance of the draft law on amendments to the Constitution of Ukraine (regarding the strategic course of the state towards the acquisition of full membership of Ukraine in the European Union and the North Atlantic Treaty Organization) (reg. No. 9037) in conformity with the requirements of Articles 157 and 158 of the Constitution of Ukraine.

which the adoption of the Fundamental Law of Ukraine took place on June 28, 1996. In addition, the judge also raised the question of formal contradiction with the Act of the Declaration of Independence of Ukraine, which refers to the Declaration on the State Sovereignty of Ukraine (regarding the intention to become a neutral state).

Such considerations of these judges of the Constitutional Court of Ukraine do not correspond to the contemporary constitutional doctrine, and in fact it was an attempt to block these constitutional amendments, including those aimed at supplementing the preamble, concerning the geopolitical orientation of Ukraine. The preamble is an integral part of the constitution, has legal significance in terms of law enforcement, and contains fundamental principles. The constitution may be amended and supplemented, taking into account the inviolability of its core according to the principle of constitutional identity. As the FCC ruled in its opinion on the Lisbon Treaty on 30 June 2009, Germany seeks to realise a united Europe at it follows from the Preamble to the BL; the achievements of “European Integration and an international peaceful order” derives from the Preamble to the Basic law.

The practice of applying the Preamble to the Constitution in decisions made by the Constitutional Court of Ukraine has been developing rapidly in recent times. This trend is particularly evident in the context of Russian aggression. The Preamble is seen as an integral part of the Constitution that holds legal normative force and embodies a concentrated expression of national and constitutional identity.

The Constitutional Court of Ukraine, in its decision of July 14, 2021, referred to the preamble to declare the constitutionality of using Ukrainian as the state language, by central and local government institutions, and, consequently, justified a significant legal limitation on the use of other languages, such as Russian. In resolving the issues raised in the constitutional submission, the Constitutional Court of Ukraine proceeded from the integrity and indivisibility of the Constitution of Ukraine, determined by the systemic connection between the provisions of its preamble, and the principles and norms of other provisions of the Constitution of Ukraine.

The Court highlighted that “the Ukrainian language, as the state language, is a vital tool for regulating the activities of all state authorities and local self-governments. It plays a crucial role in ensuring the political unity of the state and fostering social cohesion. This aligns with one of the aspirations that guided the drafters of the Constitution of Ukraine, adopted on June 28, 1996, particularly their commitment to “strengthening civil harmony on the land of Ukraine” (paragraph five of the Preamble to the Constitution of Ukraine).”⁶²

‘A threat to the Ukrainian language is seen as a threat to the national security of Ukraine, the existence of the Ukrainian nation and its state, since

62 Decision of the Constitutional Court of Ukraine of July 14, 2021 No. 1-p/2021.

*language is considered a fundamental part of the nation's identity and code, and not just a means of communication. Without the full functioning of the Ukrainian language across all areas of public life throughout the territory of Ukraine, the Ukrainian nation is threatened with the loss of its status and role as a titular and state-forming nation, which is tantamount to the threat of the disappearance of the Ukrainian state from the political map of the world. The Ukrainian language is a necessary condition (conditio sine qua non) of the statehood of Ukraine and its unity. Ukraine is the only area in the world where the preservation, existence and comprehensive development of the Ukrainian language and, accordingly, the Ukrainian nation as a state-forming one can be guaranteed, therefore any encroachments on the legal status of the Ukrainian language as a state language on the territory of Ukraine are unacceptable, since they violate the constitutional order of the state, threaten national security and the very existence of the statehood of Ukraine.*⁶³

The concept of “Ukrainian people, citizens of Ukraine of all nationalities” used in the Preamble to the Constitution of Ukraine covers all individuals, regardless of their ethnicity, who have a permanent legal connection with Ukraine, i.e. have Ukrainian citizenship.

The Constitutional Court of Ukraine believes that the approach in the Law, within the framework of which the use of the languages of national minorities of Ukraine that are official languages of the European Union and the languages of national minorities of Ukraine that are not official languages of the European Union is differentiated, has a constitutional basis. It is constituted by the preamble of the Constitution of Ukraine, which confirms the “irreversibility of the European and Euro-Atlantic course of Ukraine”, and the provisions of paragraph 5 of part one of Article 85, part three of Article 102, paragraph 11 of Article 116 of the Constitution of Ukraine, according to which, in particular, the Verkhovna Rada of Ukraine is granted the authority to determine the principles, the President of Ukraine is assigned the role of guarantor, and the Cabinet of Ministers of Ukraine is charged with the duty to implement the “strategic course of the state for the acquisition of full membership of Ukraine in the European Union and the North Atlantic Treaty Organization.”⁶⁴

The decision of the Constitutional Court on the constitutionality of the law of Ukraine “On ensuring the functioning of the Ukrainian language as the state language” is the most remarkable and important example of the application of the preamble. However, other examples of the application of the preamble can be cited,

63 Ibid.

64 Ibid.

especially in recent years, which indicate the Court's recognition of the preamble as a set of legal provisions (fundamental norms and principles) and an integral part of the constitution as a whole.

