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# LAW REVIEW

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# FLAGSHIP STUDIES

Irine KURDADZE* – Eka SIRADZE**

# Protection of Constitutional Identity in Georgia vis-a-vis Negotiations on Its Accession to the EU

**ABSTRACT:** *Georgia's relations with the European Union (EU), with varying degrees of intensity and success, date back to the 1990s. Special dates include 8 July 2014, when the Association Agreement between Georgia and the EU was signed; 3 March 2022, when Georgia officially applied for membership in the EU; and 15 December 2023, when Georgia was officially granted the status of a EU candidate state – one of the most important events in the country's modern history. In this context, maintaining a balance between preserving Georgia's constitutional identity on the one hand and full-fledged European integration on the other is of particular importance. In this regard, the role of a litmus test may be played by the implementation of the so-called 12-point plan by Tbilisi and the assessment of this implementation by Brussels. Therefore, this article aims, on the one hand, to analyse and define the constitutional identity of Georgia via elaboration of the practice of the Constitutional Court of Georgia, and on the other, to assess the degree of impact of the implementation of the 12-point plan on that identity. The comprehensive analysis also includes a brief analysis of the fundamental principles of the Georgian Constitution and the influence of the rule of law in assessing the implementation of the 12-point plan.*

**KEYWORDS:** *Constitutional Identity, Candidate State, 12-point Plan, Constitutional Court, Associated Agreement (AA).*

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# 1.
# Introduction

It is noteworthy that after the October 2024 parliamentary elections, relations between Georgia and the European Union (EU) "cooled down" sharply. Despite the fact that, fortunately, neither Georgia's status as a candidate country for EU membership nor the decision on visa-free travel to Georgian citizens was reviewed by Brussels, the level of tension between the parties was quite significant, the peak of which was the official statement made by the Prime Minister of Georgia on November 2024 that Georgia would remove the EU membership bid from the agenda until 2028. That it would fully concentrate on fulfilling the obligations set out in the Association Agreement (AA) signed between Georgia and the EU, and the candidate status, such that the country could join the EU in 2030. Here, the most important question that arises is the extent to which the implementation of the so-called 12-point agenda by the Georgian side is considered in this decision. The present article aims to address precisely this, to open a discussion on, after the Georgian state obtained the status of a candidate country for the EU in 2022, the extent to which the implementation of the so-called 12-point agenda can affect the constitutional identity of Georgia and what compromise can be made in this regard between the parties. To this end, Georgia's relations with the EU will be discussed first, starting from its post-Soviet Commonwealth of Independent States membership to the status of an EU candidate country.

### *1.1. Georgia's EU Path: Approximation, Association, and Political Will*

From the outset, cooperation between Georgia and the EU evolved within a bilateral framework, reflecting Georgia's strategic orientation toward Europe, and its pursuit of normative and institutional convergence with EU values and standards. A significant step toward closer relations with the EU occurred in 2004, when Georgia established an institutional system to coordinate the process. The establishment of different state entities and bodies on European integration was a significant step forward, signifying a decisive political and institutional commitment to this trajectory. It embedded European integration within the national legislative agenda and signalled Georgia's readiness to operationalize its European ambitions through domestic reform structures.

The bilateral partnership matured into a legally binding framework with the signing of the AA among the EU, the European Atomic Energy Community,

and Georgia on 27 June 2014.[1] Ratified by the Georgian Parliament shortly thereafter and entering into force on 1 July 2016,[2] the Agreement formalized a new phase of political association and economic integration. The accelerated ratification by EU Member States – driven in part by the geopolitical repercussions of the Russian Federation's annexation of Crimea – demonstrated both the EU's strategic interest in the Eastern Partnership region and the political significance of Georgia's European trajectory.[3]

The AA institutionalized the key principles underpinning EU external governance: democracy, respect for human rights, the rule of law, and good governance.[4] It established a comprehensive framework for normative approximation, requiring Georgia to progressively align its national legislation with the *acquis communautaire* and to ensure the effective implementation of EU-compatible reforms.[5] This process transcends technical harmonization, functioning instead as a transformative mechanism reshaping domestic governance structures and policymaking practices.[6]

Georgia's application for EU membership on 3 March 2022,[7] followed by the European Council's decision of 14–15 December 2023 to grant EU candidate status,[8] redefined the nature of EU–Georgia relations. These developments embedded Georgia within the EU's pre-accession conditionality framework, thereby extending approximation obligations beyond the AA to encompass the entire *acquis communautaire*. The process thus evolved from a sectoral engagement into a systemic reform agenda, integrating nearly all dimensions of governance into the EU's normative sphere.

This transformation entails three interrelated challenges. First, ensuring the substantive implementation of the AA, avoiding purely formal compliance. Second, broadening the scope of legislative convergence to new policy domains. Third, maintaining policy coherence and socio-economic stability while addressing the financial and institutional costs of deep Europeanization. Success depends not only on legislative adaptation but also on institutional capacity, bureaucratic professionalism, and sustained political commitment.[9]

Ultimately, the evolution of EU–Georgia relations reflects a shift from bilateral cooperation toward structured integration governed by conditionality, policy

1 OJ L 261/4, 30.8.2014.
2 European External Action Service (EEAS), EU–Georgia Relations: Factsheet, Brussels, July 2016.
3 Delcour, 2020, pp. 164–179.
4 Association Agreement, Title II, "Political Dialogue and Reform, Political Association, Cooperation and Convergence in the Field of Foreign and Security Policy."
5 Association Agreement, Title IV, "Trade and Trade-Related Matters."
6 Börzel and Risse, 2012, pp. 1–19.
7 Government of Georgia, Application for Membership of the European Union, submitted to the Council of the EU, 3March 2022.
8 EUCO 20/23 CO EUR 16 CONCL 6, Brussels, 14–15 December 2023.
9 Schimmelfennig and Sedelmeier, 2005.

diffusion, and normative convergence. Legislative approximation is a complex process aimed at maintaining a coherent and effective national legal system while safeguarding national interests. It requires careful planning that considers time, human and financial resources, and the potential impact on both public and private sectors. According to the EU–Georgia AA, this process forms part of a broader framework for political and economic integration, requiring Georgia to align its national legislation with EU standards. For political integration, the AA framework promotes cooperation in justice, freedom, and security, emphasizing the rule of law and human rights as key foundations. It calls for reforms in areas such as judicial independence, access to justice, migration management, and the fight against human trafficking, organized crime, corruption, and terrorism financing. The AA must also foster collaboration on mutual legal assistance, Georgia's participation in relevant UN and Council of Europe instruments, and cooperation with the EU Agency for Judicial Cooperation (EUROJUST).

As practice shows, the accession process is more than a merit-based approach and involves negotiations on chapters of the EU Acquis.[10] Consequently, the state's political will plays a crucial role in ensuring the consistency, pace, and success of the membership process.

### *1.2. The Constitution of Georgia and the Application of the Association Agreement*

By signing the AA, Georgia has accepted obligations under international law. The Agreement takes precedence over national legislation, provided that it is in line with the Constitution. Georgia must progressively align its legal and administrative framework with EU standards in areas such as human rights, environment, trade and governance.

The Constitution of the modern Georgian state was adopted on 24 August 1995, and in its preamble, recognizes the historical and legal heritage of the 1921 Constitution. Notably, the 1921 Constitution was adopted by the National Council on 21 February 1921, 4 days before the independence of Georgia, and in reality it was not in force for a single day, although it was officially in force until 18 March 1921, when the forces of the Democratic Republic of Georgia were defeated in the war against the Bolsheviks[11]. After the restoration of Georgia's independence, there were attempts to restore the 1921 Constitution to no avail. Accordingly, the modern Georgian Constitution dates back to 1995, and is not a continuation or legal successor of the constitutions of

10 Koplatadze, 2025, The EU Acquis: 2025-2030. Agenda for the opening and conduct of Georgia's EU accession negotiations and the domestic and foreign policy risks of negative impacts on it

11 Matsaberidze, 2021, pp. 336–337.

the former Georgian Soviet Socialist Republic (1924, 1937, 1978). The Constitution of Georgia was significantly amended on 19 October 2017 and 2 April 2018.

Georgia was one of the first countries of the former Eastern bloc to recognize the primacy of international law in Georgian legislation after the restoration of independence, while still formally under the conditions of the Soviet Union's existence. On 9 April 1990, by the Act of Restoration of State Independence of Georgia, it enshrined the primacy of international law over national legislation, ensuring its direct effect, and declaring it one of the constitutional principles.[12]

The rationale behind this approach was reinforced in Articles 6 and 7 of the 1995 Constitution of Georgia and retained in the 2018 revision under Article 4, paragraphs 2 and 5.[13] This provision defines the relationship between international and domestic law, outlining that Georgia's legislation must align with universally recognized principles and norms of international law. Furthermore, international treaties take precedence over domestic legal acts unless they contradict the Constitution or the Constitutional Agreement of Georgia[14].

Additionally, Article 7, paragraph 4 of the Organic Law of Georgia on Normative Acts and Article 6 of the Law of Georgia on International Treaties outline the hierarchy of legal norms, placing the Constitution at the top, followed by international treaties and agreements, and then domestic laws and other legal acts. These provisions collectively underscore Georgia's dedication to integrating international legal standards into its national legal framework.

Before ratifying or accessing international treaties, Georgia typically aligns its national legislation with treaty requirements. However, parliamentary practice has shown that the country may also ratify a treaty first and then adjust domestic laws accordingly.

Under Article 4, paragraph 2 of Georgia's Constitution, human rights and freedoms have direct and immediate legal effect. The state recognizes and upholds universally accepted human rights as fundamental values, binding both the government and the people. Additionally, the Constitution does not exclude other universally recognized rights that, while not explicitly mentioned, stem from its core principles.

In summary, the statement that 'the Constitution of Georgia corresponds to universally recognized principles and norms of international law' signifies the primacy of international law not only over domestic legislation but also in relation to the Constitution itself. By incorporating the concept of 'universal principles and rules,' the legislature affirms Georgia's commitment to international legal standards as part of a modern, civilized community. The legal system encompasses treaties,

12 Kurdadze. Kevlishvili, 2023, p. 228.
13 Kurdadze, 2001, p. 44.
14 About supervision mandate of Constitutional Court See Kezuriani, 2013, p. 12.

legal interpretations, international legal relations, and the application of norms, all of which integrate international law into national legislation. These universal principles serve as the foundation for Georgian lawmaking and must guide legislative processes. In cases where domestic law lacks specific regulations (legal vacuum), these principles function as direct legal norms, extending their influence beyond domestic law to the entire legal framework. Besides, 'by using the term "universally recognized principles and norms of international law", the Constitution helps Georgia uphold the high values recognized by the entire international community, thereby contributing to the development of international law'.[15]

The enforcement of international obligations of Georgia also affects European law, notwithstanding the latter's *sui generis* nature. The EU was established by intergovernmental treaties, making it a phenomenon of international law. The European Court of Justice (ECJ) has described the EU as a 'new order of international law':

> *'The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community.'* [16]

Obligations under the AA are not in conflict with general international law, as confirmed by the AA: '*the Parties reaffirm their respect for the principles of the rule of law and good governance, as well as their international obligations, in particular under the UN, the Council of Europe and the OSCE. In particular, they agree to promoting respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence*.'[17]

The AA between the EU and Georgia is a legally binding international agreement, based on Article 217 of the Treaty of the Functioning of the European Union (TFEU), which entails reciprocal rights and obligations, common actions and special procedures.[18] The agreement is considered a "mixed agreement", indicating that it covers

15 Korkelia, 2021, p. 23.
16 See Van Gend en Loos, v Netherland, Case 26-62. this position has reaffirmed in subsequent judgments.
17 OJ L 261/4, 30.8.2014, Art. 2 para. 3.
18 European Parliament, Study: "The meaning of 'association' under EU law", 2019, p. 13.

areas of both EU and Member State competencies. As such, it requires ratification by all EU Member States and the partner country. According to Georgia's legislation, it holds supremacy over national law, while the Constitution of Georgia remains the highest legal authority. Therefore, if a conflict arises between the AA and national law, the latter must be revised. Nevertheless, in cases where the Agreement contradicts the Constitution, the possibility of amending the Agreement cannot be ruled out. Furthermore, pursuant to the principle of the primacy of international law, a State may not refuse to comply with its treaty obligations by invoking its domestic law, including the assertion that the treaty is unconstitutional.[19] Some argue that the AA has/should have a superior force in relation to other international treaties; given the special and specific nature of the AA, Georgian legislation should contain exceptional rules in order to make the position of the AA in national law legally clear and unambiguous.[20] In practice, it is difficult to imagine the implementation of such a provision, since international multilateral treaties cannot be hierarchically subordinated. The desire to give the Association a superior position is understandable, although such a mechanism is unknown to either the international or national legal systems. This is precisely what requires the doctrine of placing universal principles above the constitution. It is noteworthy and valuable information for analysis that the Constitutional Court of Georgia has not yet ruled any international treaty or its provisions unconstitutional.[21]

The AA reaffirms Georgia's territorial integrity and commitment to peaceful conflict resolution, thereby enhancing its international standing. However, apart from the political implications, the AA requires the implementation of EU standards in key sectors, including environmental protection, consumer rights, food safety, transport, energy and competition policy.

Despite recognized achievements in implementation of AA, the challenges remain, including difficulties in adopting EU standards and political polarization, which are addressed in the so-called 12-point plan: the implementation of which will require continued efforts by the Government and support from the EU. To summarize, the AA is a key instrument guiding the Georgia–EU relationship, notwithstanding obtaining Candidacy State status.

19 VCTL Art. 27.
20 Kardava, 2021, p.21.
21 Nakashidze, G., 2022. p. 81.

# 2.
# Constitutional Identity *vis-a-vis* EU Integration

## *2.1. Notion of Constitutional Identity*

While discussing the protection of constitutional identity in Georgia vis-a-vis negotiations on the accession to the EU, and in particular, compliance with the implementation of the so-called 12-point Agenda, one should always bear in mind that, by signing the AA with the EU on 27 June 2014, the Georgian Government, in addition to firmly demonstrating its strategic choice, created a very important framework for systemic change in the country.[22]

For the purposes of this study, it is important to define constitutional identity precisely as it is perceived in the legislation/legal system of the EU and its member states, and in the Georgian legal system.

Before we begin to discuss constitutional identity, it should be noted that this topic has been scarcely studied in the Georgian academic space and only a couple works can be found on it.[23] Therefore, we are justified in focusing more deeply on the concept of identity and discussing the different ways constitutional identity can be formed, as well as examining the practices of other countries to draw the right conclusions. If Georgia's constitutional identity is not assessed, or at least its contours not outlined, it will be impossible to discuss the relevance of the 12-point plan as such.

As an analytical concept, constitutional identity is used to explain how a collectivity understands itself through a constitutional document or order. As a normative concept, constitutional identity focuses on the core norms and principles of a constitutional system that bind constitutional actors in a particular way, making these rules and values unamendable.[24]

In the most general sense, constitutional identity is a set of important constitutional values.[25] It is crucial for constitutional identity that society believes the constitution to be based on and reflective of its values, and that these values are the "source of its special character".[26]

There are different ways wherein constitutional identity can be formed. Some authors believe that constitutional identity can only be formed in the decisions of

22 See Maka Bochorishvili, Chair of the Committee on European Integration, Legislative Basis of Association with the European Union 2014-2023, 27.06.2023.
23 See Gegenava, 2019; Alaverdashvili, 2024.
24 Ibid.
25 Polzin, 2017.
26 Jacobsohn, 2010, p. 114.

constitutional or cassation courts,[27] as is the case in the practice of various European countries. Many EU states' constitutional courts address the issue of "constitutional identity" in the context of the application and competition of EU and national laws.[28] Thus, for them, constitutional identity is directly related to the judiciary and the legal system.[29] The constitutional courts, are regarded as the ultimate guarantors of constitutional identity.[30] However, it is worth noting that the interpretation of constitutional courts is meaningless if other processes do not take place in parallel. In practice, constitutional identity is often determined by political processes, along with the judiciary.[31]

To ensure the protection of their own constitutions and constitutional identities, the constitutional courts of the majority of EU states have taken on the additional function of discussing constitutional identity. Many constitutional courts have developed a number of theoretical foundations and arguments to legitimize their own authority, such that they, as a counterweight to the EU, can oppose certain legal acts on the grounds of protecting constitutional identity.[32]

For example, according to the Spanish Constitutional Court, the sovereign power of a state can only be "overridden" by the EU if EU law itself is consistent with the fundamental nature of the Spanish Constitution, namely its constitutional identity.[33]

In the famous Solange I-decision of 1974, the Court gave the term legal relevance by ruling that Article 24 of the Constitution (Basic Law), which authorizes Germany to transfer powers (*"Hoheitsrechte"*) to international organizations, does not permit a change of "the constitution's basic structure (*"Grundstruktur"*) on which its identity is founded".[34] Consequently, Germany may not ratify an international treaty that would negatively affect the identity of the Basic Law. Moreover, the Court declared that the primacy of European law ends where the identity of the constitution begins.[35] According to the Czech Constitutional Court, the material, substantive core of the Constitution is still superior to the regulation of the EU.[36] Furthermore, the French Constitutional Council considers it impossible to put into practice a directive that contradicts the text and content of the Constitution. In addition, the Council of State

27 For example, Prof. Dimitri Gegenava.
28 Reestman, 2009, p. 375.
29 Fletcher, 1993, p. 738; e.g. In the case of Rogers v. Richmond, the U.S. Supreme Court interpreted the American criminal justice system and compared it to the European in order to identify the identity of the American system. Rogers v. Richmond, 365 U.S. 541 (1961).
30 Giacomo Di., 2019, p. 380.
31 Jacobsohn, 2017, p. 1602.
32 Ibid.
33 SCC Declaration 1/2004, 13 December 2004, para. 37,47,50,38,58.
34 Solange I, judgement of 29 May 1974.
35 Cloots, 2016, 92; Bundes-verfassungsgericht, 2 BvR 2728/13, 14 January 2014, para.27.
36 Czech Constitutional Court, Judgment 26/114, 13 February 2014, Para II.3.

has repeatedly stated and is deliberately developing the idea that the French constitutional identity needs to be protected, including from interference by the EU.[37]

Professor Jacobson, in contrast to the above approach, considers it sufficient to examine the text of the Constitution to determine constitutional identity.[38] He believes that the text provides information about the methods of governance adopted by the founding group and, in particular, indicates future aspirations and developments.[39] Those are either the so-called "unamendable articles"[40] of the Constitution or the general spirit of the entire text.

Although it is generally believed that the constitutional unamendability is the guardian of constitutional identity, not every unamendable article expresses constitutional identity. For this, two cumulative conditions must be fulfilled: (I) first, a significant period of time must pass from the adoption of such a norm, and (II) and second, the provision must operate under several different political majorities.[41]

As such, how many years must pass since the adoption of a specific provision for it to be considered unchangeable is not specified anywhere. Therefore, in each specific case, an assessment must be made as to whether the time that has passed since the adoption of the norm is sufficient for the provision to acquire the status of constitutional identity, provided that the second component is satisfied.

In the Georgian legal debate prevails the opinion that Georgia is not yet a fully formed constitutional identity and the path towards it is rather long.[42] Therefore, to determine at least the contours of Georgia's constitutional identity, we must first determine by what means we can find it. Considering that the Constitution of Georgia has undergone significant changes in the relatively short period of its existence, such a component of constitutional identity as the existence of an "unchangeable norm" is less useful in this specific situation.

The rule on the establishment of "constitutional identity" in judicial decisions cannot be applied in case of Georgia either, since neither the Constitutional Court of Georgia nor its Supreme Court have ruled on the constitutional identity of Georgia or on any article of the Constitution as a bearer of constitutional identity in any of its decisions. Rather, the Constitutional Court has used the term "principles of the constitution". Specifically, Court stated that 'one of the main expressions of these principles, as can be seen from the preamble to the Constitution, is that the citizens of Georgia have an unwavering will to establish a democratic social system, economic

37 Reestman, 2009, p. 386.
38 Jacobson, 2011, p. 414.
39 Jacobson, 2011, p. 131.
40 Michel, Cofone, 2018, p. 137.
41 Alaverdashvili, 2024, p. 248.
42 Gegenava, 2019; pp. 340–341.

freedom, a social and legal state, and to ensure universally recognized human rights and freedoms'.[43]

Thus, the discussion of constitutional identity is possible only based on the text of the Constitution and, accordingly, its perception is possible only at the level of assumption. The contours of Georgia's constitutional identity are yet in the process of formation, and among them, the assessment of the implementation of the 12-point plan by the Georgian authorities can be used as a starting point or basis for some kinds of practice.

### *2.2. Practice of the Constitutional Court of Georgia*

In the case of the Constitution of Georgia, the interpretation of the basic law text itself as a means of establishing constitutional identity is the most relevant way.

In general, there are several theories of constitutional interpretation, wherein preference can be given to either the substantive aspects of the Constitution that the latter had when it was adopted, the meaning of the text, the perceptions of the legislator, or practice. However, since the format of a specific work does not allow for a detailed discussion of this issue and, moreover, does not consider it as such, we will limit ourselves to a discussion of the practice of the Constitutional Court of Georgia.

Unfortunately, this case is also fraught with serious problems in research due to the lack of relevant practice of the Constitutional Court. In particular, reference is made to the relationship between the Preamble and Article 78 of the Constitution of Georgia.

The relationship between Preamble, Article 1 and Article 78 of the Constitution is an important issue. According to Preamble, one of the main goals of the Constitution is to maintain the independence of the Georgian state.[44] Article 1 titled "State Sovereignty" declares that Georgia is an independent State.[45] The question then arises as

43 „(1) Bachua Gachechiladze, Simon Turvandishvili, Shota Buadze, Solomon Sanadiradze and Levan Kvatsbaia, (2) Vladimer Doborjginidze, Nineli Andriadze, Guram Demetrashvili and Shota Papiashvili, (3) Givi Donadze v. Parliament of Georgia." Decision No. 1/1/126,129,158; Panel I - Avtandil Abashidze, Iakob Putkaradze, Nikoloz Shashkini, Besarion Zoidze, April 18, 2002.

44 Namely, the preamble states that: 'We, the citizens of Georgia – whose firm will it is to establish a democratic social order, economic freedom, and a legal and a social state; to secure universally recognized human rights and freedoms; and to enhance state independence and peaceful relations with other peoples – drawing on the centuries-old traditions of the statehood of the Georgian nation and the historical and legal legacy of the Constitution of Georgia of 1921, proclaim this Constitution before God and the nation.'

45 '1. Georgia is an independent, unified and indivisible state as confirmed by the Referendum of 31 March 1991 held in the entire territory of the country, including the Autonomous Soviet Socialist Republic of Abkhazia and the former Autonomous Region of South Ossetia, and by the Act of Restoration of State Independence of Georgia of 9 April 1991.'

to how far the aspiration for transatlantic integration, as enshrined in Article 78,[46] and the fulfilment of the obligations set out in the 12-point plan are consistent with those provisions inserted in the Preamble. The interpretation is further complicated by Article 78's placement in Chapter Eleven, "Transitional Provisions", and the issue is whether it has the same force as other "permanent" provisions. Regarding the preamble to the Constitution, generally, the practice of states varies and it is not possible to say unequivocally that the preamble 'refers to the vague aspirations of the states'.[47]

On the other hand, it is accepted in the common law tradition that the preamble constitutes a guiding framework for the interpretation of the constitution. In particular, the case law of the Federal Republic of Germany, France, Ireland, Estonia and other states assigns an important role to the preamble of the constitution for interpretation purposes. In fact, the ECJ often uses the preamble of the Treaty on the European Union (TEU) for the purposes of interpretation.

In 2013, the Constitutional Court of Georgia ruled that 'the framework of the Constitution of Georgia, on which the entire structure of the Constitution is based, is expressed in the Preamble of the Constitution of Georgia, which has a normative meaning since not only a specific norm or part of a norm but also the preamble of a law may have a normative content'.[48]

In several decisions, the Constitutional Court appeals to the establishment of a social, legal and democratic state (as stated in the preamble) as a manifestation of the unwavering will of the Georgian people.[49] Thus, it can be stated with a high degree of probability that these principles will definitely be included in the criteria defining the constitutional identity of Georgia.

As constitutionalist T. Erkvania notes in her amicus curiae, 'Constitutional submission of members of the Parliament of Georgia[50] on the issue of alleged violation of the Constitution of Georgia by the President of Georgia', nowhere is there an explanation given of the relationship between the Preamble of the Constitution of Georgia and Article 78. Moreover, the constitutional submission of the members of

46 'The constitutional bodies shall take all measures within the scope of their competences to ensure the full integration of Georgia into the European Union and the North Atlantic Treaty Organization.'

47 Frosini, Justin, 2017, p. 603(607), as cited in the amicus curiae opinion of Albrecht Weber and Wolfgang Babek in the President of Georgia v. Parliament of Georgia, Constitutional Complaint No. 1828.

48 Minutes of the Constitutional Court of Georgia of 4 April 2013, No. 1/2/534 in the case "Citizens of Georgia Tristan Mamagulashvili and Firuz Vaniev v. Parliament of Georgia", II-16.

49 Georgian citizen Tamar Tandashvili v. Government of Georgia; Protocol No. 2/11/663; Panel II - Tamaz Tsabutashvili, Irine Imerlishvili, Teimuraz Tugushi, Manana Kobakhidze, 2017. 48 members of the Parliament of Georgia v. the Parliament of Georgia; Decision N2/35 of the Plenum, 1997.

50 In total of 80 members of the Parliament.

the Parliament itself does not address this issue, and the focus is only on the fact that 'the President of Georgia, like all other constitutional bodies, can participate in the implementation of foreign policy tasks stipulated by Article 78 of the Constitution of Georgia only within the framework of his authority, that is, only with the consent of the Government of Georgia'.[51]

It is true that, in the end, the Constitutional Court conducted its deliberations with respect to Article 78 only in the direction of whether the President violated the requirement to act "within the scope of his authority", and not directly on the meaning of this article and its compliance with the Preamble (since the requirement was not formulated in this way). The Constitutional Court recognized the primacy of the main articles of the Constitution over transitional provisions. In particular, 'In the opinion of the Court, in all cases it would be completely unjustified to seriously consider that a violation of any one norm of the Constitution could be justified on the grounds of compliance with another norm, especially a violation of the fundamental norm of the Constitution - a norm specified in temporary, transitional provisions'.[52]

In the practice of the Constitutional Court, the most in-depth discussion regarding Article 78 has begun in the case N3/3/1828,1829,1834,1837.[53] As a member of the Court stated, the Constitutional Court had not received any lawsuits regarding the compliance with Article 78 and the content of Article 78 had not been properly interpreted until this claim.[54]

The claim states that Article 78 of the Constitution of Georgia 'reinforces the value and civilizational choice of the citizens of Georgia and the obligation of all branches of government to take all measures to ensure the full integration of Georgia into the EU and the North Atlantic Treaty Organization.'[55]

51 Constitutional submission of members of the Parliament of Georgia (IKobakhidze,I., Papuashvili, Sh., Mdinaradze, M. and others, 80 members in total) on the issue of alleged violation of the Constitution of Georgia by the President of Georgia; Amicus of the Court opinion, Erkvania, T. ac1797, 2023.

52 Conclusion of the Constitutional Court of Georgia on the Violation of the Constitution by the President of Georgia; Case No. 3/1/1797; 16 September 2023, p. 72.

53 President of Georgia, Members of the Parliament of Georgia: Tamar Kordzaia, Ana Natsvlishvili, Levan Bezhashvili and others (total 38 MPs), Non-Commercial Legal Entity "Institute for the Development of Freedom of Information", Non-Commercial Legal entity "Rights Georgia", Non-Commercial Legal entity "Civil Society Foundation" and others (total 122 claimants), LLC "Network of Information Centers" and Non-Commercial Legal entity "Studio Monitor" against the Parliament of Georgia; N3/3/1828,1829,1834,1837; 4 October 2024. The constitutional complaint was filed on 18 July 2024, and the decision to initiate the case was published on 9 October 2024.

54 The Dissenting Opinion of the Member of the Constitutional Court of Georgia, Eva Gotsiridze, regarding the Recording Notice No.3/3/1828,1829,1834,1837, 4 October 2024, of the Constitutional Court of Georgia.

55 Ibid., p. 27.

Notably, this case was the first time that the position of the Parliament of Georgia was expressed regarding the interpretation of Article 78. In particular, it 'should be interpreted in accordance with and taking into account the principle of sovereignty'.[56] However, the discussion did not continue with regard to the interrelation of Article 78 to the Preamble. The Constitutional Court has not yet issued a decision or conclusion on the aforementioned lawsuit, and accordingly, we are limited in our ability to make specific conclusions.

Despite all the above, the Constitutional Court confirmed that Georgia's accession to the EU is, in essence, an issue of Georgia's foreign policy and the main direction of this policy, which is reflected, among other things, in the government program. In particular, the 'Government Program 2021-2024 for Building a European State' is considered. Moreover, among the main directions of foreign policy, it can be said that integration into European and North Atlantic structures is the most important, since taking all possible measures to achieve it is considered a constitutional obligation (Article 78).[57]

Moreover, when discussing a different issue, the position of the judges of the Constitutional Court, including the outstanding Georgian Scholar Professor Besarion Zoidze, was that '*the Constitution, the main purpose of which is to determine the foundations of the relationship between society and the government, cannot contain unrealistic goals. In this regard, the absence of certain obligations will call the goal itself into question*'.[58]

Thus, one can argue that regardless of the importance and place of Article 78 of the Constitution, it undoubtedly clearly expresses the main goal of foreign policy of independent Georgia and creates corresponding obligations for all branches of government, regardless of the current political situation.

To complete the picture, Preamble and Article 1 of the Constitution of Georgia shall be read in the context of the TEU. In particular, Article 4(2) TEU stipulates that the EU must respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. The EU must also respect the Member States' essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. As such, Article 4(2) TEU forms the legal basis for the EU's acknowledgment and respect of the

56 Ibid., p. 50.

57 Conclusion of the Constitutional Court of Georgia on the violation of the Constitution by the President of Georgia, 2023, p. 56.

58 Dissenting opinion of members of the Constitutional Court of Georgia Ketevan Eremadze and Besarion Zoidze; Dissenting opinion do1/2/434; I Panel Eremadze, K., Zoidze, B., 2009.

Member States' constitutional identities when interpreting and enforcing EU law.[59] On the other hand, there are those who claim that, 'giving Article 4(2) the broader meaning is harmful, as it opens the door to abusive and superficial uses of identity as a justification for non-compliance with EU obligation from the side of member states.'[60]

In addition, there is the assumption that the TEU speaks not on constitutional identity, but of national identity, which indicates that the Member States, as the authors of the Treaties, saw their identity endangered by the EU, not the other way round. Constitutional identity comes in insofar as national identity is declared to be 'inherent in the fundamental structures of the member states, political and constitutional'.[61]

In the well know case *Commission v. Italy*, the Court of Justice of the European Union (CJEU) stated:

> *'for a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the community brings into question the equality of Member States before community law and creates discriminations at the expense of their nationals, and above all of the nationals of the state itself which places itself outside the community rules.'*[62]

However, one should bear in mind the time of adoption of this decision, the fact that respect of national identity of Member States appeared only in the Lisbon amendments and that "national identity" is a stronger term rather than "national interest". On the other hand, in the case of *Bogendorff von Wolffersdorffthe*, Luxembourg judges did not insist on the scope of national identity vis-a-vis that of constitutional identity.

59 The notion of constitutional identity and its role in European integration, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 760.344- March 2024; p. 6.

60 Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States, De Witte, 2021, pp. 559–570.

61 Grimm, 2024.

62 CJEU, *Commission v. Italy*, 1973, para. 24.

## 3.
## EU Reports on Georgia's Implementation of the 12-point Plan

Although the subject of the study was supposed to be the Commission Staff Working Document (SWD), the Georgia 2023 Report Accompanying the document, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions 2023 Communication on EU Enlargement policy, the 2024 report also became available during the research process, and we believe that comparative analyses of these two documents will reveal the broader picture of the extent of progress, if any, that Georgia has made in implementing of the 12-point plan.

In the Reports, Chapters 23 'the Rule of Law' and 24 'Fundamental Rights' are the subjects of the examination regarding the implementation of the 12-point plan. They cover a wide variety of aspects of justice, internal security, fundamental rights and the fight against corruption and organized crime.

> *'While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.'*[63]

The rule of law is a globally recognized principle, often seen as a standard for national legal systems. Compliance with the rule of law is a key requirement for EU membership, as set out in the Copenhagen criteria.[64]

The EU has established various instruments, including the wide range of the mechanisms and instruments elaborated under UN and Council of Europe (CoE), to promote and uphold the rule of law based on three key pillars:

63 CJEU, Case C-156/21, 2021, p. 18(6).
(Action for annulment – Regulation (EU, Euratom) 2020/2092 – General regime of conditionality for the protection of the European Union budget – Protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States – Legal basis – Article 322(1)(a) TFEU – Alleged circumvention of Article 7 TEU and Article 269 TFEU – Alleged infringements of Article 4(1), Article 5(2) and Article 13(2) TEU and of the principles of legal certainty, proportionality and equality of Member States before the Treaties).

64 Established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995.

- Promotion of a rule-of-law culture within the EU, focused on enhancing cooperation to foster a deeper understanding of the rule of law across Europe.
- Prevention of rule-of-law issues by addressing emerging problems early, minimizing the risk of escalation. This includes the European Rule of Law Mechanism, with the annual Rule of Law Report as its central tool.
- Effective response to significant rule-of-law issues in Member States, using measures such as the procedure outlined in Article 7 of the Treaty on European Union.

### *3.1. Notion of the Rule of law*

Introduced in 2014, the Rule of Law Mechanism aims to ensure effective protection of the rule of law in EU Member States. It involves annual dialogue between EU institutions and national parliaments, with the European Commission monitoring developments and issuing recommendations when threats arise. The Commission keeps the European Parliament and Council informed on progress. When the Commission first offered a comprehensive working definition of the rule of law in a Communication published in 2014, it distinguished six core components on the basis of a number of CJEU rulings.[65]

Article 2 of the TEU states that the EU is founded on values including the rule of law, democracy, and human rights. CJEU highlights the importance of judicial review in ensuring compliance with EU law. The European Commission defines the rule of law as public powers acting within legal constraints, ensuring legal certainty, judicial independence, and respect for fundamental rights.

In 2021, the EU introduced the Conditionality Mechanism, linking rule of law violations to the EU budget. The European Commission can propose sanctions, such as suspending payments, if violations threaten the EU's financial interests.[66] Article 7 of the TEU allows for sanctions in cases of systematic violations, though these mechanisms are often limited by high decision-making thresholds and lack of member state cooperation.

Without any doubt, the EU legal framework of the rule of law is based on documents developed under auspices of the UN and CoE. In 2005, all UN Member States affirmed the importance of universal adherence to the Rule of Law at both national and international levels.[67] Founded in 1945, the UN today faces challenges that require collective action under the rule of law, ensuring accountability, transparency, and

65 9 COM (2014) 158 final (n 2) Annex I: The Rule of Law as a foundational principle of the Union.
66 EU activated those procedures against Poland and Hungary for judicial reforms.
67 2005 Outcome Document from the World Summit, paragraph 134), reaffirmed in 2024 (Pact for the Future, Global Digital Compact and Declaration on Future Generations, Action 13.)

alignment with international human rights standards. The rule of law is essential for peace, political stability, development, and protection of fundamental rights. It combats corruption, limits power abuse, and strengthens citizen–state trust. Goal 16 of the Sustainable Development Goals (SDGs)[68] highlights justice systems and reforms for marginalized groups, addressing human rights violations. Namely, the UN's "New Vision for the Rule of Law" outlined in "Our Common Agenda" focuses on people-centred justice systems, and aims to improve UN coordination and provide technical support to member states. It builds on existing agreements, addressing contemporary issues such as technology, environmental concerns, and access to justice, while maintaining established concepts. Regional organizations like the Organization of American States (OAS), African Union, and Arab League also recognize the rule of law in their frameworks.[69]

On the other hand, the CoE recognizes the Rule of Law as one of the foundational principles of genuine democracy, along with individual freedom and political liberty.[70] Moreover, the Statute of CoE mandates that respect for the rule of law is a prerequisite for any new member state seeking to join the Organization.

Rule of Law ensures that public authorities act within the law, uphold democracy and fundamental rights, and are subject to scrutiny by independent courts. The broader European aim of this framework is drawing on the experience of the European Commission for Democracy through Law (Venice Commission).

Although the CoE has not defined the rule of law or created a specific monitoring mechanism for it, it promotes the rule of law through various bodies, including the European Court of Human Rights (ECtHR), the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of European Judges (CCJE), the Group of States against Corruption (GRECO), the Monitoring Committee of the Parliamentary Assembly, the Commissioner for Human Rights, and the Venice Commission.[71]

The Rule of Law is a fundamental principle upheld by the ECtHR and frequently referenced in its case law. Additionally, it is regarded as a shared legal tradition among European states that are signatories to the Convention. Over the decades, the Court's jurisprudence has evolved to establish several substantive guarantees derived from this concept. These include the principles of legality and foreseeability, legal certainty, equality before the law, oversight of executive power in matters affecting public liberty, justiciability, and the right to a fair trial. Many of these principles are interconnected and can be grouped under the broader categories of legality and due process. Their primary aim is to safeguard individuals from arbitrary actions,

68 2030 Agenda and Sustainable Development Goals.
69 CDL-AD (2016)007, para 10.
70 Statute of the CoE, Preamble and Article 3.
71 CDL-AD (2011) 003rev, 2016.

particularly in their interactions with the state. Since Golder v. the United Kingdom[72], the rule of law has become a guiding principle for the ECtHR; it 'inspires the whole Convention'[73] and is 'inherent in all the Articles of the Convention'.[74] It is defined as 'one of the fundamental principles of a democratic society'.[75]

The Court has highlighted the strong connection between the rule of law and a democratic society through various statements, emphasizing their interdependence: 'a democratic society respecting the rule of law',[76] 'a democratic society based on the rule of law'[77] and, more systematically, 'the rule of law in a democratic society'.[78] Linked to the concept of "democratic society", the Rule of Law is also linked to the broader concept of "European social order".[79]

The World Justice Project (WJP) Rule of Law Index is a useful source for assessing the state of the Rule of Law[80] in different countries. It allows us to identify challenges and progress in the context of Georgia.[81]

Georgia had the highest index in 2015/2016 (0.66).[82] Over the past three years, the index has remained at 0.6. Although Georgia has maintained its position as the top-ranked country among 15 countries in the regional ranking since 2014, it has decreased in certain areas, such as absence of corruption and fundamental rights.[83]

The Venice Commission has issued critical opinions on several drafts and adopted laws of Georgia, including in light of the Rule of Law standards. In the Venice commission checklist of the Rule of Law related to the relationship between the parliamentary majority and the opposition in a democracy, is stressed that 'complex and controversial bills would normally require particularly long advance notice, and

72 In the Court's view, 'it would be a mistake to see... a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One of the reasons why the signatory Governments decided "to take the first steps towards the collective realization of certain rights enshrined in the Universal Declaration" was their profound belief in the rule of law', para. 34.

73 *Engel v. the Netherlands*, 8 June 1976, § 69.

74 *Amour v. France*, 25 June 1996, § 50.

75 *Klass v. Germany*, September 8, 1978, § 55.

76 *Winterwerp v. the Netherlands*, 24 October 1979, § 39.

77 *Vereiniging Weekblad Bluf v. the Netherlands*, 9 February 1995, § 35.

78 *Malone v. the United Kingdom*, 2 August 1984, § 79.

79 *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Turkey, 30 January 1998, §45.

80 This project has presented data on Georgia since 2014.

81 The index measures adherence to the Rule of Law based on eight factors: constraints on government powers; absence of Corruption; open government; fundamental Rights; order and security; regulatory enforcement; civil justice; criminal justice. Between 2023 and 2024, the Rule of Law weakened in a majority of countries. The WJP Rule of Law Index overall score fell in 57% of countries and improved in 43%. On average, the overall score declined by 0.2%.

82 A score of 1 indicates the strongest adherence to the rule of law, while a score of 0 indicates the weakest adherence

83 See Worlds Justice Project. Rule of Law. [online] Available at: https://worldjusticeproject.org/rule-of-law-index/global/2024/Georgia/Absence%20of%20Corruption/table.

should be preceded by pre-drafts, on which some kind of consultation takes place. The public should have a meaningful opportunity to provide input […]'.[84] The Venice Commission expresses deep concern about the fact that this human-rights sensitive Law was adopted in a rushed way (very little time separated the three readings in Parliament), with no meaningful consultation process.[85]

The Venice Commission sharply criticized Georgia's recent laws on foreign influence, including the Foreign Agents Registration Act (FARA) and amendments to the Law on Grants. The commission stated that these laws risk undermining the Rule of Law and civic space. The commission recommended repealing or substantially revising these laws, warning that they impose disproportionate restrictions, lack clarity, grant authorities excessive discretion, and were passed without sufficient public consultation. In their October 2025 opinion, the commission urged Georgia to repeal FARA and the foreign funding ban for broadcasters. They also called for a more inclusive and systemic approach to future lawmaking. The commission states the following when considering recent amendments to a certain number of laws: 'Together, these issues risk arbitrary enforcement and threaten the rule of law and democracy.'[86] The Speaker of the Georgian Parliament announced the official stance regarding the Venice Commission's expert opinion: '*Previously, the Venice Commission had clear legal opinions, but we have seen for several years now that these are political conclusions and reports. This report is the best example that the Commission has become a compiler of political conclusions rather than legal ones*.'[87] Clearly, the opinions of the Venice Commission and other authoritative international bodies are very important while assessing Georgia's relationship with the EU. However, so far, the Georgian government has not taken any steps based on above cited recommendations.

### *3.2. Implementation by Georgia 12-point Plan*

While discussing the protection of constitutional identity in Georgia *vis-a-vis* negotiations on the accession to the EU, and in particular, the compliance of the implementation of the so-called 12-point Agenda with the Constitution of Georgia, it should be considered that, by signing the AA with the EU on 27 June 2014, the Georgian government, in addition to firmly demonstrating its strategic choice, created

84 CDL-AD (2019)015, para 74.
85 CDL-PI (2024)013, para 47.
86 CDL-AD (2025)034, para 79.
87 See Papuashvili, Sh.: Venice Commission dares not tell America that FARA contradicts rule of law, yet says so about Georgia, 16.10.2025

a very important framework for systemic change in the country.[88] However, in this case, a line must be drawn between where a state is ready for constitutional changes on the path to integration with the EU and where these changes can be considered an attempt to deviate from constitutional (and, according to some authors, national) identity.

In fact, the demands listed in the 12-point plan broadly did not contradict either the Constitution of Georgia or the government's declared policy of approximation to European standards and legislation at first glance. However, what is important here is what in-depth demands and expectations the parties actually had behind each point of the 12-point plan, and this is precisely what the 2023 and 2024 Reports provide, which reflect in detail both the progress achieved by the Georgian government, the shortcomings, and those aspects that, from the European Commission's point of view, can be considered as the fulfilment of all twelve points.

Before we get into the details, it should be noted that by 2023, the European Commission considered the reforms and legislative initiatives put forward by the Georgian side sufficient to grant the country candidate status, although with significant conditions. Notably, the factor of Georgia's population and its strong aspiration towards the EU or common European space played a major role in the granting of candidate status.

As for the recommendations given in paragraphs 23 and 24 of the report, they can be divided into two major parts. There are recommendations that do not contradict the spirit of the Constitution in any way, and even if constitutional amendments are necessary to implement them, will not have any impact on constitutional identity. However, the same cannot be said about a number of recommendations and suggestions that may be considered contrary to constitutional identity. For example, the recommendations on judicial reform also include a passage on the necessary integration of foreign experts in the High Council of Justice (HCJ) with a decisive role in the process of selecting judges.[89] This might be considered as contrary to the sovereignty, which is emphasised in the Preamble and Article 1 of the Constitution of Georgia, and independence of the judicial system, not only from internal but also from external bodies or actors.

Furthermore, on the protection of the rights of LGBTQ persons at the legislative level, anti-discrimination articles are included in the Georgian legislation, starting

88 See: Maka Bochorishvili, Chair of the Committee on European Integration, Legislative Basis of Association with the European Union 2014-2023, 27.06.2023.

89 Commission Staff Working Document, Georgia 2023 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement policy. Brussels, 8.11.2023 SWD (2023) 697. p. 20.

from the Constitution,[90] although discrimination on the basis of gender and identity is not specifically mentioned among the list in Article 11 of the Constitution. However, in 2014, the law on the Elimination of All Forms of Discrimination was adopted, which prohibits of any form of discrimination, including based on race, skin colour, language, sex, age, citizenship, origin, place of birth or residence, property or social status, religion or belief, national, ethnic or social origin, profession, marital status, health, disability, sexual orientation, gender identity and expression, political or other opinions, or other characteristics.[91]

Since 2017, major amendments have been made to the legislation. First, in Article 30 of the Constitution, marriage has been defined as 'a union of a woman and a man for the purpose of founding a family, shall be based on the equality of rights and the free will of spouses'; in 2024, the Law on the Protection of Family Values and Minors has been adopted, which recognizes only two biological sexes (woman and man)[92] and strictly prohibits popularization of a person's assignment to neither biological sex, and/or a sex different from his/her biological sex, or a relationship between representatives of the same biological sex with an expressed sexual orientation, or incest.[93]

In the 2024 Report, although the Commission recognizes some progress in implementation of the AA and 12-step Agenda, it still maintains its reservations regarding the independence of the HCJ, in particular, the involvement of foreign experts, and the protection of the expression and other rights of LGBTIQ persons, which were further limited by the legislative amendments discussed above in 2024.

Therefore, the requirement to adopt the Human Rights action plan ensuring the rights of LGBTIQ persons,[94] if they conflict with article 30 of the Constitution and the purpose and objective of the Law on the Protection of Family Values and Minors, may be considered a step against constitutional identity. The clearly stated position of the current Georgian government remains to protect so-called traditional values, which are reflected in the latest legislation.

90 Article 11 of the Constitution of Georgia.
91 Article 1 the Law on Elimination of All Forms of Discrimination No 2391-IIs.
92 Article 2 of the Law on the Protection of Family Values and Minors (No 4437-XVI ბს -X ბპ).
93 Ibid., Article 3.1.
94 Commission Staff Working Document, Georgia 2023 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement policy. Brussels, 8.11.2023 SWD (2023) 697. p. 28.

# 4.
# Conclusion

This article analyses the complex intersection between Georgia's constitutional identity and its process of European integration, particularly in the context of the EU's 12-point agenda for candidate status. Following the endorsement of the AA in 2014, Georgia has demonstrated a commitment to a program of legal and institutional transformation. This agreement was indicative of a geopolitical realignment, as well as the establishment of a framework for deep normative convergence with EU values and standards. However, the implementation of the 12-point agenda, while largely consistent with Georgia's Constitution in a formal sense, reveals underlying constitutional tensions when examined in depth.

The EU's 2023 and 2024 progress reports play a pivotal role in evaluating Georgia's adherence to European standards. Noteworthy advancements have been acknowledged, including anti-corruption measures, institutional reforms, and public support for integration. Concurrently, they identify areas of concern wherein EU expectations appear to clash with Georgia's constitutional provisions or legal culture. Among the proposed judicial reforms is the integration of foreign experts into the High Council of Justice, which would grant these individuals a significant degree of influence over domestic policy. This has led to concerns regarding the implications of such reforms for state sovereignty, as outlined in the Preamble and Article 1 of the Georgian Constitution. Furthermore, advocacy for the enhancement of the rights of LGBTIQ individuals conflicts with contemporary legislative developments, including the 2024 Law on the Protection of Family Values and Minors and the 2017 constitutional definition of marriage, which accentuate conventional values and impose limitations on gender identity expression.

This juxtaposition suggests that constitutional identity in Georgia might be perceived as a dynamic and contested concept, influenced by evolving political discourse and limited judicial interpretation. It is not yet fully crystallized into a legal doctrine. The Constitutional Court of Georgia has not played a significant role in defining the scope of constitutional identity, instead leaving much of the interpretive work to political actors and civil society. In this context, the notion of constitutional identity can serve as a protective measure for national sovereignty and as a tool to establish boundaries in response to external pressures, particularly when those pressures are seen as affecting fundamental societal norms.

Therefore, the key challenge lies in managing the delicate balance between upholding the foundational principles of the Georgian constitutional order and embracing the systemic reforms required for EU accession. A delicate balance seems to be essential, particularly given how widely supported European integration is,

which was a major reason why candidate status was awarded in 2023. Future progress will depend not only on technical compliance with EU directives but also on the ability of Georgian institutions to interpret and adapt these reforms within a constitutional framework that respects national values and public legitimacy.

Ultimately, Georgia's path to EU membership will require a nuanced approach, one that does not frame constitutional identity and European integration as mutually exclusive, but rather as potentially compatible trajectories. Ensuring this compatibility is a process that will require sustained dialogue, institutional maturity, and a robust legal culture that is capable of navigating the complex interplay between national sovereignty, constitutional principles, and supranational obligations

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Deyana MARCHEVA*

# Constitutional Identity and Human Rights: A Critical Examination in the Bulgarian Context

**ABSTRACT:** *The concept of constitutional identity was first introduced in Bulgarian Constitutional Law literature in 2017. However, following the Constitutional Courts 2018 ruling that declared the Istanbul Convention unconstitutional, this notion started to be used in civil and administrative court case law as a counterargument against human rights claims. This paper critically examines the academic and legal debates surrounding constitutional identity in Bulgaria, emphasizing how a focus on constitutional tradition in academia, combined with a judicial emphasis on traditional values, has negatively impacted protections for transgender individuals and same-sex families.*

*As Bulgaria seeks to fulfill its commitments to the European Union and the Council of Europe, it faces the challenge of reconciling its constitutional identity with its obligation to uphold human rights. The developments in the Pancharevo administrative case and the 2023 reversal of three decades of civil law practice allowing legal gender change through judicial means raise pressing questions about whether the concept of constitutional identity has been misappropriated to justify the dehumanization of individuals with homosexual orientations and transgender identities.*

*The anti-gender doctrine developed by the Bulgarian Constitutional Court and the related rulings of the administrative and civil courts illustrate a troubling trend in which constitutional identity is leveraged to impose restrictions on fundamental rights, particularly impacting transgender individuals and same- sex families. There is an urgent need for a more inclusive interpretation of constitutional identity in Bulgaria – one that harmonizes modern human rights principles with the nation's historical and cultural context. Future discussions should aim to cultivate a dialogue that reconciles tradition with contemporary values, ensuring that Bulgarian constitutional identity evolves to safeguard the rights and dignity of all its citizens.*

**KEYWORDS:** *Bulgarian Constitutional Identity, Traditional values, Pancharevo Case, Koilova and Bablukova v Bulgaria, Same-sex Families, Transgender Persons.*

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# 1.
# Introduction

The concept of constitutional identity emerged as a significant topic in Bulgaria's constitutional law discourse in 2017. However, following the Bulgarian Constitutional Court's 2018 ruling that deemed the Istanbul Convention unconstitutional and embraced an anti-gender doctrine, tensions between constitutional identity and the protection of human rights have intensified. This paper critically analyses the academic and jurisprudential discussions surrounding constitutional identity in Bulgaria, emphasising how a focus on constitutional tradition in academia, alongside a jurisprudential emphasis on traditional values, has negatively impacted the human rights protections afforded to transgender individuals and same-sex families.