*'The legislator is obliged to take into account the individual, and their decent living conditions as the goal and core of the constitutional order of Ukraine, recognising these as the highest values (Preamble, part one of Article 3 of the Constitution of Ukraine). It follows from the above that the legislator cannot resort to a legislative regulation that would enable the forced deprivation of persons of housing, solely due to a change in the owner of the dormitory, which could put persons and their family members in an exceptionally difficult social situation, incompatible with their human dignity – one of the fundamental values of the constitutional order of Ukraine.'*⁶⁵

*'The Constitutional Court of Ukraine proceeds from the fact that the Preamble to the Constitution of Ukraine confirms "the European identity of the Ukrainian people and the irreversibility of Ukraine's European and Euro-Atlantic course". In its Decision No. 5-p(II)/2022 of June 22, 2022, the Constitutional Court of Ukraine (Second Senate) noted that "Ukraine aims to gain full membership in the European Union, consistently implementing the relevant constitutional values in legislation, taking into account the fact that the European Union is founded on "the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights", as well as on the fact that "these values are common to the Member States". In turn, the European integration of Ukraine requires the establishment of true democracy, the observance of human rights and the rule of law as pan-European values.'*⁶⁶

8.

Protection of Constitutional Identity in the Process of Amending the Constitution

One of the manifestations of constitutional identity is the complex process of amending the constitution so as not to damage its core. In Ukraine, amendments to the constitution are made by the Verkhovna Rada of Ukraine in two sessions – at the first,

65 Ibid.

66 Decision of the Constitutional Court of Ukraine (Grand Chamber) dated June 30, 2022 No. 1-r/2022.

the bill must be approved by a simple majority, and at the next regular session – by a constitutional majority, that is, two-thirds of the deputies from the constitutional composition (Article 155 of the Constitution). This applies to amendments to all parts of the Constitution, except for Chapters I, III and XII. Amendments to these chapters, after adoption by at least two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine, are approved by an all-Ukrainian referendum (Article 156 of the Constitution).

A draft law on amendments to the Constitution of Ukraine shall be considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the compliance of the draft law with the requirements of Articles 157 and 158, and in particular, the Constitution of Ukraine cannot be amended during martial law or a state of emergency; if the amendments foresee the abolition or restriction of human and citizen's rights and freedoms, or if they are oriented toward the termination of independence or violation of the territorial indivisibility of Ukraine.

The Constitutional Court of Ukraine on June 9, 1999 provided an official interpretation of Article 159 of the Constitution of Ukraine in the light of the fact that it will be the guarantor of the protection of constitutional identity from those amendments to the Constitution that violate it. In its decision, it set the binding nature of the Court's opinion in the process of amending the Constitution. If the Verkhovna Rada does not take the opinion into account or takes it into account only partially, the process of amending the Constitution must restart from the beginning. Thus, only a one hundred percent positive opinion of the Constitutional Court on the proposed amendments can open the way to constitutional changes:

*'The provisions of Article 159 of the Constitution of Ukraine shall be understood as meaning that a draft law on amendments to the Constitution of Ukraine in accordance with Articles 154 and 156 of the Constitution of Ukraine may be considered by the Verkhovna Rada of Ukraine only upon the availability of an opinion of the Constitutional Court of Ukraine that the draft law complies with the requirements of Articles 157 and 158 of the Constitution of Ukraine. If amendments are made to the draft law during its consideration by the Verkhovna Rada of Ukraine, it shall be adopted by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine that the draft law with the amendments made to it complies with the requirements of Articles 157 and 158 of the Constitution of Ukraine. The subject of constitutional submission on these issues shall be the Verkhovna Rada of Ukraine.'*⁶⁷

67 Decision of the Constitutional Court of Ukraine dated June 9, 1998 No. 8-rp/98.

If, nevertheless, the Verkhovna Rada of Ukraine ignores the opinion of the Constitutional Court in whole or in part, or amends the part of the constitution that is not covered by an opinion, the Constitutional Court may declare such amendments unconstitutional: “The Constitution of Ukraine does not contain any reservations regarding the possibility of the Constitutional Court of Ukraine exercising further (*a posteriori*) constitutional control over the law on amendments to the Constitution of Ukraine as a constitutional amendment after its adoption by the Verkhovna Rada of Ukraine. The Constitutional Court of Ukraine shall exercise further (*a posteriori*) constitutional control over constitutional amendments after their entry into force, since the absence of judicial control over the procedure for consideration and adoption of relevant laws, which is determined by the provisions of Section XIII of the Constitution of Ukraine, may result in the restriction or abolition of human and citizen rights and freedoms, the termination of independence or the violation of territorial integrity, or a change in the constitutional order in a manner not provided for by the Constitution of Ukraine. Compliance with the procedure set by the Constitution of Ukraine for considering, adopting, and enacting laws is essential. This includes constitutional amendments, which are acts of the drafters, carried out by the Verkhovna Rada of Ukraine. Adhering to this procedure is crucial for ensuring the legitimacy of the people’s constituent power. As follows from Article 157 of the Constitution of Ukraine, the constituent power explicitly limited itself to disallow changes to those provisions of the Constitution of Ukraine that protect “human and citizen rights and freedoms”, “independence” and “territorial integrity”.⁶⁸

Constitutional control over amendments to the Constitution of Ukraine is not only formal; the Constitutional Court verifies compliance with human rights from the standpoint of their constitutional identity, that is, their essential content:

“The prohibition provided for in part one of Article 157 of the Constitution of Ukraine on amending the Constitution of Ukraine, if the amendments provide for the abolition or restriction of human and citizen rights and freedoms, is a constitutional guarantee of preserving both the very essence of such rights and freedoms, their scope and content, and their protection. The purpose of this guarantee is to prevent any narrowing of the content of the rights and freedoms of an individual, because, as the Constitutional Court of Ukraine has established, “the narrowing of the content and scope of rights and freedoms is their restriction” (paragraph four of subparagraph 5.2 of paragraph 5 of the motivational part of the Decision of September 22, 2005 No. 5-rp/2005). The specified guarantee of preserving the very essence of the rights and freedoms of a person and

68 Decision of the Constitutional Court of Ukraine dated November 1, 2022 No. 2-p/2022.

*a citizen is a constitutional requirement, which strengthens the general prohibition established by the requirement of part three of Article 22 of the Constitution of Ukraine to narrow their content and scope when adopting new laws or amending existing laws.*⁶⁹

In this regard, it is worth mentioning the contemporary approach of the Constitutional Court of Ukraine in recognising the individual constitutional identity when determining the constitutionality of limitations on human rights and freedoms. In its decision in the case on judicial control over the hospitalisation of incapacitated persons in a psychiatric institution dated June 1, 2016, No. 2-rp/2016 the Constitutional Court noted that “in the event of a limitation of a constitutional right or freedom, the legislator is obliged to introduce such legal regulation that will allow for the optimal achievement of a legitimate goal with minimal interference in the implementation of this right or freedom and not violate the very essence of such a right.”⁷⁰ In this decision, the Constitutional Court recognised the lack of judicial control over the placement of a person in a psychiatric hospital to be unconstitutional, because it violates the very essence of the personal constitutional right to liberty and security.

9. Conclusion

The constitutional changes that came into force on February 7, 2019, finally consolidated the aspiration of the Ukrainian people to become part of European civilization, so that the Constitution of Ukraine would make it impossible to return to the Soviet past in the form of constant attempts by our northern neighbour to drag Ukraine into its post-Soviet bloc of states - satellites of the Russian Federation. Now any attempts by politicians to return to the post-Soviet past and block the direction of Ukraine's European integration will be unconstitutional and invalid in a legal sense.

At the same time, from the aspect of constitutional law, the concept of constitutional identity is understudied in Ukrainian legal literature and relatively new in the practice of the Constitutional Court of Ukraine.

The concept of European identity is not the same concept of constitutional identity, although it is enshrined in the Preamble to the Ukrainian Constitution, while constitutional identity is not, and comes implicitly from the core of the constitution, which cannot be changed or abolished even by amending the constitution, and comes

69 Opinion of the Constitutional Court of Ukraine dated December 24, 2019 No. 9-B/2019.

70 Decision of the Constitutional Court of Ukraine dated June 1, 2016, No. 2-rp/2016.

from the practice of constitutional courts, and in particular, from the practice of the Constitutional Court of Ukraine.