# 2.
# Bulgarian Academic Literature on Constitutional Identity

## *2.1. Constitutional Law Literature*

The concept of "constitutional identity" was first introduced in Bulgarian legal literature in 2017 by Martin Belov, who framed it within the context of postmodern and supranational constitutionalism.[1] Belov's exploration begins with inquiries into the constitutional core of values and institutions shared by the state-organised community, underscoring the necessity for protection against potential derogations by supranational constitutionalism and identifying the institutions that can legitimately define this core. His ambitious aim was to establish the theoretical foundations of a universal concept of constitutional identity, with parameters broadly applicable to all EU Member States.[2]

Belov analyses the essence, content, and functions of constitutional identity,[3] distinguishing it from other types of identity and related constitutional concepts, such as sovereignty, constitutional consensus, and constitutional tradition.[4] He differentiates constitutional identity from collective social identities such as national

1 Белов [Belov], 2017.
2 Ibid., p. 11.
3 Ibid., pp. 72–96. Belov outlines the following functions of constitutional identity – namely, the legitimation function, the safeguarding function, the linking function, the differentiating function, the ideological function, and the function of constitutional and political self-understanding. For the functions, see also: Belov, 2017.
4 Белов [Belov], 2017, pp. 44–64.

and political identity, as well as from the concept of the "identity of the constitution," which pertains to the fundamental legal-political act within each constitutional system. He theorises that constitutional identity serves as a hybrid or crossroad between political identity and the identity of the constitution,[5] and views it as a specific type of political identity shaped by constitutional law, the identity of the constitution itself, and national constitutionalism. Constitutional identity captures the essence of constitutional consensus and influences the practical functioning of constitutional institutions. Thus, it is understood as a product of both the constitutional tradition and the identity of the current constitution, shaped by the ideological-political context of society, including the dominant values, principles, and institutions that govern social and political life.[6]

Contemporary theory primarily examines constitutional identity in terms of delineating and justifying legitimate boundaries that should not be infringed upon by the interaction between EU law and national laws. The idea is to use constitutional identity as a flexible yet tangible final barrier against the encroachment of supranational constitutionalism that could undermine the state-organised political community.[7] Martin Belov emphasises that the core of the discussion on constitutional identity lies in defining intrinsic, traditional, and fundamental values, principles, and institutions that serve as boundaries against the transfer of sovereignty to supranational organisations and the transplantation of foreign legal models into the national legal system.

In this context, Belov raises the question of whether a reliable and universal criterion is in place for identifying the essential elements of the constitution – its fundamental values, principles, and rules that express constitutional identity.[8] However, he does not address the well-known conundrum in constitutional theory regarding the fundamental issue of constitutive views of constitutional identities. Tushnet's question about the identity of "we the people" in the preamble of the constitution[9] is crucial for understanding that its answer cannot be derived solely from the constitution itself.[10]

5 Ibid., p. 42.
6 Ibid., p. 43.
7 Ibid., p. 21.
8 Ibid., Martin Belov borrows the question from J. L. Marti, who comments on the idea of constitutional identity *"as the identity of the constitution",* present in German jurisprudence and scholarly literature, i.e. "our constitutional identities depend largely on the values and principles enacted and protected by, and taken to be essential for, our own constitutions, whether they are objectively correct or not". Marti highlights that determining this identity is quite challenging, involving intricate interpretations and the uses of political, moral, and legal arguments. See: Marti, 2013, p. 25.
9 Tushnet, 2010.
10 Marti, 2013, pp. 25–26.

In the introduction to his research, Martin Belov explicitly states that Bulgarian constitutional identity exists both within and beyond the text of the 1991 Constitution.[11] He adopts a socio-legal approach, intentionally diverging from prevailing legal realist and legal positivist frameworks.[12] While presenting arguments against the academic fixation on the jurisprudential dimension of constitutional identity,[13] Belov acknowledges the significance of judicial dialogue between the Court of Justice of the EU (CJEU) and the national courts in developing the concept of constitutional identity.[14]

The pioneering study on constitutional identity explores its historical development, conceptualising the idea of Europe as a key factor in shaping and evolving Bulgarian constitutional tradition.[15] Belov argues that modernisation in Bulgaria has often been equated with Europeanisation, primarily due to the interrupted state tradition and the need to construct a constitutional system almost from scratch following the Liberation from Ottoman rule in 1878. The Bulgarian constitutional system has been established through substantial waves of complete or partial reception or transplantation of European constitutional models, legal ideas, and institutions.[16] The Tarnovo Constitution of 1879 and the Constitution of 1991 are influenced by European constitutionalism,[17] whereas the Constitutions of 1947 and 1971 are direct transplants of Soviet totalitarian models. The current Constitution of 1991 is the only one, which represents not a comprehensive and massive transplantation, but rather a more creative and selective reception of legal models derived from various European

11 Белов, [Belov], 2017, p. 13. Belov explains that he shares the view and approach taken by M. Rosenfeld. See also: Rosenfeld, 2012.

12 Ibid, p. 14. Belov summarises how the three approaches view and analyse constitutional identity as follows: as an emanation of national constitutional tradition and culture (anthropological, socio-legal approach); a system of principles and norms enshrined in the active constitution (legal positivist approach); or a system of principles and norms embedded in the active constitution as interpreted by the courts (legal realist approach).

13 Ibid., pp. 14–15: 'First, the courts are not the only legitimate spokesperson for the community regarding its constitutional identity. Second, case law is often casuistic, biased, and created for various reasons. It is also highly inconsistent across different countries. Third, the analysis of case law tends to overlook its normative foundation, namely the written constitution's text. Fourth, case law does not provide sufficient clarity regarding the "living constitution" and "law in action." Judicial decisions are somewhat a sterile and isolated elitist product of expert analysis, which lacks the criteria for its own legitimacy, credibility, and validity.'

14 Ibid., pp. 97–111.

15 Ibid., pp. 121–142.

16 Ibid., pp. 136–137.

17 The Tarnovo Constitution is widely recognised as the Bulgarian version of the Belgian Constitution of 1831, transplanted through its Balkan interpretations, such as the Constitution of Greece of 1864, the Constitution of Romania of 1866, and the Constitution of Serbia of 1869. Martin Belov notes that despite some adaptations to the Bulgarian context, such as the removal of the censitary suffrage, the Senate, the State Council and the Tarnovo Constitution closely follow the above-mentioned sources of inspiration.

constitutional legal systems.[18] All participants in the constitution-making process of 1990–1991, including politicians and experts, sought constitutional solutions from both the traditions of previous Bulgarian constitutions and existing European legal mechanisms, rather than relying solely on specific constitutional models.[19]

Martin Belov characterises the Bulgarian constitutional tradition as comprising various concepts and institutions, which he categorises into three groups.[20] He identifies Europeanism, republicanism,[21] secularism, and tolerance as positive phenomena, while pointing out negative aspects such as elitist-oligarchic governance, an authoritarian-corporatist tradition, a hierarchical and pro-authoritarian political culture, a lack of civic activism, a poorly developed civil society, unrepresentative political parties, superficial media, constitutional nihilism, and constitutional fetishism.[22] Additionally, elements of the national constitutional tradition include the unitary state structure, unicameralism, egalitarianism,[23] and the belief in the expert, non-political role of judges, which cannot be distinctly classified as either positive or negative. Belov contends that understanding the Bulgarian constitutional tradition requires recognising the coexistence of two opposing trends: anti-elitism

18 Белов [Belov], 2017, p. 137. According to Belov, the Constitution of 1991 is primarily influenced by the Constitutions of Austria, Spain, Portugal, Greece, France, and Italy regarding the form of government and the institutional design of the head of state, government, and parliament. The models of constitutional justice and the judiciary have been predominantly drawn from Italy and Spain.

19 Марчева [Marcheva], 2024.

20 Белов [Belov], 2017, p. 164.

21 Ibid., pp. 166–168. It is worth mentioning that the Tarnovo Constitution established a monarchical form of governance, and the abolition of the monarchy occurred through a referendum in 1947, coinciding with the establishment of a Soviet-style totalitarian regime. However, today, the republican form of government is regarded as a fundamental component of the constitutional and political consensus. Belov points out that republicanism, in its dimension of civic activism, has limited traditions and still exhibits weak practice in Bulgaria.

22 Ibid., pp. 138–139. Belov defines constitutional nihilism as the belief that the state is a network of empirical power connections and relationships, with the official model for the distribution of power – enshrined in the constitution – serving primarily decorative functions rather than acting as a neutral mechanism for exercising political power. Constitutional fetishism, on the other hand, is based on the exaggeration of the role of the constitution and legislation as instruments for political and social reform and modernisation.

23 Ibid., pp. 168–169. Since the Tarnovo Constitution, political equality and the absence of censuses have been enduring characteristics of the Bulgarian constitutional tradition. These elements are interconnected through the shared phenomena of egalitarianism and anti-elitism, which reflect the goal of ensuring that the institutional design aligns with the presumed relatively homogeneous social structure of Bulgarian society.

and mediated governance.[24] However, a notable shortcoming in his analysis is the lack of empirical, factual, and sociological evidence to support these claims.

Until 2017, the Constitutional Court had not issued decisions directly addressing constitutional identity and had not engaged in any form of judicial dialogue with the CJEU.[25] At the conclusion of his analysis, Belov unexpectedly[26] claims that Bulgarian constitutional identity cannot be reconstructed through a legal positivist approach, either by interpreting the immutable provisions of the 1991 Constitution or by analysing the jurisprudence of the Constitutional Court.[27] Instead, he argues that 'until clearer legal indicators for the parameters of Bulgarian constitutional identity emerge, it should be defined through a critical analysis of the identity of the 1991 Constitution and the Bulgarian constitutional tradition…". Furthermore, Belov posits that "constitutional identity is part of the 'missing Constitution' in Bulgaria,'[28] a view that has been met with widespread criticism in the legal literature.[29] The open-ended and vague notion of Bulgarian constitutional identity presented at the end of the book is surprising, particularly in light of the ambitious objectives outlined at the beginning and the initial effort to distinguish the concept from related phenomena. It is also unclear why Belov suggested that the inalienability of fundamental rights was excluded from the Bulgarian constitutional identity due to its absence in the Bulgarian constitutional tradition, without addressing the significance of the identity of the 1991 Constitution in this context.[30]

Despite these complexities, Martin Belov's contribution to the concept of constitutional identity in Bulgaria provides valuable insights into its theory, history, and significance in the interplay between national and supranational legal systems. In subsequent years, Georgi Bliznashki further analysed and developed the notion in his foundational work "General Theory of the Constitution".[31] He challenged Belov's assertion that the absence of an "eternity clause" in the 1991 Constitution hindered the delineation of constitutional identity and led to the conclusion of a "missing constitution" in Bulgaria.[32] Bliznashki connects elements of constitutional identity[33]

24 Ibid., p. 168. Belov explains that "mediated governance" is not synonymous with representative government or democracy; it indicates that power in the state is exercised by a designated political elite instead of the people, nations, or citizens. This elite is not required to represent the interests of the populace, nor are they necessarily democratically elected or accountable.
25 Ibid., p. 185.
26 It is unexpected given the rhetorical rejection of the "fixation" on the "jurisprudential dimension of constitutional identity" at the beginning of research when commenting on methodology.
27 Белов [Belov], 2017, p. 194.
28 Ibid., pp. 173 and 176.
29 Друмева [Drumeva], 2018, p. 341; Близнашки [Bliznashki], 2019, p. 813.
30 Ibid., p. 184.
31 Близнашки [Bliznashki], 2019, pp. 773–817.
32 Ibid., p. 813.
33 Ibid., p. 816.

to the values enshrined in the preamble of the 1991 Constitution – liberty, peace, humanism, equality, justice, and tolerance. He highlights the republic as a form of state, the parliamentary system of governance, and the unitary structure state structure, the direct effect and applicability of constitutional provisions, and the constitutional guarantees for unalienable human rights that remain inviolable by the authorities, even during a state of emergency. In a broader context, provisions regarding the Bulgarian language as the official language of the state (Article 3) and the special place and role of Eastern Orthodox Christianity as the traditional religion in Bulgaria (Article 13, paragraph 3) can also be considered elements of national constitutional identity.[34] Radoslava Yankulova further identified fundamental right to culture as an element of the Bulgarian constitutional identity – a core value that cannot be compromised or altered under the pressure of supranational processes or phenomena.[35]

### *2.2. EU Law Literature*

In 2021, Atanas Semov, a professor of EU law and a constitutional judge, published the book "Protection of National Constitutional Identity in the European Union,"[36] prior to the CJEU's judgement in the Pancharevo case in December 2021.[37] He describes the case as "historic"[38] because it marks the first instance in which a Bulgarian national judge made a preliminary referral invoking elements of national constitutional identity. While Semov extensively cites the Opinion of Advocate General Kokott[39] in his book, none of his subsequent academic writings address the EU's judgement or the case's further developments within the national court system.

Semov asserts that the EU can only function by respecting the sovereignty and identity of its Member States.[40] He conceptualises respect for national constitutional identity as a "fundamental principle" of the EU, which counterbalances the principles

34 Ibid.
35 Янкулова [Yankulova], 2019.
36 Семов [Semov.], 2021.
37 Judgement of the Court (Grand Chamber) of December 14, 2021, V. M. A. v. Sofia Municipality, Pancharevo District, Case C-490/20.
38 Семов [Semov], 2021, p. 111.
39 Opinion of Advocate General Kokott delivered on 15 April 2021. V. M. A. v Stolichna obshtina, rayon "Pancharevo". Document 62020CC0490
40 Семов [Semov], 2021, p. 10.

of integration, loyal cooperation, and the primacy of EU law.[41] He posits that its protection can only be achieved through the CJEU[42] and emphasises the necessity of "clearly and substantively" indicating a specific element of national constitutional identity when making a preliminary referral to the court.[43] According to Semov, 'there is no national constitutional identity in general – and no one could formulate it generally,' because it 'always has specific manifestations, such as enhanced protection of human dignity, enhanced protection of the national language, a multilingual regime, constitutional protection (status) of the family, and different sexes of those entering into marriage (and/or parents), which would likely be the case, for example, with the Bulgarian Constitution, the constitutional status of religion – or the complete absence of such status (in a secular state like France), etc.'[44]

Semov contends that any reference to national constitutional identity should cite one or more specific provisions of the constitution, suggesting that the spirit of the constitution should be invoked only as a last resort and ideally derived from those specific provisions.[45] However, he does not identify the relevant provisions to support his claim that part of Bulgarian national constitutional identity includes the so-called 'constitutional protection (status) of the family and the different sexes of those entering into marriage (and/or parents).'

Even if one accepts that the definition of marriage in Article 46, paragraph 1 of the 1991 Constitution – describing marriage as a voluntary union between a man and a woman – forms part of Bulgarian constitutional identity, there is no definition of "family" or "parents" in the constitution. This lack of a normative basis undermines the assertion that the inability to recognise same-sex family relationships is an inherent characteristic of national constitutional identity, rendering it more an intuition than a scientifically grounded thesis.[46]

On the back cover of his book, Atanas Semov states, '*National constitutional identity is subject to protection in its two dimensions: formal-legal and cultural-historical (or normative and value-based).*' However, the study itself lacks a clear methodology

41 Семов [Semov], 2021, p. 11. Semov explicitly counters Hristev's view that respect for the constitutional identity of Member States is not a distinct new principle in primary EU law and that it does not restrict or derogate from the primacy of EU law over national law. Hristev contends that Art. 4, para. 2 of the Treaty on European Union merely establishes a specific right for the Union, allowing each Member State to impose proportionate restrictions on the application of certain EU law provisions, as long as such restrictions are necessary to uphold the fundamental principles of their constitutional order. See: Христев [Hristev], 2021.

42 Семов [Semov], 2021, p. 67.

43 Ibid., p. 63.

44 Ibid., pp. 56–57.

45 Ibid., p. 101.

46 Марчева, Стайкова [Marcheva and Staykova], 2024.

for implementing this value-based approach. Instead, Semov opts to "hint", as he puts it:

> *'at least a few basic elements of Bulgarian national constitutional identity,' including the assertion that 'the survival of the nation is one of the vertebrae in the backbone of the Bulgarian national spirit (and one of the main elements of our identity), which shapes our attitude toward family in its kin and national reproductive function, especially during the years of slavery.'*[47]

This approach appears to be tied to the author's subjective views and beliefs, lacking a scientific methodology while still reaching conclusions that legal scholars and practitioners might reference as authoritative.

It is also noteworthy that prior to the referral to the CJEU in the Pancharevo case, no theoretical writing had identified the constitutional definition of marriage as part of the Bulgarian constitutional identity. The European Union's responsibility to acknowledge national identity stems from a liberal commitment to respecting members of a multinational political community. In contrast, national constitutional courts uphold constitutional identity through a distinct interpretation of sovereignty. Therefore, it is crucial to understand that calls for honouring both national and constitutional identities are informed by differing theoretical frameworks.[48]

## 3.
## The Jurisprudence of the Constitutional Court and Related Case Law of the Supreme Cassation Court

The concept of "constitutional identity" first emerged in the jurisprudence of the Constitutional Court in 2018, initially invoked in the context of interpreting Article 4, paragraph 2 of the Constitution, which states that the Republic of Bulgaria participates in the construction and development of the European Union. The Constitutional Court elaborated on this notion as follows:

> *"EU law and national law together form the space in which public authority simultaneously participates in the creation of union law and develops the national legal order while respecting the values and fundamental principles of the EU and national interests. It also serves as a framework*

47 Семов [Semov], 2021, p. 226.
48 Cloots, 2016, p. 80.

> *for the transfer of powers, a process that is not unlimited. By emphasising "the Republic of Bulgaria," the constitutional legislator underscores that constitutional identity is preserved in the participation of the Bulgarian state in the construction and development of the EU."*[49]

Subsequently, the concept of constitutional identity was referenced in the decision that declared the Istanbul Convention unconstitutional, labelling the terms "gender" and "gender identity" as ambiguous and unacceptable.[50] However, the majority of constitutional judges did not ground their reasoning in this concept; instead, they cited it while presenting the opinion of Plamen Kirov, Professor of Constitutional Law, who argued that certain provisions of the Istanbul Convention were inconsistent with the principles and norms of the Bulgarian Constitution and were "in sharp conflict with Bulgarian constitutional identity."[51] Notably, the term "constitutional identity" also appears in the Dissenting Opinion of Constitutional Judge Filip Dimitrov:

> *'The erroneous interpretation by the majority pertains to the concept of "gender identity." The existence of individuals whose behaviour diverges from traditional male or female roles (and who wish for it to be so) is a fact of life, not a normative one. No constitution or law – even those of the Nazis or communists – can determine whether such individuals exist; it can only dictate whether they can be exterminated (as in the case of Nazism), discriminated against, and expelled (under communism), or provided with basic protection against violence, as stipulates the Convention. Public recognition of this reality clearly aids rather than hinders the guarantee of such protection. To assert (as some of the submitted opinions do) that a "Bulgarian constitutional identity" contradicts the acknowledgment of existing life facts is absurd. It is equally incomprehensible to claim that the Constitution prohibits discussing this issue because it "does not aim to achieve equality between the sexes, but erases the differences between them, thereby rendering the principle of equality meaningless.'*[52]

49 Decision No. 7, issued on 17 April 2018 by the Constitutional Court of the Republic of Bulgaria in Case No. 7/2017.

50 Decision No. 13, issued on 27 July 2018 by the Constitutional Court of the Republic of Bulgaria in Case No. 3/2018.

51 Ibid. It is important to note that Plamen Kirov has not published any theoretical works on the concept of constitutional identity.

52 Dissenting Opinion of Constitutional Judge Filip Dimitrov regarding Decision No. 13, issued on 27 July 2018 by the Constitutional Court of the Republic of Bulgaria in Case No. 3/2018.

Shortly after the Constitutional Court declared the Istanbul Convention unconstitutional, the Supreme Cassation Court, in a three-judge panel, extensively referenced the concept of Bulgarian constitutional identity to deny the legal recognition of sex change in civil registration acts, as follows:

> *'Constitutional identity represents a specific identity of the nation, expressed, defined, and delineated through its national constitution. The core values enshrined in the national constitution are upheld and protected, and for the Republic of Bulgaria, this is rooted in the supremacy of the Constitution (Article 5, paragraph 1 of the Bulgarian Constitution).'*

The Supreme Cassation Court asserts that an element of Bulgarian constitutional identity is the legal understanding of "sex," which is consistently interpreted across all constitutions of the Third Bulgarian State, the Constitution of 1879, the Constitutions of 1947 and 1971, and the currently active Constitution from 1991.[53] The legislative body has consistently associated this concept solely with biological sex, which is genetically encoded and does not change from birth to death. For this reason, national law does not explicitly define the terms "sex," "man," or "woman." The rationale for this approach, including that of the constitutional legislator, is rooted in Christianity. The beginning of the process of adopting this religion as the official one for the Bulgarian state dates back to 864 AD. Christianity forms the basis of Eastern Orthodox belief, which is the traditional and official religion of the Republic of Bulgaria (Article 13, paragraph 3 of the Constitution). Christianity links sex to the divine origins of the male and female principles. Regarding sex determination, other religious communities in Bulgaria similarly align their religious doctrine. The constitutional enshrinement of biological sex as a legal category throughout the 140-year existence of the Third Bulgarian State should be viewed as an element of Bulgarian constitutional identity. No supranational or international legal act can oppose this identity.[54]

53 Such a conclusion is highly contentious, as none of the Bulgarian constitutions focus specifically on "sex" and its interpretation. The first Tarnovo Constitution of 1879 uses the term "sex" in the context of determining the parliamentary representation quota in Art. 86, stating, 'The Ordinary National Assembly is composed of representatives elected directly by the people, with one representative for every ten thousand individuals of both sexes.' The 1947 Constitution asserts that women are equal to men in all areas of state, private law, economic, social, cultural, and political life (Art. 72, para. 1), and it employs the term "sex" solely to define suffrage rights for all Bulgarian citizens "regardless of sex." The second Constitution of the People's Republic of Bulgaria, enacted in 1971, reiterates the principle of equality between women and men (Art. 36). The democratic Constitution of 1991 is notable for being the first to define marriage as a voluntary union between a man and a woman (Art. 46, para. 1) and uses the term "sex" exclusively in the anti-discrimination clause of Art. 6, para. 2, as one of the protected characteristics.

54 Decision No. 119 of February 14, 2019, of the Supreme Cassation Court in civil case No. 4104/2017, III Civil Panel.

The Supreme Cassation Court uses the term "constitutional identity" eleven times in its justification and, for the first time, incorporates historical and religious reasoning. In her Dissenting Opinion, Judge Daniela Stoyanova does not directly address the concept of constitutional identity but points out that the majority of judges[55] have deviated from the established practice of the Supreme Cassation Court, which previously allowed for the legal change of sex in civil records through judicial means. She criticises their conservative approach to understanding gender, primarily based on objective physiological criteria, as being at odds with advancements in science, particularly in medicine and psychology, as well as contemporary views on gender division and the rapidly evolving processes of internationalisation and globalisation within the legal framework. Judge Stoyanova embraces a more flexible understanding of gender, which gives significant weight to the individual's will and self-identification.[56]

The division among civil judges became so pronounced that in 2021, the General Assembly of the Civil College of the Supreme Cassation Court initiated a constitutional case seeking a mandatory interpretation of several constitutional provisions. The Constitutional Court agreed to consider the request for a mandatory interpretation of Article 6, paragraph 2 (the anti-discrimination clause) and Article 46, paragraph 1 (definition of marriage) of the Constitution. The key question posed was: How should the term "sex," as used in the Constitution, be understood, and does it have a meaning distinct from biological sex? The Constitutional Court concluded that the term "sex" under the Constitution is to be understood solely in its biological sense.[57]

55 Dissenting Opinion of Judge Daniela Stoyanova regarding Decision No. 119 of February 14, 2019, of the Supreme Cassation Court in civil case No. 4104/2017, III Civil Panel: 'In its ruling, the majority of the judicial panel concludes that a Bulgarian citizen's identification as a gender different from their biological sex, along with the reasons for this (such as transsexuality, transgenderism, homosexuality, transvestism, and others) or its consequences (including hormonal and/or surgical modifications to align the body with a different gender, as well as sexual or social behaviours characteristic of the other gender) do not provide sufficient grounds (material legal prerequisites) for making changes to civil status records through administrative or judicial means. The ruling also states that only the existence of an error, specifically an incorrect entry of biological sex, constitutes a material legal basis (condition) for permitting a corresponding change in the names and personal identification numbers of the Bulgarian citizens in civil status records via judicial means.'

56 Ibid.: 'When a person's psychological self-perception sharply conflicts with their legal gender to the extent that it causes suffering, and when both criteria are established – a medical criterion (the condition of transsexuality) and a legal criterion (a serious and unwavering decision to change biological sex due to the fulfilment of a psychological and social gender role) – the requested change of gender should be permitted. Consequently, this should also allow for a change of names and the corresponding notation in the birth certificate. A contrary resolution would be incompatible with the guaranteed inviolability of personal life, leading to an imbalance between public interest and the individual's interest, thus violating Art. 8 of the Convention.'

57 Decision No. 15, issued on 26 October 2021 by the Constitutional Court of the Republic of Bulgaria in Case No. 6/2021.

In its reasoning, the majority of the constitutional judges did not cite a specific provision of the 1991 Constitution as part of constitutional identity. Instead, they referenced "the value understandings of society, shaped by religion and morality" and "the established values that guided the constitutional legislator," which defined marriage in the constitution as a voluntary union between a man and a woman. Rather than treating the constitutional definition of marriage as an element of constitutional identity, the Court used it as a basis for a broader discussion of non-listed value understandings rooted in religion and morality. This raises significant questions about whether such broad references can genuinely be considered part of constitutional identity, as they lack clear parameters.

Decision No. 15 of 2021 of the Constitutional Court extensively references the concept of constitutional identity, linking it to the so called Bulgarian traditional values:

> *'...The third point of reference is related to Bulgarian traditional values, specifically to the predominant religion practiced by the majority of Bulgarian citizens – Eastern Orthodox Christianity. This religion is designated as "traditional" in Article 13, paragraph 3 of the Constitution,*[58] *which supports the conclusion that the constitutional legislator in 1991 aimed to embed the value systems established in Eastern Orthodox Christianity into the constitutional legal order. In this regard, the position presented in the case by the Holy Synod of the Bulgarian Orthodox Church connects Eastern Orthodoxy with "ancient moral values" and with "the national and constitutional identity of Bulgaria," including those that have historically served as a source of normative regulation. It is not coincidental that the provision of Article 14, which places family, motherhood, and children under the special protection of the state and society, is systematically positioned immediately after Article 13, which proclaims the significance of Eastern Orthodoxy in shaping Bulgarian cultural, spiritual, and value identity. This role of Orthodoxy has been repeatedly emphasised in statements made by members of the National Assembly during the adoption of Article 13, paragraph 3 of the Constitution, asserting that: Orthodoxy "is indeed the foundation of our culture"...; "Orthodoxy is closely tied to the national*

58 1991 Constitution of the Republic of Bulgaria, Article 13:
(1) Religious denominations are free.
(2) Religious institutions are separate from the state.
(3) The traditional religion in the Republic of Bulgaria is Eastern Orthodox Christianity.
(4) Religious communities and institutions, as well as religious beliefs, cannot be used for political purposes.

*idea. It represents a tradition that has permeated the consciousness of the Bulgarian people…*

*…As an exception to the general model of modern European constitutions, the provision of Article 13, paragraph 3 holds specific significance for delineating Bulgarian cultural and spiritual uniqueness, a consideration taken into account by the constitutional legislator when adopting the Fundamental Law, which should be considered in its interpretation. This is particularly relevant given that in Article 37 of the first Bulgarian Constitution – the Tarnovo Constitution of 1879 – the Orthodox Christian religion of Eastern Confession is defined as "dominant," thus establishing a constitutional tradition that is essential for shaping Bulgarian national constitutional identity.*

*…The Court considers that the value understandings of society, formed by religion and morality, are characterised by stability as a regulator of behaviour, whereby the imposition by the state of legal permissions in conflict with established moral and/or religious norms and principles would be characterised by questionable legitimacy and would compromise their regulatory potential. This should also be borne in mind when interpreting the Basic Law, the preamble of which states that its drafters were driven by the desire to express the "will of the Bulgarian people"*[59]*, which cannot be considered without taking into account their established values, which guided the constitutional legislator. It is in this context that the understanding of sex in its biological sense embedded in the Bulgarian Constitution is a manifestation of the Bulgarian national constitutional identity…'*[60]

The Constitutional Court's reasoning places excessive emphasis on tradition, particularly the role of Eastern Orthodox Christianity, as a defining aspect of Bulgarian national constitutional identity. This perspective, however, fails to acknowledge the dynamic nature of culture and identity, which evolve over time, and risks suppressing contemporary values and the contributions of diverse groups within Bulgarian society.

It is an overinterpretation of Article 13, paragraph 3 of the Constitution, which designates Eastern Orthodox Christianity as "traditional", to assert that the framers intended to embed its value systems i.e. "traditional human society, built on binary sex" and "traditional family values," into the legal order, as identified in the new anti-gender doctrine of the Constitutional Court. Such a claim regarding a religious

59 1991 Constitution of the Republic of Bulgaria, Preamble: 'We, the members of the Seventh Grand National Assembly, in our effort to express the will of the Bulgarian people…'.

60 Decision No. 15, issued on 26 October 2021 by the Constitutional Court of the Republic of Bulgaria in Case No. 6/2021.

belief system linked to Bulgarian constitutional identity disregards the principle of secularism, which has never been disputed in Bulgarian public law. This approach risks marginalising non-Orthodox citizens, including those of other faiths, atheists, agnostics, and individuals who do not share the same values. The intention behind Article 13, paragraph 3 of the Constitution was solely to acknowledge the historical significance of Eastern Orthodox Christianity within the new democratic, pluralistic, and diverse society, rather than to impose a singular moral framework that reflects the beliefs of a majority.

Ultimately, the Constitutional Court's argument implies that prioritising traditional moral values over individual rights aligns with Bulgarian constitutional identity. However, while this may resonate with the totalitarian frameworks of the 1947 and 1971 Constitutions of the People's Republic of Bulgaria, it contradicts the 1991 Constitution, which highlights "the rights, dignity, and security of the individual" as its "foremost principle" in the Preamble.

By anchoring constitutional identity in historical and traditional views, the Court fails to navigate the complexities of gender and sexuality and to strike a balance between tradition and modernity, as well as between societal prejudices and individual rights. This exclusivist approach raises important questions about the role of the Constitutional Court in shaping Bulgarian constitutional identity. It raises doubts about whether the Court is truly safeguarding this identity, not in relation to the supranational EU legal framework, but rather against its citizens who may not share the vision and values of the twelve Constitutional judges.

In 2024, the Constitutional Court shifted away from relying on broad traditional values to define Bulgarian constitutional identity and introduced the term "Bulgarian constitutional specificity (identity)," emphasising the second sentence of Article 1, paragraph 2 as a key element: 'The entire power of the State shall derive from the people. The people shall exercise this power directly and through the bodies established by this Constitution.'[61] This provision on the principle of popular sovereignty reflects the understanding that the sovereign (the people) can decisively express their will in national referendums on specific governance issues, rather than merely offering opinions for others – such as Parliament – to consider. The Court indicates that "the constitutional legislator has established two main forms of exercising state power with equal constitutional rank – direct and representative (Article 1, paragraph 2 of the Constitution) – which mutually complement each other and enhance the stability of the modern democratic state."[62]

61 Decision No. 3, issued on 8 February 2024 by the Constitutional Court of the Republic of Bulgaria in Case No. 13/2023.

62 Ibid.

The jurisprudential concept of constitutional identity in Bulgaria was significantly advanced by the Constitutional Court in its landmark Decision No. 13/2024, which introduced a nuanced perspective while reviewing the 2023 constitutional reform enacted by the National Assembly. In this ruling, the Court used the terms "genuine essence" and "core of values" almost interchangeably with "constitutional identity," emphasising these as fundamental, inviolable elements of the Constitution that cannot be altered by the derivative constituent authority, the National Assembly.

The Court reasoned that amendments made without the original constituent authority's participation risk enabling shifting political majorities to reinterpret or distort the Constitution in ways that undermine its "genuine essence." To prevent this, constitutional drafters deliberately designate the Constitution's spirit – its "core of values" or "constitutional identity" – as immutable, thereby protecting the supremacy of the Constitution from dilution by derivative authorities. The Court explained:

> *'Since changes to the constitutional regulation made without recourse to the original constituent authority bear risks of different political majorities interpreting the constitution contrary to its genuine essence, the creators of constitutions declare the spirit of the constitution, its 'core of values', or 'constitutional identity' unchangeable, thus protecting its supremacy against the derivative constituent authority... In short, there is a core value on which the constitution is premised and which defines its essence and identity, hence the principles that translate this value are in general stable – should they be eliminated, a qualitative change will occur, which is not simply a change of the constitution but in fact substituting it with another constitution. The substantive limitations are the criteria for establishing unconstitutionality of constitutional amendments. The scope of 'matters' immune to changes by the derivative constituent authority is intended to protect the constitutional continuity and constitutional identity...'*[63]

Further, the Constitutional Court acknowledged that while no universally fixed constitutional core exists regarding the precise content and scope, there are broadly accepted fundamental values common to modern democratic constitutions. These values are "translated" into the fundamental law through constitutional principles, described as the "very heart of the constitution."[64] Without providing an exhaustive list, the Court identified the following foundational principles, constituting "the basis of the constitutional order" and "basic constitutional characteristics":

63 Decision No. 13, issued on 26 July 2024 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/2024.

64 Ibid.

*'national sovereignty, separation of powers, rule of law of which the constitution is the ultimate manifestation, political pluralism, protection of human rights and fundamental freedoms, independence of the judiciary.'*[65]

This jurisprudence effectively blurs previously maintained theoretical distinctions between constitutional identity, constitutional values, and constitutional principles, equating them substantively. Such conflation is problematic because it risks conceptual confusion, undermining clarity and precision in constitutional adjudication. While principles and values denote fundamental norms underpinning the constitutional order that can gradually evolve alongside societal changes, constitutional identity is intended to capture the core, defining features – its "essence" that ensures continuity and distinguishes the constitution from others. Equating constitutional identity with principles or values threatens to render all fundamental principles immune to amendment or reinterpretation, effectively freezing the constitution. This rigidity may hinder necessary constitutional evolution and reform, undermining democratic self-governance and adaptability.

Moreover, conflating constitutional identity with principles and values may grant constitutional judges excessively broad discretion to invalidate constitutional amendments based on vague or subjective interpretations of "core values." This heightens the risk of judicial overreach, enabling the Constitutional Court to encroach on the legislative or constituent authority's domain and entrench particular political or ideological positions under the pretext of defending constitutional identity. Consequently, this conflation threatens the functional differentiation vital for nuanced constitutional balancing, as it blurs the scope and firmness of protections afforded to constitutional identity.

## 4.
## Bulgarian National Constitutional Identity and the First Referral to the CJEU on Pancharevo Administrative Case

The Pancharevo case marked the first instance in which a Bulgarian national judge made a preliminary referral to the Court of Justice of the European Union (CJEU), invoking the protection of national and constitutional identity. The case involved the refusal of Bulgarian authorities to recognise the family relationship of a same-sex couple and the rights of the child born to and raised by that couple.

Initially, the Sofia Administrative Court established that "baby Sara" was born in Spain in December 2019, where Spanish authorities issued a certificate listing two mothers, one a Bulgarian citizen and the other a British citizen, who were married in

65 Ibid.

Gibraltar in 2018. According to Article 25, paragraph 1 of the Constitution, any person whose parent is a Bulgarian citizen is automatically granted Bulgarian citizenship at birth. Thus, the court determined that baby Sara acquired Bulgarian citizenship.

Following this, the Bulgarian mother submitted a request to the Sofia Municipality, Pancharevo district, for the issuance of a birth certificate for her daughter, which was necessary for obtaining a passport and facilitating travel within the EU for both mother and child. However, the municipal authorities required evidence that she was the "biological mother" of the child, a requirement she did not fulfil, as Bulgarian laws do not impose such a legal obligation on parents. The administrative body justified its refusal to issue a birth certificate by citing a lack of information regarding the identity of the child's biological mother, arguing that registering two female parents on the birth certificate contradicted "public order" in Bulgaria.

In this context, the administrative court sought clarification from the CJEU regarding the potential adverse effects on public policy and national identity in Bulgaria that might result from mandating Bulgarian authorities to recognise two mothers as parents on a child's birth certificate. The judge aimed to balance Bulgaria's constitutional and national identity with the interests of the child, particularly the child's right to a private life and free movement.[66]

The use of meta-legal concepts such as "national identity" is unavoidable in the case law of the domestic court, invoking Article 4, paragraph 2 of the TEU. The CJEU notes that the respect for the national identity of Member States under Article 4, paragraph 2 TEU pertains to elements that are "inherent in their fundamental structures, political and constitutional".[67] However, defining Bulgarian national identity through the lens of Bulgarian constitutional and public law is challenging due to its origins in the reception and transplantation of foreign legal models, which began in the late nineteenth century with the establishment of the Bulgarian national state under the Tarnovo Constitution and continued during the totalitarian regime, which mirrored the Soviet model. Bulgarian judges cannot rely on broad and amorphous concepts such as "societal values shaped by religion and morality" when defining Bulgarian national and constitutional identity, as these concepts cannot be substantiated by legal sources or any scientifically recognised methods for establishing facts.

The CJEU has repeatedly emphasised the need for a contextual approach and analysis that provides a clear and specific reference to national identity as a legitimate objective. Furthermore, the concept of public policy, when invoked to justify a derogation from fundamental freedom, must be interpreted strictly, and applied only in cases where there is a genuine and sufficiently serious threat to a vital interest of

66 Judgement of the Court (Grand Chamber) of 14 December 2021, V. M. A. v. Sofia Municipality, Pancharevo District, Case C-490/20, paras. 28–30.

67 Ibid., para. 54.

society.[68] The court concluded that a Member State's obligation to issue a passport to a child who is its national, as well as to recognise the parent-child relationship, even when the child's parents are of the same sex, does not undermine national identity or pose a threat to the public policy of that Member State, particularly in the context of the child's right to free movement.[69]

According to the CJEU, depriving "baby Sara" of her relationship with one of her parents would violate her fundamental rights under Articles 7 and 24 of the Charter, which protect the respect for family life and require consideration of the child's best interests. Such deprivation would contradict her right to move and reside freely within the territory of the EU, particularly if her ability to exercise that right was rendered impossible or excessively difficult solely because her parents are of the same sex.[70]

After the CJEU determined that there was no applicable protection of Bulgarian national and constitutional identity or public order in the Pancharevo case, the first-instance administrative court directed the municipal authorities to issue a birth certificate for the child.[71] However, the municipal authority challenged this decision and the Supreme Administrative Court (SAC) distorted the facts, by denying the Bulgarian citizenship of the child, in order to disregard the EU law established by the CJEU.[72] The SAC justified its conclusion that "baby Sara" was not recognised as a Bulgarian citizen, and was therefore not an EU citizen entitled to free movement, by stating that the Bulgarian citizen listed as the mother on the birth certificate issued in Spain failed to prove that she was the child's "biological mother."

In a surprising final comment, the SAC concluded that since the child had not acquired citizenship from either of her two mothers, she had become a citizen of the host country – Spain. Thus, the supreme judges contradicted their initial finding that the child was not an EU citizen and that the rights under the TFEU and Directive 2004/38/EC did not apply to her.

Most notably, the SAC narrowed the definition of "mother" to "biological mother," reducing the legal concept of "descent" to a purely biological interpretation. In doing so, and in an effort to maintain their prejudices against same-sex families, the supreme administrative judges overlooked the fundamental legal principles regarding descent in Bulgarian law:

68 Judgement of the Court (Grand Chamber) of 14 December 2021, V. M. A. v. Sofia Municipality, Pancharevo District, Case C-490/20, para. 55.
69 Ibid., paras. 56–57.
70 Ibid., paras. 63–65.
71 Decision No. 3251, issued on 13 May 2022, by the Administrative Court of the City of Sofia, in administrative case No. 3654/2020.
72 Decision No. 2185, issued on 01 March 2023, by the SAC, III panel, in administrative case No. 6746/2022.

Firstly, descent is not exclusively a biological concept and cannot be limited to the existence of a blood relationship; it is not solely defined by whether a parent is a "biological mother" or "biological father". Secondly, when acknowledging a child by a father, the administrative body never requires evidence that he is the "biological father". Thirdly, legal relationships of descent can also be established through adoption, where the mother has neither given birth nor has any biological connection to the child.

Notwithstanding, the SAC arbitrarily decided to limit the legal concept of descent to a single aspect, biological descent, solely to avoid recognising the child's Bulgarian citizenship and, consequently, the rights arising from EU citizenship. This operation of rendering the child rightless is executed simply because two mothers are listed as parents in the child's birth certificate, issued in a foreign country.

The SAC also violated the provisions of the Code of Private International Law (CPL) concerning the applicable law for descent. The supreme judges contradictorily applied Article 83, paragraph 1 of the CPL[73] by denying that the child acquired Bulgarian citizenship at birth while simultaneously regulating the child's descent according to Article 60, paragraphs 1 and 2 of the Bulgarian Family Code.[74] They even went so far as to attribute the extraterritorial effect to the Bulgarian legal norm on maternal descent within Spain, where the child was born and where descent from two mothers was recognised, solely to deny the legal relationship of descent from the Bulgarian citizen and, consequently, the child's Bulgarian citizenship.

Furthermore, Article 83, paragraph 2, item 1 of the CPL requires that the Bulgarian court, "if it is more favourable for the child," must apply the law of the state where the child has habitual residence at the time of establishing descent (i.e., Spanish law). This means that Bulgarian state authorities, both administrative and judicial, are obligated to recognise the descent as established by the Spanish authorities in the birth certificate. However, the SAC deliberately disregarded the CJEU's preliminary ruling through a series of manoeuvers that mimicked the interpretation and application of the law, ultimately leading to a predetermined outcome: the denial of the child's Bulgarian and European citizenship and the refusal to register the child in Bulgarian civil status records, simply because the child has a Bulgarian mother who established her legal relationship of descent abroad within a same-sex marriage.

73 Code of Private International Law, Art. 83:
(1) Descent shall be governed by the law of the state whose citizenship the child acquires at the time of birth. (2) Notwithstanding the provision of para. 1, it may be applied if it is more favourable for the child: 1. the law of the state of which the child is a citizen or where the child has habitual residence at the time of establishing descent, or 2. the law applicable to the personal relationships between the parents at the time of the child's birth.(3) Reference to the law of a third state shall be accepted, if that law recognises the establishment of the child's descent.

74 Family Code, Art. 60: (1) Maternal descent is established at the time of birth. (2) The mother of the child is the woman who has given birth to the child, including in cases of assisted reproduction.

As a result, the case reveals blatant intersectional discrimination against women with homosexual orientations, reflecting a disregard for their personal and family lives. Such stringent requirements for proof of biological descent were never applied to men within the administrative procedure for recognising an already established descent abroad. Moreover, Bulgarian authorities act discriminately based on "sexual orientation"; when foreign birth certificates list parents of different sexes, the administration never questions the facts established or certified by the foreign act, nor does it seek ways to refuse its recognition.

The entire progression of the Pancharevo case in the Bulgarian courts raises critical questions why non-recognition of same-sex families began to be considered as a component of Bulgarian national and constitutional identity and public order. If so, does this imply a fundamental denial of certain rights, such as the right to respect for private and family life, as well as the prohibition of discrimination based on gender and sexual orientation?

## 5.
## Protection of Human Rights as an Integral Aspect of Bulgarian Constitutional Identity: The Koilova and Babulkova v. Bulgaria Case at the ECtHR

Martin Belov doubts whether the inalienability of fundamental rights constitutes an integral part of the Bulgarian constitutional identity, arguing that this connection cannot be established within our constitutional tradition. However, it seems implausible to separate the identity of the current Bulgarian Constitution from the protection of human rights, particularly when considering the Preamble of the 1991 Constitution, its fundamental provisions, and Chapter 2, which is dedicated to fundamental rights.

Given that the constitutional definition of marriage is a union between a man and a woman, it is clear that same-sex marriage cannot be recognised under Bulgarian legislation, as it contradicts the 1991 Constitution. However, the terms "family" and "parents" are not explicitly defined in the constitutional provisions, meaning that the recognition of same-sex family relationships and the protection of the human rights of their members cannot be deemed unconstitutional. Generally, the Constitutional Court interprets fundamental rights in the Bulgarian Constitution, in alignment with

international human rights treaties and the jurisprudence of the European Court of Human Rights (ECtHR),[75] while also striving to avoid conflicts with EU law.[76]

In its judgement in the case *Koilova and Babulkova v. Bulgaria*, the ECtHR found a violation of Article 8 of the ECHR, determining that Bulgaria has a "positive obligation to provide legal recognition and protection for same-sex couples".[77] The case revolves around the municipal mayor's refusal to update Darina Koilova's marital status in the civil records by registering her marriage to Lilia Babulkova, which took place in the United Kingdom. The administrative body and all levels of domestic administrative courts cited the concept "constitutional tradition"[78] and "conflict with Bulgarian public order"[79] to justify their denial of the applicant's request.

The first-instance administrative court broadly and vaguely linked the conflict with public order to "fundamental imperative norms essential to the legal order and administration of justice," yet it failed to identify any specific norms.[80] Nevertheless, the judge hastily concluded, without justification, that violating such norms would

75 This approach of conforming the interpretation of the Constitution with international treaties is explicitly established in many decisions of the Constitutional Court. See, for instance, among others: Decision No. 1, issued on 1 March 2012 by the Constitutional Court of the Republic of Bulgaria in Case No. 10/2011; Decision No. 6, issued on 14 June 2016 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/2016; Decision No. 14, issued on 17 November 2022 by the Constitutional Court of the Republic of Bulgaria in Case No. 14/2022.
The conforming interpretation of the constitution with international treaties is analysed explicitly in the constitutional doctrine. See: Цеков [Tsekov], 2021.

76 On the reserved position and the judicial self-restraint of the Constitutional Court of the Republic of Bulgaria, see: Белов [Belov], 2017, pp. 102–103.

77 Koilova and Babulkova v. Bulgaria. Application No. 40209/2020. European Court of Human Rights, 5 Sept. 2023, para. 38.

78 Decision No. 180, issued on 08.01.2018, by the Administrative Court of the City of Sofia, in administrative case No. 7538/2017: 'It is undisputed that the ECtHR fully respects the domestic regulations of each state, acknowledging the right of the State Parties to guarantee and regulate marriage and the right to establish a family in accordance with national laws governing the exercise of these rights. In the context of marriage, no evaluation based on "public interest" or individual interests is required. This is because recognition of fundamental rights stems from the common *constitutional traditions* of the State Parties, and these rights should be interpreted in harmony with those traditions...'.
It is clear that the ECtHR fully respects the domestic regulations of each state, acknowledging the right of contracting states to guarantee and regulate marriage and the establishment of a family in accordance with their national laws. In the context of marriage, no evaluation based on "public interest" or individual interests is required. This is because fundamental rights are recognised, arising from the common constitutional traditions of the Member States, and these rights are interpreted in harmony with those traditions (Art. 52 of the Charter). Additionally, there is no consensus among member states regarding same-sex marriages.

79 Art. 117 of the Code of Private International Law sets out the conditions for the recognition and enforcement of decisions and acts from foreign courts and authorities. One key requirement is that such recognition or enforcement must not conflict with Bulgarian public order.

80 Decision No. 180, issued on 08.01.2018, by the Administrative Court of the City of Sofia, in administrative case No. 7538/2017.

harm the "public and personal interests of citizens" and lead to an "unacceptable infringement of fundamental values", which were also unnamed. No examples were provided of public or personal interests that could potentially be violated by a same-sex marriage conducted abroad. Simultaneously, the court declined to address the applicant's concerns that the refusal to change her marital status could result in legally prohibited situations, such as polygamy, or non-compliance with other obligations mandated by Bulgarian law, such as the requirement to submit accurate declarations.

The Supreme Administrative Court presented a similar line of reasoning, completely confusing the logical sequence between the recognition of a marriage conducted abroad and the generation of legal effects in Bulgaria.[81] While it is evident that the purpose of "recognition" is to generate effects in Bulgaria, the supreme judges assert that "a marriage that has not produced legal effects in Bulgaria cannot be recognised and subsequently registered." It is unclear why they believe that a marriage conducted abroad must first produce effects in Bulgaria before it can be recognised; this reasoning is both absurd and nonsensical – akin to "putting the cart before the horse." Why would anyone need recognition of a legal act that has already produced effects within the territory of Bulgaria? This flawed reasoning reveals an inherent rejection of same-sex marriages conducted abroad, rooted in the judges' prejudices and biases, ultimately leading to a fundamental denial of the human right of Bulgarian citizens to marry abroad.