European identity values are fully reflected in Article 2 (1) of the Treaty on European Union:

“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. They are common to the all Member States. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

European identity is the embodiment of the desire of the Ukrainian people to be part of the unity of European nations, to be involved in the process of European integration, as Ukrainian people share these values with other European nations, and these values are also reflected in our constitution.

Constitutional identity safeguards the constitution and core principles (eternity clause) from political interference. This protection is designed to prevent changes to the constitution or distortions in its interpretation that could compromise its essential content and meaning. This would cause a threat to the existence of constitutional order. Constitutional identity represents the people’s constituent power and sovereignty. State bodies, such as the parliament or the president, do not have the authority to change fundamental constitutional principles that are enshrined in the constitution, nor can they violate the very essence of human rights through positive law. Constitutional core means fundamental, legally unchangeable provisions and national constitutional principles.

Constitutional identity is also about the dialogue of national constitutional courts with EU institutions based on national constitutional norms, values and principles that have priority over EU Law. If they comprise the core of the Constitution, the principle of superiority of the Constitution comes into effect

Bibliography

- Allezard, L. (2022) 'Constitutional identity, identities and constitutionalism in Europe', *Hungarian Journal of Legal Studies*, 63(1), pp. 58–77.
- Aristotle (1962) *The Politics*. Ernest Baker trans. Oxford: Oxford University Press. https://doi.org/10.1007/978-3-642-48409-4_2
- Arnold, R. (2017) 'European Union law and the German Constitution', *Journal of the Association of Constitutional Justice of the Baltic and Black Sea Regions*, 2017/1, pp. 72–85.
- Arnold, R. (1999) 'European Constitutional Law: Some Reflections on a Concept that Emerged in the Second Half of the Twentieth Century', *Tulane European and Civil Law Forum*, 1999/14, pp. 49–64.
- Barabash, Y. (1991) 'Rol akademichnoï dumky u formuvanni ofitsiynoi konstyuttsii doktryny v Vzaiemni zdobutky Yevropejskoï Komisii "Za demokratiiu cherezpravo" i orhaniv konstyuttsiynoi yustyttsii ta problemy tлумachennia u konstyuttsiynomu sudochynstvi: zb. materialiv i tez Mizhnar. onlajn-konf.', Online conference, VAITE.
- Campbell Black, H. (1990) *Black's Law Dictionary*. St. Paul, Minnesota: West Publishing; <https://doi.org/10.1017/9781108864435.027>
- Boryslavska, O. (2023) 'Derzhavna mova i konstyuttsiina identychnist Ukrainy: pryroda vzaiemozviazkiv', *Ukrainskyi chasopys konstyuttsiinohoprava*, 2023/3, pp. 3–15.
- Boryslavska, O.M. (2015) 'Zahalnoievropeiski konstyuttsiini tsinnosti yak osnova yevropeiskoi modeli konstyuttsionalizmu', *Chasopys Kyivskoho universytetu prava*, 2015/2, pp. 54–58.
- Bulletin of the European Communities (1973) 'Declaration on European Identity', Luxembourg: Office for official publications of the European Communities, 1973/12, pp. 118–122.
- Drinoczi, T. (2020) 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach', *German Law Journal*, 2020/21, pp. 105–130.
- Granat, M. (2021) 'Constitutional Identity and its Significance', *Ukrainian Journal of Constitutional Law*, 2021/ 4, pp. 3–7.
- Jacobson, G. (2006) 'Constitutional Identity', *The Review of Politics*, 2006/68, pp. 361–397
- *Kesavananda Bharati v. State of Kerala*, 1973 SC 1461 (1973), 1624
- Kolisnyk, V., Berchenko, H., Slinko, T. (2022) 'Constitutional Identity as the Constituent Power Embodiment', *Journal of the National Academy of Legal Sciences of Ukraine*, 29(3), pp. 69–87.
- Kommers, D. (2012). *The constitutional jurisprudence of the Federal Republic of Germany*. Durham – London: Duke University Press. <https://doi.org/10.2307/j.ctv125jqj0.1>