The Supreme Administrative Court explicitly rejected the applicant's claim of a violation of Article 8 of the ECHR, emphasising that *'the regulation of family relationships, as a fundamental unit of society that pertains to reproduction and individual development, is a matter of national significance that necessitates public consensus, as evidenced by positive normative legislation'*.

Unlike Bulgarian courts, which maintain that each state has full discretion in deciding whether to provide legal recognition of the family life of same-sex couples in its legislation and legal system, the European Court of Human Rights underscores that the margin of appreciation for states is significantly reduced when it comes to granting same-sex couples the opportunity for legal recognition and protection. States enjoy broader discretion regarding the "choices of means", used in the specific legal regime concerning both the form of recognition of same-sex relationships and the content of the protection provided to same-sex couples. Moreover, since the aim of the European Convention on Human Rights is to protect rights that are "concrete, not theoretical or illusory," it is essential that the legal protection for same-sex families be "adequate." In this regard, the ECtHR has addressed issues related to maintenance,

81 Decision No. 17003, issued on 12.12.2019, by the SAC, III panel, in administrative case No. 4245/2018.

taxes, inheritance, and moral obligations (mutual duties of support) that are specific to family life, which would benefit from being regulated within a legal system open to same-sex couples.

The ECtHR highlights that the official recognition of a same-sex couple's relationship holds intrinsic value for the applicants and contributes to the affirmation of their personal and social identity, as guaranteed by Article 8 of the ECHR.[82] It provides the couple with existence and legitimacy in the eyes of the outside world, independent of the legal consequences – whether broader or more limited – that recognition entails.[83] In addition to the need for official recognition, a same-sex couple, like a heterosexual couple, also has "ordinary needs" for protection, as 'the recognition of a couple cannot be separated from its protection.'[84]

This serves as a lesson from the ECtHR to the Bulgarian courts: individuals entitled to legal protection under the ECHR cannot be dehumanised,[85] and the scope of that protection cannot be restricted, even under justifications related to constitutional traditions and the margin of appreciation of Member States. The ECtHR clarifies that the absence of legal recognition for same-sex couples, relegating them to de facto unions that can only regulate their relationships through contracts, fails to provide adequate protection.[86] Consequently, they are unable to assert the existence of their relationship before administrative and judicial authorities or third parties.

In this context, the ECtHR addresses the claims made by the Bulgarian authorities that individuals of same-sex couples possess the same rights as Bulgarian citizens, including the ability to seek protection for their rights and "ordinary needs" from national courts. The necessity to pursue such legal steps is interpreted as an obstacle to respecting their personal and family lives. Given this, the ECtHR concludes that

82 *Koilova and Babulkova v. Bulgaria*. Application No. 40209/2020. European Court of Human Rights, 5 Sept. 2023, §50.

83 Ibid., para. 51.

84 Ibid., para. 52.

85 Frick, 2021, p. 188: '...dehumanisation is defined as an activity that consists of a denial of status as a true/real human being and can be subdivided along the lines of different possible actions and practices. The term "activity" here is used in a broad sense in order to span as many phenomena that constitute a denial of belonging to the group that would be considered (fully) "human." A low-key denial of this sort can already occur where someone holds the view that another person or group of others is not (fully) human. The holding of views, particularly when anthropological/biological and evaluative/normative beliefs conjoin, are hardly ever accidental. Denying that someone is (fully) human presupposes a complex set of beliefs as to what a human being is or should be like. Granted that the thought processes in our minds are not entirely passive but are, in fact, (at least in parts) governed by the choices we make in sorting out and combining (sensual and non-sensual) information as well as reviewing and reiterating it, we can speak of latent dehumanisation. It consists of the holding of views and attitudes according to which another person or group is not ("fully") human.'

86 *Koilova and Babulkova v. Bulgaria*. Application No. 40209/2020. European Court of Human Rights, 5 Sept. 2023, para. 53.

the protection available to same-sex couples in stable relationships in Bulgaria, as reflected in the analysis of national law and the government's description, fails to meet the fundamental needs of the affected individuals.[87]

The judgement in the *Koilova and Babulkova v. Bulgaria* case exposes the shortcomings of the prevailing Bulgarian legal discourse, which undermines the application of Article 8 of the ECHR through vague references to Bulgarian constitutional tradition and public order.

## 6. Conclusion

The exploration of constitutional identity in Bulgaria reveals a complex interplay between its prevailing understanding rooted in constitutional tradition and traditional values and the protection of human rights. As Bulgaria navigates its role within the European Union and the Council of Europe, the challenge lies in reconciling its constitutional identity with the obligation to uphold human rights. The jurisprudence of the Constitutional Court and the case law of domestic courts illustrate a disturbing development where constitutional identity is invoked to justify restrictions on fundamental rights, particularly affecting transgender individuals and same-sex families. There is a need for a more inclusive understanding of constitutional identity in Bulgaria that embraces contemporary human rights standards while honouring the nation's historical and cultural context. Future discourse should strive to foster a dialogue that bridges the gap between tradition and modernity, ensuring that Bulgaria's constitutional identity evolves to protect the rights and dignity of all its citizens.

87 Ibid., § 54.

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# Issues of Constitutional Identity in a Candidate State: Bosnia and Herzegovina

**ABSTRACT:** *The concept of constitutional identity has been a focal point of extensive scholarly debate in legal and constitutional theory in recent decades. While elements of this concept can be traced back to antiquity, its more developed conceptualisation emerged in German legal thought during the Weimar Republic. In recent years, the notion of constitutional identity has gained prominence in the context of the relationship between the European Union (EU) and its Member States. The constitutional courts of EU Member States have increasingly invoked the concept of constitutional identity – whose protection is enshrined in the Lisbon Treaty, which "constitutionalized" national identity – as a means of delineating "red lines" against the implementation of certain EU measures and legal acts (such invocations have at times faced criticism, with opponents arguing that they reflect illiberal and undemocratic tendencies).*

*Conversely, the European Court of Justice (ECJ) has progressively developed the concept of EU constitutional identity, using it to challenge specific legal provisions and measures adopted by Member States. Both interpretations of constitutional identity have the potential to play a significant role in the EU accession process. Pre-accession conditionality imposed on candidate states is often designed to safeguard values that are closely associated with EU constitutional identity. At the same time, invoking the constitutional identity of a candidate country may serve as a legal basis for resisting the implementation of these conditions. These dual dimensions are particularly significant in Bosnia and Herzegovina's (BiH) EU accession process. The priorities outlined in the European Commission's Opinion require amendments to the BiH constitution, which may be perceived as conflicting with the country's constitutional identity. This paper examines the constitutional reforms that may be required for BiH's EU accession, as articulated both explicitly and implicitly in the European Commission's conditions, while analysing the legal and political controversies surrounding their implementation.*

**KEYWORDS:** *Constitutional Identity, European Union, Member States, Pre-accession Conditionality, Bosnia and Herzegovina.*

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## 1.
## Introduction

The concept of constitutional identity is widely employed in contemporary legal and constitutional theory, where it has been the subject of growing scholarly debate and of jurisprudence across regional and national courts. In the context of relations between the institutions of the EU and its Member States, constitutional identity manifests in two primary senses: (1) the constitutional identity of individual Member States, increasingly invoked as a basis for challenging the implementation of EU measures and legal acts, and (2) the distinct identity of the EU itself, which may serve as a counterbalance to constitutional identity arguments advanced by Member States.

Both interpretations are highly relevant to accession processes for prospective EU Member States. On the one hand, a country's constitutional identity may pose a challenge to the implementation of reforms mandated by pre-accession conditionality. On the other hand, the EU's constitutional identity may serve as the rationale for enforcing such reforms. This dual application of the concept is especially significant in Bosnia and Herzegovina's (BiH) pre-accession process, particularly concerning the legal and institutional reforms required for BiH's successful integration into the EU.

The first part of the paper provides a concise analysis of the concept of constitutional identity, together with an overview of its application in the case law of national constitutional courts and the ECJ. The paper then examines the priorities outlined by the European Commission as conditions for BiH's EU accession, with emphasis on potential tensions between these requirements and BiH's constitutional identity (elements of which are explored within this discussion).

## 2.
## The Concept of Constitutional Identity

Constitutional identity has become one of the most important and contested concepts in contemporary constitutional theory and practice, yet its foundational principles, precise meaning, scope, and the dynamics of its continuity and evolution remain insufficiently clarified.[1] Although constitutional identity is sometimes described as "a relatively recent and enigmatic notion in constitutional law and theory"[2], its origins are much older. The roots of the concept can be traced back to Aristotle, who argued that the identity of a state is determined not by its physical characteristics but by

1 See Hirschl, Roznai, 2024.
2 Polzin, 2017, p. 1596.

its constitution.[3] In Book III of *Politics*, he examined what defines the identity of a city – understood as its essence and the distinguishing element that sets it apart from other cities. According to Aristotle, a city's identity is not determined by its physical features, such as walls, but by its political structure as established through its constitution. He therefore asserted:

> *'If a city is a form of association, and if this form of association is an association of citizens in a constitution, it would seem to follow inevitably that when the constitution undergoes a change in form, and becomes a different constitution, the city will likewise cease to be the same city.'*[4]

In German constitutional theory, the concept of constitutional identity was first introduced by Carl Bilfinger and Carl Schmitt. During the Weimar period, these authors developed the notion to justify material constitutional limits on constitutional amendments. According to Bilfinger, the legislator must respect the fundamental core of the constitution.[5] Schmitt grounded his understanding of material limits in the idea of constituent power as "the comprehensive foundation of all other powers".[6] He distinguished between two kinds of constitutional provisions: those representing fundamental decisions (the "true" constitution) and other, less important provisions described as "constitutional laws".[7] Provisions representing the "true" constitution could be amended only by the constituent power, whereas the constituted powers, established by the constitution, could modify only "constitutional laws". As Schmitt observed: '*That 'the constitution' can be changed should not be taken to mean that the fundamental political decisions that constitute the substance of the constitution can be eliminated at any time by parliament and be replaced through some other decision*'.[8] He therefore denied constituted authorities the power to amend the substantive core of the constitution – a concept he deliberately left undefined – significantly constraining their ability to shape its content.[9]

The concept of constitutional identity has been subject to diverse interpretations. Rosenfeld identifies three broad meanings of constitutional identity.[10] First, constitutional identity may stem from the mere existence of a constitution, since polities with constitutions differ from those without one. Second, the contents of a constitution

3 Rosenfeld, 2012, p. 756.
4 Aristotle, 1995, p. 90.
5 Bilfinger 1931, p. 86 quoted in Polzin 2016, p. 418.
6 Schmitt, 2008, pp. 125–130, quoted in Polzin, 2016, p. 419.
7 Schmitt, 2008, pp. 74–89, 125, 151 quoted in Polzin, 2016, p. 419.
8 Schmitt, 2008, p. 79.
9 Polzin, 2016, p. 421.
10 Rosenfeld, 2012, p. 757.

provides defining elements of identity – for example, a federal constitution establishes a different polity from a unitary state. Third, the context in which a constitution operates can play a significant role, as different cultures may understand fundamental rights in contrasting or even contradictory way. Polzin identifies five largely independent discourses concerning constitutional identity.[11] Marti differentiates between the identity of the constitution – its essential, unamendable elements, the alteration of which would amount to a "constitutional revolution" – and the identity of the people or political community governed by that constitution.[12] According to Núñez Poblete, constitutional identity: '*expresses some sort of meta-constitution, understood as a set of norms or pre-constitutional principles that define the meaning of other constitutional norms, eventually coinciding, at a textual level, with other norms of different political communities*'.[13]

Kabat-Rudnicka further elaborates the distinction between constitutional identity and national identity. She argues that '*constitutional identity is a narrower concept than national identity, since it refers to the constitutional values and state structures, whereas national identity comprises original, one can say pre-constitutional values and/or elements, such as common language, customs, history, etc*'.[14] Thus, one concerns the civic, the other the ethnic dimension of the nation.[15] Kabat-Rudnicka's study highlights the increasing relevance of constitutional identity in European constitutional

11 The first and most widely discussed discourse, according to Polzin, arises within European legal scholarship, focusing on Article 4 paragraph 2 of the Treaty on European Union. This provision mandates that the EU respect the national identities of its Member States, particularly their fundamental political and constitutional structures. The second discourse, which is related to the first, examines the relationship between constitutional identity and public international law. This discussion considers whether core constitutional values can legitimize violations of international legal obligations and the extent to which international courts must account for national constitutional norms. The third discourse consists of various national interpretations of constitutional identity, particularly in Germany, where it is predominantly understood as the identity of the constitution itself – a purely normative concept. The German Federal Constitutional Court has reinforced this interpretation since the *Lisbon Judgment*, defining constitutional identity as the core of the German constitution that is impervious to amendment. The key issue in this discourse is whether a constitution remains fundamentally the same despite amendments or whether certain changes alter its essence, effectively creating a new constitution. The fourth discourse views constitutional identity as a reflection of a people's or nation's collective identity, which is both shaped by and expressed through the constitution. This perspective explores the abstract relationship between a nation's cultural heritage and its constitutional framework. The fifth discourse explores the relationship between constitutional identity and immigration policies, emphasizing that a nation's self-definition is influenced not only by its constitutional framework but also by policies that regulate membership within the national community. (Polzin, 2017, pp. 1597–1599)

12 Marti, 2013.

13 Núñez Poblete, 2008, p. 338 quoted in Amaiquema, 2015, p. 25.

14 Kabat-Rudnicka, 2018, p. 145.

15 Ibid.

discourse, illustrating its role both as a protective mechanism for national legal orders and as a point of contention in the ongoing development of EU integration.[16] The following section examines how constitutional identity has been interpreted in the jurisprudence of the constitutional courts of Member States and the European Court of Justice (ECJ).

## 3.
## Constitutional Identity in the Jurisprudence of the European Court of Justice and National Constitutional Courts

The principle of respect for the national identities of Member States was first introduced in the Maastricht Treaty (the Treaty on the EU) as a means of addressing national constitutional concerns.[17] Article F(1) of the Maastricht Treaty stated: '*The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy*'. This provision was later revised in the Amsterdam Treaty of 1997, where Article 6(3) retained the commitment to respecting national identities but omitted the explicit reference to democratic principles, stating instead: "The Union shall respect the national identities of its Member States." For the first decade after its introduction, the national identity clause played a relatively marginal role in both ECJ case law and academic scholarship. During this period, "the link between 'national identity' and 'constitutional identity', that appeared later, had not yet been made".[18]

The Lisbon Treaty redefined the national identity clause, emphasising its legal and constitutional dimensions. Article 4(2) states:

> '*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the state, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*'

In the Lisbon version of the national identity clause, "the political and constitutional aspect is much enhanced".[19] As Besselink observes, the Lisbon Treaty's focuses

16 Ibid.
17 Faraguna, 2017, p. 1619.
18 Reestman, 2009, p. 376.
19 Besselink, 2010, p. 44.

on state structures marks a shift from national identity as such to constitutional identity.[20] The "constitutionalization" of the concept of national identity was noted by other authors as well. Faraguna, for instance, argues that '*the Treaty of Lisbon gave a remarkable contribution for the enrichment of the legal, and more precisely, constitutional, meaning of the identity clause, by weakening sociological and historical reference of the clause*'.[21]

This change in the meaning of the identity has had a significant impact on ECJ case-law. Following the Lisbon Treaty, the "constitutionalisation" of national identity transformed the identity clause into "the battleground or the meeting point, where the limits of the authority of EU law lie".[22] It has emerged as an increasingly significant component of ECJ legal reasoning.

Even before the Lisbon Treaty, the ECJ acknowledged the significance of specific constitutional arrangements within Member States as a basis for justifying exceptions or distinctions that would otherwise be impermissible. The most significant pre-Lisbon case, as highlighted by Besselink, is the *Omega* judgment.[23] This case involved a prohibition imposed by the Mayor of Bonn on the operation of laser-gun games, in which participants simulated killing others for entertainment. The ban was justified on the grounds that such games violated human dignity, as protected under Article 1 of the German Basic Law. The ban was challenged as an infringement of the free movement of goods and services by the laser-game provider. The ECJ concluded that it is not indispensable for a restrictive measure issued by a Member States regarding the precise manner in which a fundamental right or legitimate interest should be safeguarded.[24] Since the entry into force of the Lisbon Treaty, the ECJ has, in several judgments, expressed its view on the meaning of national identity as protected under the identity clause. According to the Court, the national identities of the Member States include, among other things, "the status of the State as a Republic"[25] and "protection of a State's official national language".[26]

National constitutional courts have invoked national constitutional identity to draw "red lines" against deeper European integration.[27] As Besselink notes, although

20 Ibid.
21 Faraguna, 2017, p. 1620.
22 Chalmers, Davis, Monty, 2010, p. 202, quoted in Faraguna, 2017, p. 1621.
23 Besselink, 2010, p. 45.
24 Ibid.
25 Judgment Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien issued 22.12.2010 by the Second Chamber of the Court of Justice of European Union in No. C.208/09
26 Cloots, 2016, p. 83.; Judgment Malgožata Runevič-Vardyn and Lukasz Pawel v Vilniaus miesto savivaldybés administracija issued 12.5.2011 by the Second Chamber of the Court of Justice of European Union in No. C.381/09; Judgment Anton Las v PSA Antwerp NV issued 16.4.2013 by the Grand Chamber of the Court of Justice of European Union in No. C.202/11.
27 Theil, 2014.

the highest and constitutional courts across all EU Member States acknowledge the primacy of EU law over conflicting national legislation, most do not recognise its supremacy over national constitutions.[28] The Italian Constitutional Court set an early precedent in *Fragd*, establishing that the refusal to grant priority to EU law should be limited to cases involving fundamental constitutional principles.[29] The French Constitutional Court, in its July 2006 decision, ruled that an EU Directive may be deemed contrary to the French Constitution only when it infringes rules and principles inherent to France's constitutional identity.[30] In the *Lisbon Judgment*, the German Constitutional Court *'recognized the mutuality in the duty to respect the constitutional identity of Member States as both a national constitutional obligation as well as an EU obligation, albeit that the latter was founded on the Member States' constitutions'*.[31]

In recent years, some Eastern and Central European constitutional courts have shifted their interpretation of constitutional identity. According to Kovács, the recent trend in the region's jurisprudence is that these courts *'apply an ethnocultural understanding of identity, thereby putting European integration in peril'*.[32]

Conversely, some scholars argue that although constitutional identity has traditionally been invoked by Member States to resist EU obligations, the EU itself possesses a constitutional identity that functions as a counterbalance when national claims diverge from the fundamental values enshrined in the EU's legal order. Drinóczi and Faraguna contend that this identity is rooted in Article 2 TEU, which defines the Union's fundamental values, including democracy, the rule of law, and human rights.[33] Recent rulings by the CJE reinforce the idea that these values constitute the "untouchable core" of the European legal order. As evidence, the authors cite two CJE rulings (*Case C-156/21, Republic of Poland v European Parliament and Council of the European Union*, 16 February 2022; *Case C-157/21, Hungary v European Parliament and Council of the European Union*, 16 February 2022), in which the Court explicitly referred to Article 2 TEU as encompassing the fundamental values that "define the very identity of the European Union as a common legal order."[34]

28 Besselink, 2010, p. 46.
29 Ibid.
30 Decision issued 27.7.2006 by the French Conseil Constitutionnel No. 2006/540.
31 Besselink, 2010, p. 47 fn. 28.
32 Kovács, 2017, p. 1703. The author examines the jurisprudence of East Central European constitutional courts, with a particular focus on the Visegrád Group (comprising the Czech Republic, Hungary, Poland, and Slovakia). She argues that these courts employ the concept of constitutional identity as a mechanism to constrain European integration, frequently interpreting national identity in exclusionary, ethnocultural terms.
33 Drinóczi, Faraguna, 2022, p. 77.
34 Ibid.

## 4.
## BiH's Accession Process and the Issue of Constitutional Identity

As highlighted in the introduction, the conditions imposed on candidate states during the EU accession process, as part of pre-accession conditionality, have the potential to conflict with principles forming the state's constitutional identity. The conditions identified by the European Commission as priority requirements for BiH's accession to EU will therefore be analysed regarding their (in)compatibility with the core principles of the country's Constitution, while also seeking to outline BiH's constitutional identity.

BiH has pursued full EU membership since the late 1990s, formally articulating this aspiration only a few years after the end of the armed conflict. In 1998, the Council of the EU issued a "Declaration on Special Relations between the EU and BiH", expressing its commitment to strengthening relations, contingent on BiH fulfilling the conditions outlined in the Regional Approach.[35] Subsequently, on 28 January 1999, the BiH Council of Ministers adopted the "Decision on Launching the Initiative for BiH's EU Accession"[36], followed on 27 July 1999 by the Parliamentary Assembly's adoption of the "Resolution on European Integration and the Stability Pact for South-East Europe."[37]

In 2005, negotiations for the Stabilisation and Association Agreement (SAA) between the EU and BiH were formally initiated. At that time, the European Commission acknowledged BiH's substantial progress in implementing the reforms necessary for advancing its European integration process. The negotiations concluded successfully in 2006, leading to the signing of the SAA in 2008, alongside an Interim Agreement on Trade and Trade-Related Affairs. The SAA established a free trade framework and aimed to support BiH's legal, administrative, institutional, and economic reforms in preparation for future EU membership negotiations. Although provisionally applied upon signing, the agreement did not fully enter into force

35 "The European Union in Bosnia and Herzegovina: Repairing, reconstructing, reconnecting", European Commission, p. 16. [Online], Available at: https://aei.pitt.edu/33628/4/A527.pdf (Accessed: 4 September 2024)

36 "Decision on Launching the Initiative for BiH's EU Accession", Council of Ministers of BiH (1999), *Official Gazette of BiH*, No. 3/99.

37 "Resolution on European Integration and Stability Pact for South-East Europe", Parliamentary Assembly of BiH (1999), *Official Gazette of BiH*, No. 12/99.

until 2015, as the EU suspended its implementation pending significant political reforms.[38]

On 28 January 2016, the BiH Presidency ratified the "Decision on the Submission of BiH's EU Membership Application",[39] authorising its formal submission. The application was presented to the EU on 15 February 2016, eight years after the SAA was signed, reaffirming BiH's commitment to implementing reforms in line with Article 49 of the EU Treaty. Following its submission, the Council of the EU acknowledged the application, and on 9 December 2016, the European Commission issued a comprehensive questionnaire comprising 3,242 questions. After a 14-month review, BiH responded on 28 February 2018, prompting an additional 655 questions from the Commission on 20 June 2018, to which BiH replied on 4 March 2019. These materials formed the basis for the EU's formal opinion (*Avis*) on BiH's membership application.

In 2019, the European Commission issued its "Opinion on BiH's application for membership of the European Union", which set out concrete indications and priorities for BiH's path toward EU accession. The key priorities cover the areas of democracy/functionality, the rule of law, fundamental rights, and public administration reform. Among the 14 priorities, several explicitly require constitutional change. This affect at least six key areas (Criteria IV):

1. Ensuring legal certainty in the distribution of competences across all levels of government;
2. Introducing a substitution clause enabling the state, upon accession, to temporarily exercise the competences of other levels of government to prevent and remedy breaches of EU law;
3. Guaranteeing the independence of the judiciary, including its self-governance institution, the High Judicial and Prosecutorial Council (HJPC);
4. Reforming the Constitutional Court, including addressing the presence of international judges and ensuring the enforcement of its decisions;
5. Guaranteeing legal certainty, including the establishment of a judicial body responsible for ensuring consistent interpretation of the law throughout BiH;

38 Nielsen, 2022, p. 7. The EU delayed the entry into force of the SAA due to BiH's failure to comply with the *Sejdić-Finci* ruling of the European Court of Human Rights (ECtHR). One of the factors contributing to the final entry into force of the SAA was the German-British initiative, which prioritized the implementation of the Reform Agenda without requiring the execution of the aforementioned ECtHR's decision (Galić, Barbarić, Bošnjak, 2022, p. 267).

39 "Decision on BiH's EU Membership Application Submission", 28 January 2016, BiH Presidency, 2015, Document No. 01–50–1-227–29/16.

6. Guaranteeing equality and non-discrimination of citizens, particularly by incorporating relevant jurisprudence from the European Court of Human Rights (ECtHR).[40]

The implementation of certain requirements and priorities outlined in the Opinion presents significant challenges within BiH's existing constitutional framework. One of the priorities identified by the European Commission requires ensuring equality and non-discrimination of citizens, by taking into account the ECtHR's case-law. Given that the changes mandated by the ECtHR's rulings affect fundamental aspects of the constitutional structure, the proposed amendments may be contested on the grounds that they conflict with BiH's constitutional identity (understood as the set of core constitutional principles).

Several ECtHR judgments have determined that the exclusion of citizens from certain political offices, as prescribed by the BiH Constitution itself, constitutes a violation of the European Convention on Human Rights (ECHR). In a series of cases, the ECtHR adjudicated complaints filed by citizens of BiH who alleged discrimination and the denial of their right to stand for election to specific institutions. These individuals were either not members of one of the three constituent peoples, had chosen not to declare their affiliation, or were excluded based on their place of residence. The Court's jurisprudence on this issue began with the *Sejdić and Finci v. BiH* (2009) and was subsequently reaffirmed in *Zornić v. BiH* (2014), *Pilav v. BiH* (2016), *Šlaku v. BiH* (2016), and *Pudarić v. BiH* (2020). Each ruling underscored the need to amend the Constitution to eliminate discriminatory provisions and ensure full electoral rights for all citizens. However, none of these decisions has yet been implemented.

The most recent ECtHR decision concerned the active rather than the passive right to vote. The applicant, Slaven Kovačević, a citizen of Sarajevo in the Federation of Bosnia and Herzegovina (FBiH), and an adviser to a Croat member of the BiH Presidency, does not identify with any of the constituent peoples or any other ethnic group. In his complaint, Kovačević asserted that he was unable to vote for candidates of his choice in the 2022 general elections due to legal provisions imposing territorial and ethnic requirements on candidates for the BiH Presidency and the House of Peoples. He argued that his preferred candidates were ineligible because they did not belong to the "correct" entity or ethnic group. Kovačević's alleged violations of Articles 13, 14, and 17 of the ECHR, as well as Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 of the Convention. In its Chamber judgment of 29 August 2023, the ECtHR found a violation of Article 1 of Protocol No. 12 (general prohibition of discrimination) relating to his inability to vote for all candidates for the Presidency and for delegates to the House of People under BiH's constitutional and electoral regime. However, following

40 Woelk, Galić, Sekulić, 2023, p. 460.

a request for referral to the Grand Chamber by the Agent of the Government of BiH, the ECtHR, in its Grand Chamber judgment, declared Mr. Kovačević's application inadmissible, finding that the applicant had abused the right of application within the meaning of Article 35(3a) of the Convention and that he lacked victim status. Accordingly, the Court ruled that BiH had not violated the Convention in the circumstances alleged.[41]

The issues raised by these applications and the related ECtHR jurisprudence call for a comprehensive, multidimensional analysis. First, they must be examined through the framework of consociational democracy, which forms the foundation of BiH's constitutional and political system and can be regarded as an element of the country's constitutional identity. Second, the analysis must account for the principles of federalism, as BiH functions as a federal state with a complex power-sharing structure.[42]

The institutional structure of BiH, established through the Dayton Peace Agreement, is based on a model of consociational democracy (the BiH "constitutional text

41 *Kovačević v. Bosnia and Herzegovina*, ECtHR (2025), [Online], Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-245359%22]} (Accessed: 21 September 2025)

42 Marković, 2023, p. 3. BiH is a complex state, described in the literature as a federation with distinct confederal elements (Stankovic, 2019, p. 4). It consists of two entities (federal units): the Republic of Srpska (RS) and the Federation of Bosnia and Herzegovina (FBiH). Some authors argue that BiH is an example of an asymmetric federation ("a mildly asymmetrical constitutional system"; Sahadžić, Woelk, 2023, p. 371). The RS is a unitary entity, while the FBiH is federally structured (it consists of 10 cantons). The third subnational unit in BiH is the Brčko District (BD) of BiH, a special administrative unit of local self-government (according to Article 1.1 of the BD Statute).

suggests a classic corporate consociation")[43], ensuring representation of the constituent peoples across state institutions. The designation "constitutional people" refers to the three primary ethnic groups: Bosniacs, Serbs, and Croats. This designation is enshrined in the Preamble of the BiH Constitution, which recognises these groups, alongside "Others", as the foundation of the constitutional order.[44] The institutional framework of BiH, as set out in its constitutional provisions, is structured on ethnic and territorial criteria, with the constituent peoples playing a dominant role in its composition.

The application of these criteria is evident in the structure and organisation of the Parliamentary Assembly of BiH, the bicameral legislative body at the state level. The Assembly comprises two chambers: the House of Representatives and the House of Peoples. The House of Representatives is composed of 42 directly elected deputies,

43 McCrudden, O'Leary, 2013, p. 21. Consociational democracy represents a political model designed for deeply divided or post-conflict societies, characterized by institutionalized cooperation among distinct social segments, most often ethnic, linguistic, or religious groups. This model rests on a grand coalition of representatives from all major social segments, parity (numerically equal) or proportional representation in political institutions, and decision-making procedures based on consensus, qualified majorities, or mutual vetoes. The electoral system follows the principle of proportional representation to guarantee fair participation of each group, while a degree of segmental autonomy, often expressed through territorially organized federal units, allows distinct communities to exercise legislative, executive, and judicial authority within their domains. Bosnia and Herzegovina (BiH) represents one of the few contemporary examples of this model, alongside Belgium, Switzerland, and Lebanon. In BiH, the principle of the grand coalition is manifested through the participation of political parties representing each of the three constituent peoples within the ruling majority. This arrangement was evident after the 1996 elections, when the government was composed of the three major ethnic parties, each corresponding to one constituent group (however, it should be noted that the constitutions in BiH do not formally require that such grand coalitions include parties enjoying a simple or absolute majority of support among their respective constituent peoples). The veto mechanisms, including consensus, qualified majorities, and the protection of vital national interests, are constitutionally guaranteed to prevent the domination of one group. Representation within the institutional framework of BiH, both at state and entity level, is structured according to two complementary principles: proportional representation, applied in collective bodies such as the House of Representatives of the Parliamentary Assembly of BiH, where seats are distributed according to territorial/entity criteria, as well as in entity governments, and parity-based representation, used, for example, in several state-level institutions, such as the BiH's Presidency and the House of Peoples of the Parliamentary Assembly of BiH, to guarantee equal participation of all three constituent peoples (Marković, Milinković, 2023, pp. 403-408). The following sections of the paper will provide a more detailed analysis of these institutional arrangements.

44 The Constitution of BiH explicitly stipulates, in its Preamble, that it has been adopted by "the Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina" (Constitution of Bosnia and Herzegovina. [online], Available at: https://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pdf (Accessed: 24 January 2025)). Through this formulation, the Constitution accords to the constituent peoples the status of bearers of sovereignty, together with the citizens (Marković, Milinković, 2023, p. 403).

with 28 elected from the FBiH and 14 from the RS. A quorum is reached a majority of its members (22 of 42) is present. Deputies serve four-year terms. Owing to their direct election, they ostensibly represent the citizens, or at minimum the citizens of their respective entities. However, the constitutionalization of "entity voting" as a mechanism to safeguard entity interests challenges the conventional understanding of citizen representation.[45] According to Article IV.3(d), decisions in the House of Representatives are adopted by a majority of members present and voting. Members must make every effort to ensure that this majority includes at least one-third of representatives from each entity. If this threshold is not achieved, a decision may still be adopted by a simple majority of those present and voting, provided the opposing votes do not constitute two-thirds or more of the representatives elected from either entity.

The House of Peoples, in contrast, functions primarily serves as a representative body for the constituent peoples, reflecting the societal segmentation embedded in BiH's political structure. It consists of fifteen delegates, two-thirds (ten) elected from the FBiH, five Bosniaks and five Croats, and one-third (five members) from the RS, all of whom are Serbs. The Bosniak and Croat delegates from FBiH are selected by their respective caucuses in the FBiH House of Peoples, while the Serb delegates from the RS are elected by the RS National Assembly. A quorum requires nine delegates, including at least three from each constituent people (Article IV.1(b) of the BiH Constitution)[46]. Delegates serve four-year terms. The House of Peoples is organised into three constituent people's clubs (Bosniak, Croat, and Serb), which play a central role in the legislative process. The House may be dissolved either by decision of the BiH Presidency or by its own resolution, with dissolution requiring a majority of delegates, including a majority from at least two constituent peoples. The BiH Presidency must decide by consensus; however, if consensus is not reached, the decision may proceed with the support of two out of three Presidency members.

As in the House of Representatives, decisions are made by majority vote of those present and voting, provided that the quorum requirements are met and subject to the entity voting mechanisms under Article IV(3)(d) of the Constitution. The Constitution also prescribes the procedure for protecting the vital interests of the constituent peoples in the House of Peoples. Article IV.3(e) stipulates that a proposed decision may be declared destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of their respective delegates. Such a decision then requires, for approval, a majority of the Bosniac, of the Croat, and of the Serb Delegates present and voting.

45 Marković, 2023, p. 4.

46 Constitution of BiH, [online], Available at: https://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pdf (Accessed: 14 December 2024)

The House of Representatives and the House of Peoples hold equal legislative authority, requiring the approval of both chambers for the enactment of laws. This bicameral system ensures that all legislative decisions reflect consensus between the two houses, reinforcing BiH's power-sharing institutional framework.[47]

The executive power in BiH is structured along ethnic and territorial lines, reflecting the country's consociational model of governance. The Presidency of BiH consists of three members: one Bosniac and one Croat (both elected from the FBiH), and one Serb (elected from the RS). This arrangement is designed to ensure equal representation among the three constituent peoples. However, it excludes individuals who do not belong to one of these groups ("Others") from eligibility, a model that, as previously noted, has been deemed discriminatory by the ECtHR. The BiH Presidency functions as a collegial body, with a Chairperson who serves as *primus inter pares*. The Chairpersonship rotates every eight months among the three members. Decision-making follows a collective approach, with certain decisions requiring consensus as explicitly stipulated in the BiH Constitution. Where consensus is not reached, decisions may be adopted by majority vote, although a dissenting member retains the right to invoke a veto, thereby suspending implementation.

In addition to the Presidency, the executive power in BiH is exercised by the Council of Ministers. Although the Constitution does not explicitly define this body as a government, it has been entrusted with traditional governmental functions and responsibilities.[48] Article V(4) of the BiH Constitution stipulates that the Council is "responsible for carrying out the policies and decisions of Bosnia and Herzegovina", implying that it cannot be regarded as an executive body subordinate to either the Parliamentary Assembly or the Presidency.[49] The number of ministries in the Council of Ministers has increased significantly over time (its expansion from three to nine ministries illustrates the progressive strengthening of state competences). The requirement that no more than two-thirds of ministers come from the FBiH ensures representation for the RS, preventing dominance by one entity. The appointment of ministers and deputy ministers is also determined by the ethnic principle. Article 6 of the Council of Ministers Act[50] prescribes that the constituent peoples must be equally represented (Article 6 (1). The Chairperson of the Council of Ministers and Deputy Chairpersons must come from different constituent peoples (Article 6 (2)). The Act further requires that each minister have one deputy minister, who must belong to a constituent people different from that of the minister they assist (Article 7

47 McCrudden and O'Leary describe „the rules governing the passage of legislation" in BiH as "strongly consociational" (McCrudden, O'Leary, 2013, p. 21).
48 Marković, Davidović. 2023, pp. 300–301.
49 Ibid., p. 301.
50 *Official Gazette of BiH*, no. 38/02, 22/03, 42/03, 12/04, 43/09, and 103/09.

(1) and (2)). At least one position must be allocated to Others, or the Secretary General of the Council must belong to this group.

Regarding its decision-making procedure, the Council of Ministers Act provides that the Council shall decide by majority vote of members present and voting only in cases where its decision is not final and the matter will subsequently be determined by another institution (e.g., adoption of the draft state budget). Where the Council has final decision-making authority, it shall decide by consensus of members present and voting, particularly with respect to regulations, appointments and nominations within its competence, and its Rules of Procedure and their interpretation. If consensus cannot be achieved, the Chairperson convenes the member or members who opposed the proposal in an effort to reach agreement. Should consensus still not be reached within seven days, the Council adopts a decision in accordance with the majority voting rule, provided that such a majority includes the vote of at least one member from each constituent people (Article 18 of the Council of Ministers Act).

## 5.
## The Constitutional Court of BiH: Issues of BiH's Constitutional Identity

As previously noted, one of the priorities outlined in the European Commission's Opinion concerns the reform of the Constitutional Court of BiH, particularly the resolution of the contentious issue surrounding the participation of foreign judges. This matter has been a longstanding subject of constitutional and legal debate in BiH, carrying significant implications for both preserving and defining the country's constitutional identity. Moreover, it may have substantial consequences for future reforms of BiH's constitutional framework and institutional organisation. Constitutional courts play a pivotal role not only in identifying and safeguarding a state's constitutional identity but also in shaping its substantive content. Accordingly, it is essential to examine the organisation and jurisdiction of the BiH Constitutional Court, the controversies relating to the institution, and the impact of its rulings on the interpretation of BiH's constitutional identity.

The constitutional judiciary in BiH operates under a centralised (concentrated) model,[51] whereby the BiH Constitutional Court exercises jurisdiction across the entire state territory, while the entity constitutional courts hold jurisdiction within their

51 The centralized model of constitutional review grants specialized constitutional courts exclusive authority to determine the constitutionality of legislation. This model emerged in Europe following World War I, with Hans Kelsen playing a pivotal role in its development and popularization. Today, the centralized model remains the predominant approach to constitutional review across Europe (Comella, 2004, p. 461).

respective territories. The origins of constitutional adjudication in BiH can be traced to the Socialist Federal Republic of Yugoslavia (SFRY). The 1963 Constitution established a dual-tier system comprising the Constitutional Court of the SFRY at the federal level and constitutional courts in the federal republics. This structure remained until the dissolution of the Yugoslav federation. Within this system, the Constitutional Court of BiH was formally constituted on 15 February 1964. Its organisation, jurisdiction, and procedural matters were governed by the Law on the Constitutional Court, which defined its role within the broader constitutional framework of the republic.[52]

The Constitutional Court of BiH was constituted under Article VI of the BiH Constitution. Article VI(3) grants the Court exclusive jurisdiction to adjudicate disputes arising under the Constitution in cases involving conflicts between entities, between BiH and one or more entities, or between BiH institutions. The Court also exercises appellate jurisdiction over constitutional issues arising from the judgments of any other court in BiH. Lower courts may refer a law to the Constitutional Court if that law's validity is essential to the resolution of a pending case. One of the Court's competencies regarding the protection of vital national interests is explicitly established in Article IV of the Constitution.

The Constitution of BiH defines the Court's composition, quorum, the public nature of proceedings, jurisdiction, and the final and binding nature of its decisions. Procedure matters, financial and administrative autonomy, organisational foundations, and other significant issues are regulated by the Rules of the Constitutional Court of BiH[53]. This arrangement deviates from comparative constitutional law standards, under which such matters are usually regulated by the constitution or legislation, in BiH the Rules were drafted by the newly appointed judges themselves before the Court commenced operations in 1997.

Pursuant to Article VI(1)(a) of the BiH Constitution, the Court consists of nine members. Four judges are appointed by the House of Representatives of the FBiH, while two are appointed by the National Assembly of the RS. The remaining three judges are selected by the President of the ECtHR after consultation with the BiH Presidency, following the 4-2-3 composition formula. From the elected judges, one president and three vice-presidents are elected by secret ballot with a majority of all judges (Article 83 of the Rules of the BiH Constitutional Court). The president, who serves a three-year term, is elected by rotation among judges from the constituent peoples, ensuring that no two consecutive presidents belong to the same group. The president and vice presidents may not be elected from the same ethnic group simultaneously. Article VI(1)(b) requires Constitutional court judges to be legal

52 Vlaški, Marko, 2023, p. 326.

53 Rules of the Constitutional Court, Constitutional Court of BiH. [online] Available at: https://www.ustavnisud.ba/en/rules-of-court?force_locale=true (Accessed: 18 December 2024).

professionals of high moral standing; any person meeting these criteria and possessing voting rights may be appointed. Judges appointed by the President of the ECtHR must not be citizens of BiH or any neighboring country.

The Constitution authorises the Parliamentary Assembly of BiH to prescribe by law an alternative method for selecting the three judges appointed by the President of the ECHR. The Court's composition, which includes foreign judges, is atypical from a comparative federalism perspective. In this context, the European Commission's 2019 Opinion on BiH's application for European Union membership states that "it is necessary to reform the Constitutional Court, including resolving the issue of international judges" (key priority 4.d).[54]

The BiH Constitutional Court has not explicitly invoked the concept of constitutional identity in its rulings. However, several of its decisions have been undeniably significant in identifying BiH's constitutional identity, particularly in defining the core principles upon which the Constitution is based. One such decisions is the Court's Third Partial Decision on Judgment U-5/98, which affirmed the principle of the constitutiveness of peoples as a fundamental constitutional principle. Although the BiH Constitution formally recognised Bosniaks, Croats, and Serbs as constituent peoples, this status was not uniformly acknowledged across both entities. In practice, only Bosniaks and Croats were recognised as constituent peoples in the FBiH, while only Serbs held this status in the RS. Responding to this disparity, the Constitutional Court ruled that all three constituent peoples must be recognised as such throughout the entire territory of BiH, irrespective of demographic distribution within individual entities.

Through this decision, the Court established the constituency of peoples as a core democratic principle, ensuring the equal protection of all ethnic groups across BiH. Within the constitutional framework, this principle was positioned as an overarching constitutional norm with which the entities must comply. This ruling effectively framed the constituency of peoples as a *sui generis* concept designed to preserve ethnic balance within BiH's governance structure. Consequently, the Court implicitly identified the constituency of peoples as a fundamental component of the country's constitutional identity. This principle was further reaffirmed in the Ljubić case, where the Constitutional Court found that the constituent peoples were not equally represented in state institutions. The Court held that the right of the constituent peoples to participate in democratic decision-making, exercised through legitimate political representation, must be based on the democratic election of delegates to the

54 Previous efforts to legislate the composition and selection process of judges in the Constitutional Court have thus far been unsuccessful. Beyond the explicit recommendation outlined in the European Commission's Opinion, which calls for reforming the Constitutional Court, the urgency of enacting such legislation is further accentuated by the fact that the Court is currently functioning without representation from one of the entities (RS).

House of Peoples of the FBiH by the constituent peoples themselves, whose interests those delegates represent. Once again, the Court underscored that the constituency of peoples represents the overarching principle of the BiH Constitution, with which all other constitutional provisions must align.[55]

The recognition of the constituency of peoples as a core principle of BiH's constitutional order, and thus as a fundamental element of its constitutional identity, justifies the existence of the consociational model of power-sharing within the country. However, this acknowledgment also highlights the complexity of implementing the previously mentioned ECtHR's rulings, which advocate reforms to eliminate discriminatory elements within BiH's constitutional framework. These rulings may, in turn, be perceived as intrusive to BiH's constitutional identity, raising challenges in balancing international legal obligations with the existing constitutional structure.

## 6.
## Conclusion

Pre-accession conditionality may necessitate substantial modifications to the constitutional order and institutional framework of candidate states. Some of required reforms may potentially conflict with the core principles underpinning a candidate state's constitutional system. In such instances, the argument for safeguarding constitutional identity may emerge as a barrier to the implementation of required reforms, thereby obstructing progress in the EU accession process. Conversely, the constitutional identity of the EU itself may be invoked to justify pre-accession conditionality, further complicating the legal and political dynamics of accession.

This issue is particularly pronounced in the case of BiH, where the constitutional framework is founded on a consociational model of power-sharing among the three constituent peoples. Implementing the ECtHR's rulings, identifying certain aspects of this ethnically-based power-sharing model as discriminatory, would require extensive modifications to the existing constitutional structure. However, the current political landscape in BiH does not reflect a willingness to undertake such profound constitutional changes. Moreover, any significant alteration or abandonment of the consociational model would not only contradict with the country's political realities and historical traditions but could also interfere with principles regarded as fundamental elements of BiH's constitutional identity. Consequently, striking an appropriate balance between the consociational framework established by the BiH Constitution and the imperative of ensuring compliance with the ECtHR's jurisprudence will remain a key challenge in all future constitutional reforms.

55 Muharemović, Nurkić, 2024, pp. 140–141.

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Stanislav SHEVCHUK*

# 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 Kozyubra 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.

> *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 emendere, 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 28 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 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 akademichnoï dumky u formuvanni ofitsiĭnoï konstytutsiï doktryny v Vzaiemni zdobutky Yevropeĭskoï Komisiï "Za demokratiiu cherez pravo" i orhaniv konstytutsiĭnoï yustytsiï ta problemy tlumachennia u konstytutsiĭnomu sudochynstvi: zb. materialiv i tez Mizhnar. onlaĭn-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. Nikorak 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 re0flects 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 Hungaryrespected 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 Hungary[54] (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, Stremler 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-в/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

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# The Rule of Law: Constitutional Identity

**ABSTRACT:** *The rule of law is a cornerstone of justice and societal stability. It ensures that behaviour is governed by laws rather than the arbitrary decisions of individuals. It guarantees that legal frameworks are transparent, consistent and impartial, thereby protecting individuals from abuses of power and safeguarding their fundamental rights. Based on the principles of equality and fairness, the rule of law plays a vital part in maintaining the balance of power between citizens and the state. However, achieving true adherence to the rule of law is complex and fraught with challenges. In many regions, legal systems are plagued by corruption, inefficient enforcement and disparities in access to justice. Additionally, global shifts such as the growth of intergovernmental relations and the rise of international law introduce new layers of complexity. Although the rule of law is vital for social order and human rights, its implementation must continually be evaluated and reinforced to address these evolving challenges and ensure its fundamental role in modern societies.*
**KEYWORDS:** *Rule of law, EU, Serbia, Constitutional Court.*

## 1.
## Introduction

The rule of law is one of the fundamental principles on which democratic societies are based. It refers to the idea that laws, rather than the arbitrary decisions of those in power, should govern society. This principle ensures that everyone, regardless of their wealth, status or position, is subject to the law and that it is applied fairly and consistently. In such a system, laws are publicly promulgated and transparent, and are applied equally to everyone, ensuring that no one is above the law – not even those in positions of power. Furthermore, the rule of law guarantees that legal rights are respected and that disputes are resolved impartially and justly.

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The rule of law is not just a theoretical concept; it is vital for preserving social order, protecting individual freedoms and maintaining justice in society. It acts as a safeguard against the abuse of power, ensuring that government actions are subject to legal constraints and that individuals have avenues for redress when their rights are violated. Moreover, it provides the structure for a stable society in which citizens can have faith in the fairness and predictability of legal processes. Without the rule of law, societies risk descending into chaos, where the powerful can act with impunity and the rights of individuals are unprotected.

However, the rule of law faces many challenges. In an increasingly globalised world, legal systems must navigate complex issues such as human rights, international law and the balance of power between state sovereignty and international obligations. Furthermore, even in well-established democracies, the principle of the rule of law can be undermined by political corruption, inequality and legal systems that fail to adequately protect vulnerable groups. This article will examine the significance of the rule of law in ensuring justice and equality, explore its role in maintaining social order, and consider the various challenges hindering its realisation in national and international contexts. It will become clear through this exploration that, while the rule of law is a vital pillar of democratic governance, constant vigilance and reform are required to ensure its continued effectiveness and justice.

This article will also focus on the principle of the rule of law in a general way, explaining its origin and significance today. Subsequently, the article refers to the rule of law in the European Union, as one of the most important principles on which the European Union is based. The article also touches on the rule of law in the Republic of Serbia, as well as the challenges that Serbia faces, which are closely related to the rule of law. Finally, the practice of the Constitutional Court of Serbia, as a body that protects the rule of law in Serbia, and the influence that this court has on other, lower courts in Serbia, are presented.

## 2.
## The Rule of Law Principle

According to Henkin, it was in England that the rule of law principle was first established, with the adoption of the Magna Carta Libertatum in 1215.[1] The fundamental principle of the rule of law is the ability to guarantee the enjoyment of the fundamental rights and freedoms enshrined in those regulations, i.e. the assurance that the established rules will be observed and applied equally to all.[2] Legal security

1 Henkin, 1999, p. 11.
2 Stein, 2009, p. 299.

is necessary for the functioning of all individuals, groups, authorities, states and international organisations. It is therefore essential to ensure legal security and to be prospective.[3]

A legitimate government based on the rule of law is the only one that meets the strict requirements of a modern democratic state system.[4] Today, the rule of law is widely recognised as a fundamental legal principle. It requires strict adherence to the constitution and laws by all state, regional or local public bodies, as well as by every individual. It holds anyone who acts contrary to the prescribed rules responsible and punishable, even those in positions of power.[5] In accordance with this principle, the fundamental rights and freedoms of individuals should be legally regulated and all persons should be equal before the law. It means that equality before the law and legal certainty are the most important elements of the rule of law.[6] Arbitrariness in decision-making should also be excluded.[7] Retroactive effects should not be permitted under the law.[8]

The formal aspect of the rule of law focuses on the procedural meaning of this institution. Here, the rule of law is considered crucial for the effectiveness of the legal order. It is reduced to the formal regulation of rules, without taking the content of the regulations themselves into account. This requires all legal rules to be adopted and published in accordance with prescribed procedures, so that individuals can act in accordance with them in advance. Thus, the actions of everyone in society become predictable, which contributes to the safety of individuals in the community.[9] Conversely, the material aspect of the rule of law is considered a set of ideals, focusing on values and objectives to be realised, promoted or achieved. Therefore, when basing the legal system on moral values, it becomes clear that substantively valuable regulations should be promoted.[10] The term "*rule of law*" is often used today in the following senses: It is used to describe constitutionality and legality in a political context, as well as the limitation of state power. While it is similar to the concept of the rule of law, it is not fully equivalent.[11]

Neither the Council of Europe's statute nor the European Convention on Human Rights includes a definition of the rule of law, and the list of principles, standards and values derived from the rule of law varies at a national level. In a report published in 2011, the Venice Commission refers to the rule of law as the basic and common

3 Summers, 1999, p. 1691.
4 Scalia, 1989, p. 1175.
5 Vidaković Mukić, 2006, p. 1284.
6 Dicey, 1982, p. 120.
7 Crawford, 2003, p. 4.
8 Etinski and Tubic, 2016, p. 59.
9 Bourricaud, 1987, p. 57.
10 Lauc, 2016, p. 51.
11 Visković, 2001, p. 76.