- Kozyubra, M. (2024) 'Konstytutsiia Ukrainy. Naukovo-praktychnyi komentar' in Barabash, Y., Hetman, A., Serohina, S. (eds.) *Konstytutsiia Ukrainy: naukovo-praktychnyi komentar*. Kyiv: Pravo Kyiv, pp. 12–14.
- Krygier, M. (1986) 'Law as Tradition', *Law and Philosophy*, 1986/5, pp. 237–262.
- Kumm, M. (2023) 'Un-European Identity Claims: On the Relationship between Constituent Power, Constitutional Identity and its Implications for Interpreting Article 4(2) TEU' in Kovács, K. (ed.) *The Jurisprudence of Particularism: National Identity Claims in Central Europe*. Oxford: Hart Publishing, pp. 173–186; <https://doi.org/10.5040/9781509960156>
- Maes, C. (2024) *The notion of constitutional identity and its role in European integration* [Online]. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2024/760344/IPOL_STU\(2024\)760344_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2024/760344/IPOL_STU(2024)760344_EN.pdf) (Accessed: 13 December 2025).
- Marinkás, Gy. (2024) 'Aktualne kwestie związane z (bezwarunkowym) pierwszeństwem prawa UEw orzecznictwie sądów konstytucyjnyh Niemiec, Węgier i Rumunii' in Grosse, T.G. (ed.) *Trzecia władza w Unii Europejskiej. Od teorii do praktyki*. Warsaw: Centrum Badań Polityki Europejskiej, pp. 461–522 [Online]. Available at: <https://cbpe.pl/eu-law-primacy-vs-constitutional-courts-germany-hungary-romania/>, (Accessed: 15 December 2025).
- Martinelli, A. (2017) *The European Identity Glocalism: Journal of culture, politics and innovation* [online], Available at: https://glocalismjournal.org/wp-content/uploads/2019/08/martinelli_gjcpi_2017_2.pdf, (Accessed: 20 December 2025).
- *Minerva Mills Ltd v. Union of India*, AIR 1980 SC 1789, 1798.
- Murphy, W. (1995) 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity' in Levinson, S. *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*. Princeton: Princeton University.
- Nykorak, O.Iu. (2023) Konstytutsiina identychnist yak katehoria konstytutsiinoho praca: dys.filosofii [spets. 081 - Pravo], *Lvivskyi natsionalnyi universytet im. Ivana Franka*. Lviv.
- *Oxford Learner's Dictionaries*, [online], Available at: <https://www.oxfordlearnersdictionaries.com/definition/academic/identity?q=identity>, (Accessed: 29 November 2026).
- Rainer, A. (2016) 'EU integration: national v. supranational order?', *European and Comparative Law Journal*, 2016/1, pp. 17–29.
- Rosenfeld, M. (2012) 'Constitutional Identity' in Rosenfeld M. Sajó, A. *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, pp. 756–776. <https://doi.org/10.1093/oxfordhb/9780199578610.001.0001>
- Sadurski, W. (2006) 'European Constitutional Identity?', *Sydney Law School Research Paper*, 2006/37.
- Savchyn, M. (2020) *Porivnialne konstytutsiijne pravo*. Kyiv: VAITE.

- Scholtes, J. (2023) *The Abuse of Constitutional Identity in the European Union*. Oxford: Oxford University Press. <https://doi.org/10.1093/oso/9780198883173.003.0001>
- Shcherbaniuk, O. (2020) 'Konstytutsiŭna identychnist v arhumentatsii rishen konstytutsiŭnykh sudiv', *Konstytutsiŭno-pravovi akademichni studii*, 2020/3, pp. 77–84.
- Slinko, T., Tkachenko Y. (2023) 'Guaranteeing constitutional national identity by constitutional control bodies', *Pravo Ukrainy*, 2023/7, pp. 70–84.
- Smith, A. (1991) *National Identity*. London: Penguin Books.
- Tribe, L. (1983) 'A Constitution We Are Amending: In Defence of a Restrained Judicial Role', *Harvard Law Review*, 1983/97, pp. 433–440.
- Troper, M. (2010) 'Behind the Constitution? The Principle of Constitutional Identity in France' in Sajo, A. Utz, R.(ed.), *Constitutional Topography: Values and Constitutions*. The Hague: Eleven International Publishing. <https://doi.org/10.1017/9781009447713.007>
- Varga, A. Zs. (2016) 'Történeti Alkotmányunk Vívmányai az Alaptörvény Kógens Rendelkezésében', *Iustum Aequum Salutare*, 12(4), pp. 85–88.
- Voermans, W., Stremmer, M., and Cliteur, P. (2017) *Constitutional Preambles: A Comparative Analysis*. Cheltenham – Northampton: Edward Elgar Publishing.
- Zalimas D. (2024) 'Problems of Legality: Collection of Scientific Works' Kharkiv Inaugural Speech at the Solemn Meeting of the Academic Council of Yaroslav Mudryi National Law University. Yaroslav Mudryi National Law University.