European standard for the exercise and limitation of "*democratic power*" and "*an inherent part of a democratic society*", stating that it "*requires decision-makers to treat everyone with respect, equality and reason, in accordance with the law*", and that "*everyone should have the opportunity to request a review of those decisions before independent and impartial courts*".[12]

From the practice of the Court of Justice of the European Union (hereinafter: the EU) and its institutions and bodies, as well as from the acts of the Council of Europe, it is clear that the rule of law is a source of reassuring principles that form an integral part of the legal acquis and arise from the constitutional traditions common to the Union's member states. Notable principles include the principles of legality and legal certainty, the prohibition of discrimination and equality before the law, as well as specific principles for the judiciary, such as the principles of judicial independence and impartiality, and the right to a fair trial.[13]

Respect for and compliance with legal norms by citizens is also required, even in cases of disagreement. In the event of a conflict of interests, it is essential that they accept the legal determination of their rights and duties. Also, it should be ensured that the law is applied equally to all, so that no one is above the law and everyone is protected by it.[14] The requirement of access is significant for two reasons. Firstly, the law should be accessible in terms of knowledge: it should be a set of rules made public so that people can study them, understand them, work out what they require of them, and use them as a framework for their plans, expectations, and for resolving disputes with others.[15] Secondly, it is considered that legal institutions and their procedures should be made available to ordinary people so that their rights can be upheld, their disputes can be settled and they can be protected against abuses of public and private power.[16] All of this means that the legal system must be independent, government officials must be accountable, public business must be transparent, and legal procedures must be fair.[17]

The rule of law was confirmed in international law in the 1948 Universal Declaration of Human Rights. The preamble to this document establishes the concept of the rule of law, where it is stated that it is essential that human rights are protected by the rule of law, so that people are not compelled to resort to rebellion against tyranny and oppression.[18]

12 Report of the Venice Commission of 4 April 2011, Study No. 512/2009.
13 Lauc, 2016, p. 54.
14 Grahovac, 2012, p. 41.
15 Corell, 2001, p. 263.
16 Mirašćić, 2014, p. 270.
17 Waldron, 2023, p. 4.
18 Universal Declaration of Human Rights, adopted by Resolution 217A(III), 10 December 1948.

The importance of the rule of law is evident from the fact that the UN adopted a Declaration on the Rule of Law at the National and International Levels in 2012. It states that:

> *'We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world." Moreover, "We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.'*[19]

## 3.
## The Rule of Law in the European Union

Although the EU (i.e. the European Community) has protected the basic rights of citizens of Member States since its inception, particularly with regard to the four fundamental freedoms (primarily economic), the rule of law was not, for a long time, an issue in relation with external partners, states negotiating membership, and associated states. There are several reasons why the rule of law only appeared on the Union's agenda in the 1990s.[20] Firstly, the EU, i.e. the Community, has undergone significant transformation since its inception, evolving from an economic project aimed at ensuring free trade among Member States into a highly complex organisation with supranational characteristics and a wide range of activities. Secondly, the EU Enlargement Policy was created as a separate policy only in the 1990s in response to requests for enlargement to Central and Eastern Europe. Before the fall of the Berlin Wall, the countries of Central and Eastern Europe belonged to the Eastern Bloc, which meant they had a completely different political system. It was the desire of these countries to join the EU that prompted it to establish the Enlargement Policy for the first time, defining a set of accession criteria at the Copenhagen meeting in 1993.

19 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, adopted by United Nations National Assembly, 19 September 2012, part I.

20 Purić and Milovanović, 2019, p. 27.

The Copenhagen criteria set out the requirement for a country to have a functioning rule of law, in addition to other criteria such as stable institutions that guarantee democracy, human rights, and the protection of minorities.[21] A third reason for the belated interest in the rule of law in countries with contractual relations with the EU is the existence of regional and international organisations with universal membership that promote and protect human rights at regional and universal levels. This primarily refers to the United Nations (UN), the Council of Europe, and the Organisation for Security and Cooperation in Europe (OSCE).[22]

To strengthen the rule of law within the EU, the European Commission presented the EU framework in March 2014.[23] Its aim is to resolve situations involving a systematic threat to the rule of law in Member States more effectively. The framework is intended to supplement the existing measures for safeguarding the rule of law within the EU. This includes initiating infringement proceedings (limited to infringements of specific EU legal provisions) against EU countries and the preventive and punitive mechanisms set out in Article 7 of the Treaty on EU. The framework enables the Commission to work with the relevant EU country to find a solution, as well as to prevent the emergence of a systematic threat to the rule of law.[24] It is applied to all EU Member States in the same way and in accordance with the same standards.

One of the basic ideas that pervades the process of preparing states for EU membership is that state building means not only accepting common values, but also implementing common practices when it comes to joining the EU.[25] The goal is therefore to build states capable of enacting and applying EU and harmonised national laws, in order to prevent the free movement of goods, services and people within the single market from being undermined.[26] The prerequisites for the EU's further economic development are legal security for transnational economic transactions, the ability to enforce contracts and protect intellectual property, and the capacity to make judgements in the economy based on known, regularly applied rules.

The European Commission and other international actors tend to interpret the concept of the rule of law very narrowly, limiting it to the functioning of the judicial system and, more specifically, the criminal court, and even more narrowly still, to corruption-related cases. This interpretation excludes a broader understanding of the concept, according to which the rule of law should also encompass the activities and decisions of all those who exercise power in both the public and private sectors,

21 Pejović, 2016, p. 14.
22 Miščević, 2009, p. 147.
23 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final, 11 March 2014.
24 Pech, 2022, p. 113.
25 Ćeranić Perišić, 2024, p. 100.
26 Vukadinović, 2012, p. 170.

including governments and public administrations, as well as their oversight by administrative and constitutional courts. More broadly, it can be said that the rule of law is not actually related to law *per se*, but to the willingness to respect the law. The narrow approach overlooks the rule of law's most important function: its social role as a mechanism for resolving social and political conflicts. This is particularly important in societies still burdened by deep ethnic and social divisions.[27] Therefore, in the near future, the EU will need to define the political criterion of the rule of law more precisely. In other words, the EU would need to adopt a broader definition based on desired outcomes rather than easily measurable means.[28]

Article 2 of the Treaty on EU states that:

> *'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'*[29]

The EU conceptualises the rule of law as a foundational value, comprising several interrelated principles that ensure the effective functioning of democratic governance and the protection of individual rights. At its core lies the principle of legality, which requires that all actions undertaken by public authorities are grounded in and comply with the law. Closely related is the principle of legal certainty, mandating that legal norms be clear, predictable, and applied consistently, thereby enabling individuals and institutions to organise their behaviour in a stable legal environment. The prohibition of arbitrariness serves as a safeguard against the abuse of state power, ensuring that governmental actions are neither arbitrary nor discriminatory.[30] Moreover, the rule of law guarantees access to justice, obligating states to provide effective judicial remedies before independent and impartial courts. The separation of powers further reinforces the rule of law by maintaining institutional checks and balances between the legislative, executive, and judicial branches. Finally, the protection of fundamental rights, as enshrined in the Charter of Fundamental Rights of the EU, ensures that civil, political, and social rights are upheld across all Member

27 Nicolaidis and Kleinfeld, 2012, p. 36.
28 Ćeranić and Glintić, 2016, p. 297.
29 The Treaty on European Union, Official Journal of the European Union C 326/13, 26 October 2012, Art. 2.
30 Blokker, 2021, p. 25.

States. Collectively, these principles form the backbone of the EU's commitment to democratic governance and the uniform application of law.[31]

The importance of the rule of law in the process of European integration is evident in the Enlargement Strategies presented by the European Commission to the European Parliament and the European Council every few years. While these strategies are not legally binding, they provide further guidance on the Union's approach to enlargement policy.[32]

Through its case law, the Court of Justice consistently highlights the significance of the rule of law within the EU. In the 1978 judgement *Granaria v. Hoofdproduktschap*, the Court acknowledged the relevance of the rule of law as a guiding principle.[33] Subsequently, in the case *Les Verts*, it underscored that the European Community is founded upon the rule of law, asserting that neither Member States nor EU institutions are exempt from judicial scrutiny regarding whether their actions align with the Union's foundational legal framework – the Treaty.[34] This position was reaffirmed in *UPA v. Council*, where the Court stated that the institutions of the European Community are subject to legal oversight to ensure that their decisions conform to the Treaty as well as to the overarching legal principles, including the protection of fundamental rights.[35]

## 4.
## The Rule of Law in the Republic of Serbia

The principles on which the rule of law in Serbia is based are set out in the Constitution of the Republic of Serbia (hereinafter: Serbia).[36] Article 1 of the Constitution states that Serbia is a state of the Serbian people and of all citizens living within its borders. It is founded on the principles of the rule of law and social justice, civil democracy, human rights and freedoms, and adherence to European principles and values.[37] The rule of law is also a fundamental principle of the Constitution, based on inalienable human rights. It is achieved through free and direct elections, constitutional

31 Closa and Kochenov, 2016, p. 17.
32 Prelić, 2019, p. 9.
33 Case 101/78, *Granaria BV v. Hoofdproduktschap voor Akkerbouwprodukten*, Judgement of 13 February 1979, para. 5.
34 Case 294/83, *Parti écologiste 'Les Verts' v. European Parliament*, Judgement of 23 April 1986.
35 Case C-50/00, *Unión de Pequeños Agricultores v. Council*, Judgement of 25 July 2002, para. 38.
36 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006 and 115/2021.
37 Ibid., art. 1.

guarantees of human and minority rights, the separation of powers, an independent judiciary and the subordination of authorities to the Constitution and the law.[38]

The legal order in Serbia is unique in that the organisation of power is based on the division of powers into the legislative, executive and judicial. The relationship between these three branches is based on mutual checks and balances, with the judicial branch being independent.[39]

The judicial power belongs to the courts, which are independent. This power is unique to the territory of the Republic of Serbia. Judicial decisions are made on behalf of the people. A judicial decision may only be reviewed by a competent court in a procedure prescribed by law, or by the Constitutional Court based on a constitutional complaint.[40]

Everyone is equal before the constitution and the law. Everyone is entitled to equal legal protection, without discrimination.[41]

The Constitution protects human and minority rights, stipulating that everyone has the right to judicial protection if any such right is violated or denied. This includes the right to have the consequences of the violation removed. Citizens also have the right to turn to international institutions for protection of the freedoms and rights guaranteed by the Constitution.[42]

In light of the fact that some constitutional provisions were merely theoretical and had no practical application, Serbia amended its constitution in line with EU recommendations in order to close another chapter in the negotiations for EU accession. Serbia's accession to the EU is a complex, ongoing process that represents one of the country's most important strategic goals.[43] It reflects a broader effort to integrate the Western Balkans into the European community, promote stability in the region, and align political, economic, and legal systems with EU standards. As of 2025, Serbia has opened 22 out of 35 chapters, with two provisionally closed. However, the pace of negotiations has slowed in recent years. The EU has reiterated its commitment to enlargement in the Western Balkans, but it has also emphasised that accession is a merit-based process – meaning Serbia must fulfil all criteria before membership.

On November 8, 2023, the EU adopted the 2023 Enlargement Package.[44] The report focuses on the progress in implementing fundamental reforms and provides clear guidance on reform priorities in different countries, such as Serbia. It states that:

38 Ibid., art. 3.
39 Ibid., art. 4.
40 Ibid., art. 142.
41 Ibid., art. 21.
42 Ibid., art. 22.
43 Knežević Bojović and Ćorić, (2022), p. 53.
44 European Commission (2023), 2023 Enlargement package, 8 November 2023.

> *'Serbia continued the implementation of EU accession related reforms, including in the area of rule of law. Serbia started implementing the 2022 constitutional amendments to strengthen the independence of the judiciary and adopted new media legislation. The implementation of the latter can significantly improve the regulatory environment. However, further amendments will be needed to be fully in line with the EU acquis and European standards. Serbia needs to improve, as a matter of priority, its alignment with the EU's common foreign and security policy, including restrictive measures and statements on Russia. Further work and political commitment are also needed to implement reforms in the area of rule of law. The Commission's assessment remains that Serbia has technically fulfilled the benchmarks to open cluster 3 (competitiveness and inclusive growth).'*[45]

In this article, we will outline the most significant constitutional amendments adopted based on EU recommendations.

In February 2022, the National Assembly of Serbia passed the Act on Amendments to the Constitution,[46] following a referendum on 16 January 2022 in which the majority of citizens declared their agreement with the implementation of constitutional changes. The adopted amendments aimed at strengthening the independence of the judiciary, one of the EU's key requirements for accession. The amendments abolished the three-year probationary period for judges and stipulated that judges and court presidents should be elected by the High Judicial Council. This reduces the direct influence of the National Assembly on judicial functions and judicial decision-making during the probationary period of the judicial term. The guarantee of judicial independence is also strengthened by the permanent nature of the judicial role, the method of selecting judges, and the provision of irremovability.

Article 4 paragraphs 2 and 3 of the Constitution stipulates that power is organised based on a division into the legislative, executive and judicial branches, and that these branches are in balance with each other and subject to mutual control. However, given that the categories of independence and mutual control were excluded, the word "control" was replaced by "verification" in the constitutional amendment. It seems that the framers of the Constitution intended to reconcile the independence of the judiciary with the need to define the relationship between the three branches of government in a milder and more neutral way.

Amendment No. 6 deals with the independence of the judiciary and stipulates that courts shall judge on the basis of '*the Constitution, ratified international treaties,*

45 Ibid., pp. 5–6.

46 Act on Amendments to the Constitution, Official Gazette of the Republic of Serbia, No. 16/2022.

*laws and generally accepted rules of international law, as well as other general acts adopted in accordance with the law*'.[47] It should be noted that, although the framers of the Constitution listed legal acts in the same order as before, it remains unclear why they chose this sequence, placing generally accepted rules of international law after the law. Article 194 of the Constitution of Serbia states that the laws and other general acts of the Republic of Serbia must not conflict with ratified international treaties or generally accepted rules of international law.[48] This could lead to inconsistent judicial practice.

Article 149, paragraph 2 of the Constitution states that influencing a judge in the performance of their judicial duties is prohibited.[49] This provision aims to prevent influences that might cause a judge to deviate from the principle of legality, basing their decisions on the expectations of political power holders or private interests instead. However, the amendment prohibits any undue influence on a judge when performing their duties. The previous solution might have been preferable, as the word "inapplicable" could relativise this prohibition and raise questions about its interpretation. Unfortunately, this constitutional prohibition does not provide any sanctions for judges in violation, nor is there an obligation to regulate it more specifically by law.

Amendment No. 9 relates to the irremovability of judges. Previously, the constitution addressed the issue of the transfer and assignment of judges differently. At that time, it was stipulated that judges had the right to perform judicial functions in the court for which they were elected and that they could only be transferred or assigned to another court with their consent. Furthermore, the constitution provided for an exception whereby a judge could be transferred or assigned permanently or temporarily to another court only if the court or the majority of its jurisdiction was abolished in accordance with the law. The amended constitutional provision stipulates that a judge may only be permanently transferred or temporarily assigned to another court with their consent, except in cases provided for by the constitution. In the event of a court being abolished, the constitution provides that a judge shall be transferred to the court taking over its jurisdiction. In the event of the abolition of a court's predominant jurisdiction, a judge may be permanently transferred or temporarily assigned to another court of the same level taking over its predominant jurisdiction, even without their consent.[50] Another important novelty is that when a judge is permanently or temporarily assigned to another court, they have the right to retain the same salary they had before the transfer or assignment, if this is more

47 Ibid., amendment no. 6.
48 Constitution of the Republic of Serbia, op.cit., art. 194, para 2.
49 Ibid., art. 149 para. 2.
50 Ibid., art. 147.

favourable. This suggests that the framers of the constitution intended to ensure the financial security of judges.

These are just some examples of amendments that have brought judicial independence in Serbia closer to European standards. Now, judges are elected only by the High Judicial Council, a body intended to ensure autonomy and professionalism, just as in EU countries such as Italy and Spain. Serbia has also adopted the practice of judges electing judges, reflecting best European standards for protecting judges from political influence in their selection and work. The elimination of the three-year probationary term for judges indicates that Serbia has gone a step further in this area, as it has relied on the advice of the Venice Commission to find a constitutional solution. Serbia has also adopted the European Court of Human Rights' standard that judges cannot be removed from office except through a strict and transparent disciplinary procedure. These constitutional innovations demonstrate that Serbia has adopted key reforms to strengthen the independence of the judiciary by accepting the recommendations of the Venice Commission and the European Commission.

It is important to note that the EU has published a report on the state of the rule of law,[51] not only in its Member States, but also in countries that may join the EU in the future. The report also addresses the rule of law in Serbia, particularly in light of the constitutional amendments of 2022. According to this report, the High Judicial Council and the High Prosecutorial Council were established in Serbia, in order to follow amendments of the Constitution of 2022 to make judicial independence stronger.[52] However, it also stated that there are significant concerns regarding pressure on judges and prosecution by politicians.[53]

One of the EU's initial impressions regarding the amendments is that there are many vacancies in the court and prosecutors' offices. This has resulted in significant delays in judicial appointments, which have had a serious impact on the judicial system. Furthermore, although some of the amendments relate to the selection of judges and public prosecutors, concerns remain about the pressure these individuals face, primarily from politicians and state officials. Therefore, their independence is still questionable.

The implementation of the 2022–2026 Strategy on Human Resources in the Judiciary is ongoing. However, the efforts made out to date have primarily concentrated on identifying and analysing existing issues, while concrete follow-up measures are still pending. Enhancing the appeal of judicial careers remains necessary. Both initial and ongoing training for judges is provided by the Judicial Training Academy, which employs suitable quality control procedures throughout the entire training process.

51 European Commission (2024), The Rule of law situation in the European Union, 2024 Rule of law Report, Brussels.
52 Ibid., p. 12.
53 Ibid., p. 13.

The Academy has the potential to further enhance its capabilities and in-house expertise, particularly in expanding its capacity to deliver training on EU law.

Additionally, one of the major problems that Serbia faces is the length of criminal, civil and commercial proceedings. A large number of complaints concerning the violation of the right to a trial within a reasonable time have been filed with the European Court of Human Rights, and a similar number of proceedings have been brought before Serbian courts in which parties file a suit against Serbia for violating this right. Serbia is then obliged to compensate the parties for the damage incurred. However, the EU believes that there has been a positive trend in Serbia regarding the reduction of the average duration of these proceedings.[54]

In the context of digitalisation, an increasing number of European countries are introducing various digital solutions that could strengthen the judicial system and improve accessibility. However, Serbia, along with Albania and North Macedonia, has only taken limited steps in this direction and the idea has yet to take root.[55] In some judicial processes, the option of submitting certain documents, lawsuits and appeals electronically is available. However, unlike in some other EU countries, there are no recorded trials and no possibility of holding the main hearing online.

It is also worth noting that corruption is one of the major problems in Serbia, and that the country has passed anti-corruption laws based on EU recommendations.[56] Some of these laws are the Law on Prevention of Corruption,[57] the Law on Financing Political Activities,[58] the Law on Seizure and Confiscation of the Proceeds from Crime,[59] and Law on the Liability of Legal Entities for Criminal Offences.[60] The Anti-Corruption Agency of Serbia was established and started operations on 1 January, 2010. The EU holds that cooperation and communication with the European Public Prosecutor's Office is a way of reducing corruption in countries. However, Serbia has not yet established any such cooperation. The number of those found guilty of high-level corruption has been on the increase in the past year. But more improvements are needed to make sure that investigations, charges and convictions are performed adequately.

In addition to the problem of judges being influenced, the media also feels pressured by politicians and state officials, which is a major setback in itself. However, the

54 Ibid., p. 15.
55 Ibid., p. 16.
56 Ibid., p. 18.
57 Law on Prevention of Corruption, Official Gazette of the Republic of Serbia, No. 35/2019, 88/2019, 11/2021 – authentic interpretation, 94/2021 and 14/2022.
58 Law on Financing Political Activities, Official Gazette of the Republic of Serbia, No. 14/2022.
59 Law on Seizure and Confiscation of the Proceeds from Crime, Official Gazette of the Republic of Serbia, No. 32/2013, 94/2016 and 35/2019.
60 Law on the Liability of Legal Entities for Criminal Offences, Official Gazette of the Republic of Serbia, No. 97/2008.

media also struggles to maintain their professional standards due to the daily pressures they face. The EU believes that this is one of the issues Serbia must address.

Moreover, Serbia has adopted other laws to align its legal and institutional framework with the European Union's *acquis communautaire*. These include the Law on the Protection of Whistle-blowers,[61] the Law on Personal Data Protection,[62] the Law on Gender Equality,[63] and the Law on Consumer Protection.[64]

## 5.
## Constitutional Court of the Republic of Serbia and the Rule of Law

The numerous competencies of the Constitutional Court, including those listed in Article 167 of the Constitution[65] and those "scattered" throughout the constitutional text, can be classified into the following groups:

- Control of constitutionality and legality;
- Competence disputes;
- Election disputes;
- Ban on the work of political parties, trade union organisations and religious communities;
- Constitutional appeal;
- Special appeals provided for by the Constitution;
- Decision on the violation of the Constitution by the President of the Republic of Serbia.

Taking into account the control of legality and constitutionality, we can conclude that, in recent years, the Constitutional Court has issued a significant number of rulings determining that certain acts, laws, etc. are unconstitutional and must be amended. In case No. IUo-161/2023, for example, the Constitutional Court ruled that the tourist organisation of the municipality of Surdulica had surpassed its powers by deciding on the amount, method of calculation and payment of fees for the use of a protected area.[66] Regarding constitutionality, the Constitutional Court ruled that Article 131, paragraph 1(2) of the Law on Civil Servants of the Republic of Serbia is not in accordance with the Constitution. The Court found that the aforementioned provision,

61 Law on the Protection of Whistle-blowers, Official Gazette of the Republic of Serbia, No. 128/2014.
62 Law on Personal Data Protection, Official Gazette of the Republic of Serbia, No. 87/2018.
63 Law on Gender Equality, Official Gazette of the Republic of Serbia, No. 52/2021.
64 Law on Consumer Protection, Official Gazette of the Republic of Serbia, No. 88/2021.
65 Constitution of the Republic of Serbia, op.cit., art. 167.
66 Constitutional Court of the Republic of Serbia, Decision of 5 December 2024, No. IUo-161/2023.

in the part that reads: '*has been sentenced to a suspended sentence of imprisonment of at least six months, regardless of the probationary period, for a criminal offence that renders him unfit to perform the duties of a civil servant*', is not in accordance with the principle of unity of the legal order under Articles 4(1) and 194(1) and Article 131(2) of the Constitution. The Court therefore invalidated this part of the provision.[67]

In practice, the Constitutional Court designates itself as a subsidiary body.[68] Therefore, in accordance with the theoretical consideration of the principle of subsidiarity, the Constitutional Court should protect human rights and, when necessary, intervene in the decisions of regular courts to direct their work. This maintains the coherence of the legal system for the protection of human rights while leaving regular courts free to act conscientiously within their powers.

Examining the cases dismissed as inadmissible by the Constitutional Court would undoubtedly lead us to conclude that it is a subsidiary body. Thus, cases that ended in dismissal mostly comprehended the following reasoning:

> *'In the previous procedure, the Constitutional Court determined that the applicant of the constitutional complaint had requested the Court to examine the legality of the contested decision as a court of first instance. The Constitutional Court states that a constitutional complaint cannot be considered a legal remedy for examining the legality of decisions made by regular courts. In the procedure for constitutional protection of human and minority rights and freedoms guaranteed by the Constitution, the Constitutional Court only determines whether an act or action by a state body or organisation with public authority has resulted in a violation or denial of these rights and freedoms. As the submitted constitutional complaint does not provide reasons linked to a violation or denial of rights or freedoms guaranteed by the Constitution, the Constitutional Court is required to act as a court of first instance when assessing the legality of the contested decision made in civil proceedings. The Constitutional Court dismissed the constitutional complaint because it is not competent to decide.'*[69]

Conversely, in line with international institutions' interpretation of human rights, the Constitutional Court is authorised to review the decisions of regular courts in exceptional cases involving violations of human and minority rights as guaranteed by the Constitution of the Republic of Serbia. The interplay and delicate balance between positive and negative obligations under the principle of subsidiarity is most evident in

67 Constitutional Court of the Republic of Serbia, Decision of 31 October 2024, No. IUo-56/2023.
68 Manojlović, 2013, p. 164.
69 Constitutional Court of the Republic of Serbia, Decision of 15 September 2011, No. 2258/2011, para. 3.

the Constitutional Court's intervention in cases of violations of the right to a fair trial, as set out in Article 32 of the Constitution, particularly with regard to the "*manifestly arbitrary application of substantive law*".[70]

The aspect of arbitrariness, or the "*arbitrary application of substantive law*" as designated by the Constitutional Court, will be established if:

> *'There has been a violation or denial of rights guaranteed by the Constitution, and the application of procedural and/or substantive law has been arbitrary or discriminatory. This indicates obvious arbitrariness and unfairness in the proceedings and decisions of regular courts, to the detriment of the applicant for a constitutional complaint. According to the Constitutional Court, obvious arbitrariness and unfairness in the proceedings and decisions of regular courts, and consequently a violation of the right to a fair trial, will always exist where regular courts apply substantive law arbitrarily, to the detriment of the applicant for a constitutional complaint. In such cases, the Constitutional Court will establish a violation of the right to a fair trial under Article 32, paragraph 1 of the Constitution. '*[71]

Unlike international institutions, the Constitutional Court explicitly incorporates the concept of "*arbitrary application of substantive law*" into the framework for guaranteeing the right to a fair trial. It also uses the expressions "*erroneous application of substantive law to the detriment of the applicant for a constitutional complaint*"[72] and "*arbitrary application of substantive law*".[73] This is a significant deviation.

We analysed the case to clarify the circumstances justifying the Constitutional Court's interference in the jurisdiction of regular courts. This clarifies the Constitutional Court's actions within the limits of its subsidiary jurisdiction. In the case of *Lidija Gvozdić*, the Constitutional Court ruled that the courts had applied substantive law arbitrarily because they had based their decisions on an interpretation of Article 68a of the Law on Labour Relations in State Bodies that was unacceptable under the Constitution.[74] In the case of *Miroslav Mladenović*, the Constitutional Court also ruled that Article 32 of the Constitution had been violated.[75] According to the Constitutional Court, the entry of an execution in the real estate register as an enforcement action must be deleted *ex officio* by suspending the enforcement procedure. In the case of the *Serbian Orthodox Church*, the Constitutional Court found a violation of Article

70 Constitution of the Republic of Serbia, op.cit., art. 32.
71 Constitutional Court of the Republic of Serbia, Decision of 6 June 2013, No. 224/2013, para. 8.
72 Constitutional Court of the Republic of Serbia, Decision of 28 November 2013, No. 1772/2011.
73 Constitutional Court of the Republic of Serbia, Decision of 4 July 2013, No. 2390/2012.
74 Constitutional Court of the Republic of Serbia, Decision of 6 June 2013, No. 3677/2013, para. 9.
75 Constitutional Court of the Republic of Serbia, Decision of 18 July 2013, No. 1868/2013.

32, paragraph 1 of the Constitution on the grounds that the position of the second instance court was arbitrary in its application of substantive law.[76] The case in question concerned the Serbian Orthodox Church's legal standing as a constitutional appellant in proceedings before regular courts. The second-instance body adopted a position based on the relevant regulations, which the Constitutional Court did not agree to. In the *Dauti case*, the Constitutional Court concluded that the Court of Appeal in Niš's interpretation of Article 42, paragraph 2 of the Expropriation Act was not "*constitutionally acceptable*".[77]

Furthermore, it is clear that the application of this aspect of the right to a fair trial is not exceptional; rather, it appears to be becoming the norm and is expanding relentlessly. Thus, the Constitutional Court has extended the concept of "*arbitrary application of substantive law*" to its own area of jurisdiction. In the *Milovan Tmušić* case, the Court concluded that the right to a fair trial can be violated or denied by the misinterpretation or incorrect application of substantive law.[78] The incorrect application of substantive law occurred when the regular courts failed to resolve the conflict between the right to freedom of expression and the right to privacy, as entailed by the guarantees of the right to a fair trial. Therefore, the Constitutional Court concludes that, by failing to respect the human right to freedom of expression, the regular courts violated the constitutionally guaranteed right to a fair trial. The same approach seems to have been upheld by the Constitutional Court in the *Vesna Ivković* case, where it was emphasised that the guarantee of a fair trial aims to ensure that human rights and freedoms guaranteed by the constitution are respected in the judicial process and that, through the European Court of Human Rights, one of these freedoms is the right to a home.[79] Deliberating upon the violation of the right to a fair trial, the Constitutional Court moves on to consider the violation of the human right to property. In the context of legality, the Court concludes that the substantive law was applied arbitrarily, and therefore the right to a fair trial was violated. The violation of the right to a fair trial is based on the violation of the right to property.

Thus, in the *Dauti Daut* case, the Constitutional Court concluded that there had been a violation of Article 32, paragraph 1 of the Constitution, establishing the violation of Article 58 of the Constitution concerning the right to property.[80] In the *Novaković et al.* case, the Constitutional Court concluded that the applicant's claims of a violation of the right to property, guaranteed by the provision of Article 58,

76 Constitutional Court of the Republic of Serbia, Decision of 22 March 2012, No. 6785/2011.
77 Constitutional Court of the Republic of Serbia, Decision of 3 April 2013, No. 3824/2011.
78 Constitutional Court of the Republic of Serbia, Decision of 21 January 2010, No. 290/2007, para.10.
79 Constitutional Court of the Republic of Serbia, Decision of 17 January 2013, No. 5084/2011, para.5.
80 Constitutional Court of the Republic of Serbia, Decision of 3 April 2013, No. 3824/2011.

paragraph 1 of the Constitution are based on allegations of a violation of the right to a fair trial.[81]

In the *Novograp case*, the Constitutional Court ruled that a violation of the right to property could only be established by proving that the contested court decision had denied the right to the peaceful enjoyment of property in an arbitrary and unjust manner.[82] However, it seems that the assessment of the violation had to follow the opposite sequence, precisely because of the exceptional nature of entering into the merits of regular court decisions. It could only be justified to consider a violation of the right to a fair trial in a situation where there were no grounds for the violation of other rights guaranteed by the Constitution and where there were obvious errors in the conduct of the procedure itself. Conversely, it appears that the Constitutional Court equates the condition of legality with the conditions of admissibility of interference with certain human rights, as set out in Article 32, paragraph 1 of the Constitution. This is not in accordance with the interpretation of international institutions, which require a formal and legal basis in law. Following this logic, there would be almost no need for different human rights as they would all be subsumed by the right to a fair trial.

The issue of the Constitutional Court's arbitrary application of substantive law – an occurrence that seems more regular than rare – stems not only from its extensive use, which clearly exceeds the Court's legally defined jurisdiction, but also from its reliance on ambiguous and undefined terminology to support such decisions. As previously noted, the Court often justifies these interventions by assessing whether the reasoning of the lower courts is *constitutionally acceptable*. However, this phrase lacks an explicit definition or clear explanation in the Court's rulings. This ambiguity gives the Court broad discretion to label any legal interpretation with which it disagrees as *constitutionally unacceptable*, regardless of its foundation in existing law. This effectively gives the Court the power to interpret all legal norms in Serbia, which is a clear overreach of its constitutional mandate.

Furthermore, the Court uses other ambiguous expressions, such as decisions being "*to the disadvantage of the constitutional complainant*". Naturally, any adverse outcome in the lower courts would be detrimental to the complainant – otherwise they would not have pursued constitutional redress. In contrast, international legal standards emphasise that the right to a fair trial is judged by the outcome rather than by subjective dissatisfaction with the result. Litigation inherently involves two opposing parties, and what one perceives as unjust, the other may view as just. Therefore,

81 Constitutional Court of the Republic of Serbia, Decision of 8 May 2013, No. 4639/2012, para. 10.
82 Constitutional Court of the Republic of Serbia, Decision of 15 December 2011, No. 454/2009, para.6.

dissatisfaction with a verdict does not, in itself, constitute a violation of the right to a fair trial.

## 6. Conclusion

In conclusion, we have seen how this principle operates within broader global frameworks, as well as in specific regional and national contexts. In the EU, for example, the rule of law is fundamental to the Union's cohesion, serving as both a guiding principle and a key membership criterion. The EU emphasises the importance of legal equality, human rights protection and the rule of law as essential components for ensuring stability, democracy and respect for citizens' rights across its Member States. However, challenges remain, particularly when national legal systems are plagued by corruption, political interference, or ineffective enforcement, underscoring the need for continuous reform and vigilance.

Turning to Serbia, the implementation and safeguarding of the rule of law presents unique challenges. While significant efforts have been made to align with EU standards, persistent issues such as political interference in the judiciary, corruption and inequalities within the legal system have hindered the full realisation of the rule of law. While Serbia's ongoing legal and institutional reforms have been vital in shaping a more transparent and accountable system, the process remains far from complete. Against this backdrop, the jurisprudence of the Constitutional Court of Serbia plays an important role in navigating the intricate intersection of constitutional law, human rights, and political dynamics. The Court has played a key role in safeguarding citizens' rights and reinforcing the constitutional framework. However, its decisions are frequently subject to political pressure, highlighting the tension between legal principles and political realities.

While the decisions of the Constitutional Court contribute to strengthening the rule of law, they also reveal the complexities inherent in balancing the legal framework with societal and political challenges. As Serbia continues on its path towards EU integration, the need for robust judicial independence, transparent legal processes and adherence to the rule of law becomes ever more pressing. The Court's role in ensuring constitutional adherence and safeguarding rights will be crucial in helping Serbia meet EU expectations and international legal standards.

Ultimately, the rule of law is neither a static nor easily achievable ideal. Rather, it requires constant attention, adaptation and reform. As we have seen in various regions and jurisdictions, implementing the rule of law requires a commitment to transparency, fairness, accountability and protecting rights. For both the EU and Serbia, strengthening the rule of law is essential for building a stable and just society. For Serbia in particular, progress in this area is essential for both its EU aspirations

and ensuring the long-term stability, justice and fairness of its legal system. The experience of Serbia's Constitutional Court highlights that, although challenges to the rule of law will persist, it remains a vital force in protecting individual rights and promoting democratic values. It has the potential of shaping a more just and more equitable future for the nation.

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# ARTICLES

Umberto DE LUCA*

# The "Juvenile Question" in the Italian Constitution: A Legal-Historical Perspective on the Preparatory Works of the Constitutional Assembly

**ABSTRACT:** *This article examines the genesis of Article 31, paragraph 2, of the 1948 Italian Constitution, which commits the Republic to protect motherhood, childhood, and youth by supporting the necessary institutions for that purpose.*
*The study focuses on a systematic legal-historical examination of the Constituent Assembly's preparatory works – subcommittee minutes, plenary debates, amendments, and individual reports – to reconstruct the intense discussion that shaped the final wording of the provision. Drawing on earlier forms of public intervention in childhood and youth protection (from Liberal Italy to the fascist period), the Constituent Assembly redefined both the scope and nature of State involvement. Through careful linguistic and conceptual choices, any monopolistic or totalitarian approach was rejected, thereby laying the foundations for instruments capable of promoting the human dignity and free development of minors within a democratic and pluralistic constitutional framework.*
**KEYWORDS:** *Juvenile question, Italian Constituent Assembly Preparatory Work, Protection of Youth in the Italian Constitution, State Intervention in the Protection of Minors.*

## 1.
## Introduction: A Legal-Historical Approach to Article 31 of the 1948 Italian Constitution

The Constitution of the Italian Republic marked a crucial turning point in the construction of the modern Italian welfare state. With its entry into force, a democratic

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era began, whose founding principles guided the institutional processes that culminated in the approval of the Charter.[1]

In a democratic system, the meaning of fundamental rights and freedoms changes. They are no longer to be conceived as:

> *'a barbed-wire fence within which the individual seeks escape against the assaults of the hostile community, but rather as the gateway that allows him to step out of his little garden onto the street, and to bring from there his contribution to the common work.'*[2]

The creation of a new legal order[3] – in which the fundamental rights and freedoms of individuals are fully realised and are, indeed, necessary for the progress of the community – is due to the synthesising effort of the political forces that contributed to the drafting of the constitutional text.

Yet the paradigm of liberty rights is not the most significant innovation of the 1948 Constitution. While the Charter, in Article 2, 'recognises and guarantees the inviolable rights of man, both as an individual and in the social formations where his personality develops,' it also solemnly commits the Republic to 'remove obstacles of an economic and social nature which, by effectively limiting the freedom and equality of citizens, impede the full development of the human person' (Article 3).

The constitutional framework for the protection of the family, motherhood, and minors is also set in this context. The removal of obstacles that hinder the development of the person encompasses and justifies the adoption of Article 31, which imposes an active duty on public authorities to protect the family – considered the fundamental cell of society – and, in particular, to establish a support network for motherhood, childhood, and youth, as specified in the second paragraph.[4]

The revolutionary nature of this choice emerges clearly from the debates of the Constituent Assembly. Some members – rooted in the liberal tradition and concerned about the risk of excessive state interference in family dynamics – opposed an explicit constitutional provision on the protection of the family, evoking the risk of authoritarian tendencies similar to those experienced during the fascist regime. In contrast, other members of the Assembly identified the protection of the family and minors as one of the cornerstone values of the Republic.

Through Articles 29–31 of the Constitution, the regulation of the family becomes one of the pillars of the constitutional programme, focusing on the dignity and full

1 Fioravanti, 1999; Lacchè, 2023, pp. 1–33.
2 Calamandrei, 1946, pp. 15–16.
3 Gregorio, 2017, p. 551. http://doi.org/10.62733/2025.2.5-15
4 Bifulco et al., 2006, p. 643.

development of the human person[5] as an individual rather than solely in relation to others.

However, despite this premise, the Charter does not define a specific status for children,[6] generally considering fundamental rights as applicable to all, regardless of age, with the exception of political rights. *The person* is recognised as the holder of individual legal rights, and the expression "minor of age" appears only once in Article 37; the minor has a *status* within the family, school, and work contexts. The only direct reference to minors is found precisely in Article 31, paragraph 2. An integrated reading of the constitutional norms, however, suggests a more complex vision, in which the protection of the family and minors is a cornerstone of a system geared toward the protection of vulnerable persons.[7]

This study outlines the content of Article 31, paragraph 2, in the context of the Italian constitutional system and explores continuities and differences from previous legislation, particularly that of the fascist system. First, the pre-existing regulatory context from the early 20th century to the fascist regime's interventions in the area of childhood and youth is examined. Next, the reports of the Constituent Assembly sessions in which the issue of child protection was addressed are reviewed. The choice of this method is motivated by the need to reconstruct, from a legal-historical perspective, the debate that took place around the approval of Article 31, analysing the different political and institutional positions on the appropriateness of providing constitutional directives for the protection of the younger generation. Finally, once the distinctive features of the normative frame of reference have been clarified, Article 31, paragraph 2, is re-examined, placing it in the broader constitutional framework.

## 2.
## Legal Condition of Children in Liberal Italy

At the beginning of the 20th century, the legal protection of minors 'appeared almost entirely absent from Italian law'[8] and was inadequate especially when compared to other European legislations.

However, the second industrial revolution – and the related phenomena of rapid urbanisation, rural exodus, and exploitation of child labour – disrupted the previous social order. Large cities were populated by gangs of juvenile delinquents who found

5 Barile, 1984, pp. 73–101.
6 Carlassare, 1980; Barile, 1984; Colao, 2019.
7 Funaioli, 1951, pp. 132–138.
8 Guarnieri Ventimiglia, 1904.

their means of subsistence in street life and petty crime and a model to follow in criminal adults.

The Italian State's commitment to the protection of minors was characterised by limited and fragmented regulatory interventions,[9] reflecting a still incomplete focus on child protection. The juvenile issue was mainly framed in relation to the prevention of deviance and crime rather than as a matter of social and preventive protection.

Faced with these masses of petty offenders, the problem was no longer whether the child had committed a crime with discernment or not; instead, the country faced the more complex problem of finding a solution to juvenile delinquency.[10]

This was the socio-legal context in which the new ideas of the *Scuola Positiva* entered Italian criminal law. The merit of this new approach was that it addressed the "juvenile question" for the first time by examining a range of factors contributing to juvenile delinquency:[11] hereditary factors, such as alcoholism or parental delinquency; economic factors, linked to poverty and need; and social factors, including marginalisation and material and moral abandonment.

In the 'century of children,'[12] jurists called upon the law to engage with a range of disciplines (such as pedagogy, psychology, and sociology) that appeared more suitable than the penal code for the "government" of these particular subjects.[13]

Two paths were thus pursued: that of defending society from dangerous youth, which saw punishment and reformers as tools for protecting bourgeois order; and that of researching the causes of juvenile delinquency in order to remove or mitigate them.[14]

The first attempt to recognise a degree of specificity for juveniles at the criminal-law level came with the Zanardelli Code of 1889. This code introduced distinctions in penalties for juveniles compared to adults, establishing four age groups and associating different corrective measures with each. However, the approach remained highly punitive and entrusted the judge with wide discretion in determining juvenile criminal responsibility. Thus, no structured protection was guaranteed; instead, a wide margin was left to the magistrate's individual discretion, with no effective correctional institutions dedicated to juveniles. Moreover, the code reflected a perception of the juvenile more as a potentially dangerous subject to be "corrected" than as an individual to be protected and supported.

9 Dalmazzo, 1910.
10 Pace Gravina, 2000.
11 Ferri, E., Fioretti, G., Garofalo, R., Lombroso, C., 1891.
12 Dalmazzo, 1911; 1922.
13 Key, 1909.
14 Colao, 2019.

On the educational front, the Coppino Law of 1877 first introduced compulsory education for children, initially setting the age limit at 9 years, later raised to 12 by the Orlando Law of 1904. These regulations, which sought to remove children from early labour, reflected an attempt to align with policies in other European countries, recognising that education could serve as a barrier to juvenile deviance. However, in practice, these measures had limited impact, as the widespread poverty in which many Italian families lived continued to force minors to contribute economically from an early age, thereby restricting effective access to education.[15]

There were also attempts to establish more effective forms of protection, especially for abandoned or at-risk children. Notable among these was the bill proposed by Giovanni Giolitti in 1907,[16] which provided assistance for abandoned children and support for youth exposed to the risk of deviance. However, the proposal failed to secure the political and social consensus necessary for effective implementation and remained unimplemented or only partially implemented. The project suffered from a scarcity of economic resources and a still rudimentary welfare system, which made institutional support for such extensive welfare projects difficult.

In 1908, Vittorio Emanuele Orlando, then Minister of Justice and particularly attentive to the issue of child protection, issued a Circular[17] in which he urged magistrates not to apply only traditional repressive measures to minors.[18] Instead, he asked the courts to appoint an investigating judge specialising in proceedings against minors. Furthermore, he urged investigators to make special inquiries into the family background of minors in order to understand their personalities. Finally, he stressed that magistrates must cooperate with the Patronage Societies, which had emerged across Italy to support juvenile delinquent recovery and prevention.

The Orlando circular did not achieve the desired effect. The establishment of a judge for children was complicated, since it would interfere with the "private" order of the family, which rested on certain provisions of the 1865 Civil Code. Only a few courts

15 Ipsen, 2006.
16 Pignata, 2009;
17 Falcone, 1909; Majetti R., 1909.
18 Daggunagher, 2011, pp. 523–529.

complied with Orlando's proposals, marking the failure of this first attempt to create a specialised juvenile judiciary.[19]

## 3.
## Fascist Regime's Policies for Children and Youth

Despite such reform intentions, Italy in the first decades of the twentieth century failed to develop effective legislation in the field of child protection.

The measures adopted were ineffective and limited, as they focused more on the containment of juvenile deviance than on genuine preventive protection of vulnerable children. This approach contributed to a regulatory framework in which minors, rather than being beneficiaries of protection, were viewed as potential sources of social disorder, with only limited and intermittent scope for state intervention.

Nonetheless, one important fact must be highlighted: the issue of child protection, although addressed through sporadic and disconnected legislative interventions, had entered public debate and generated, for the first time, the conviction that the state *should take* an interest in the protection of children.

19 Within this historical and doctrinal framework, the Draft Code for Juveniles (*Progetto di Codice per i minorenni*), presented in 1912 by Orazio Quarta to the Minister of Justice, Camillo Finocchiaro Aprile, emerged. The Draft proposed a radically innovative system of juvenile justice, establishing, for the first time in Italy, specialised juvenile justice institutions.
In each city that was the seat of a tribunal, a single-judge magistrate (*giudice monocratico*) was to be appointed with exclusive competence over matters concerning minors. At the central level, a higher collegiate body, placed under the authority of the Ministry of Grace and Justice, was entrusted with the task of coordinating the activity of the juvenile sections nationwide, supervising the uniform application of the relevant legislation, and exercising disciplinary oversight over the specialised magistrates.
The Draft did not limit itself to the repression of offences committed by minors; it also introduced specific criminal liability for the omission or abuse of parental or guardianship duties by those persons upon whom the law imposed an obligation of protection, assistance, education, and supervision in respect of the minor. To this end, the proposed legislation expressly empowered the juvenile magistrate to exercise strict vigilance over parents, guardians, and any other persons responsible for the minor, with the power to impose sanctions, including criminal penalties, in the event of serious breach of the duties of care, maintenance, and moral and material assistance.
Through these provisions, Quarta aimed to guarantee effective protection of the rights and interests of the child by means of strengthened State oversight over the family sphere, thereby subordinating parental authority to the superior interest of the minor as determined by the judicial authority.
Notwithstanding the innovative character and systematic coherence of the proposal, the Draft was never submitted for parliamentary debate nor transformed into legislation.
On this point: Quarta, 1912; Ciolfi, 1915, p. 396.

It was this vision that guided the fascist government in addressing the juvenile question. The legislation concerning minors, enacted between 1925 and 1934, on the one hand, constituted the logical outcome of earlier debates around the need for public intervention in child protection; on the other hand, it marked the beginning of legislative modernisation under the banner of the "nationalisation of childhood," albeit distorted and shaped by the political needs of the regime.[20]

The indoctrination of the younger generation was a central and vital objective for the fascist regime[21]: a long-term investment intended to ensure the survival of the system, since public schools alone could not guarantee the transmission of political ideology.[22]

For these purposes, large-scale public organisations were established to address the most diverse needs of young people. The competencies of these organisations included spiritual, cultural, religious, pre-military and sporting education.[23]

Despite the regime's extensive efforts in this field, the deplorable conditions in which millions of people lived remained a constant in Italian society and, as a consequence, juvenile delinquency did not stop. For this reason, the government decided to create, as a complement to this public system of intervention, a specialised magistracy dedicated to the control of juvenile deviance.[24]

This legislative innovation was anticipated by Minister Alfredo Rocco's Circular of September 22, 1929,[25] "Juvenile Delinquency and Magistrates for Juveniles", addressed to the First Presidents and Attorneys General in the districts of the Court of Appeals.

20 Colao, 2019, p. 339.
21 Gentile, 1996, p. 491.
22 Nello, 1978.
23 Youth aged between 8 and 18 years were incorporated into the organisational structures of the *Opera Nazionale Balilla* (ONB), which, together with the *Fasci Giovanili di Combattimento*, was reorganised in 1937 into the *Gioventù Italiana del Littorio* (GIL). More specifically, children aged 8 to 14 years were enrolled in the *Balilla* formations (subdivided into *Figli della Lupa, Balilla Moschettieri,* and *Balilla*), while those aged 14 to 18 years constituted the *Avanguardisti*.
Separate from the *Opera Nazionale Balilla*, yet integral to the regime's system of political education and control of youth, were the organisations reserved for older fascist militants: the *Fasci Giovanili di Combattimento, the Gruppi Universitari Fascisti* (for university students), the *Gruppi Fascisti Studenteschi* (for secondary-school students), and the *Giovani Fasciste* (for females aged 18 to 21).
24 Even in this domain, substantial innovations were brought about by the reform of the Criminal Code and the Code of Criminal Procedure. See Sbriccoli, 1999.
25 Daggunagher, 2011, pp. 535–536.

Through this circular, Rocco called for increased judicial intervention in the *Opera Nazionale Maternità ed Infanzia*,[26] in order to strengthen coordination between institutions in charge of assisting minors, in the name of human solidarity.

Moreover, it stipulated that, from the following judicial year, "magistrates for juveniles" were to be established in the Courts of Appeal in Turin, Milan, Florence, Rome, Naples, and Palermo. These magistrates were not to limit their activities to the repression of crimes committed by minors, but rather 'to call negligent parents to account for their duties.' The Rocco Circular proved more effective than the 1908 Orlando Circular, and specialised judges began operating in major Italian cities.

The path was thus set, and only a few years later, Royal Decree Law No. 1404 of 1934 established the Juvenile Courts in Italy.[27]

In the name of a unified approach to the juvenile question, the Juvenile Courts were granted criminal, administrative and civil jurisdiction.

In the criminal sphere, they had jurisdiction over crimes committed by minors under the age of 18.

In the administrative sphere, Article 25 of Royal Decree Law No. 1404 stipulated that the King's prosecutor, social services, parents, and protection and welfare agencies could report cases concerning minors who offered 'manifest evidence of irregularity of conduct or character' to the Juvenile Courts.

Finally, Article 32 of the decree, concerning "Civil Affairs," provided for State intervention in family matters, including the placement of children in care in cases involving abusive or incapacitated parents. Jurisdiction was not exclusive; ordinary courts decided matters concerning property interests, while Juvenile Courts decided those concerning moral issues.

Under fascism, therefore, juvenile policies received unprecedented attention, marking a sharp contrast with the situation in Liberal Italy. The child-protection system was organised through public agencies closely linked to fascist party control and offered wide-ranging assistance to families and children. To complement this structure, the Juvenile Court was established, tasked not only with dealing with juvenile offenders but also with investigating the economic, social and cultural factors that may have led them to criminality.

However, it is necessary to reflect on a fundamental aspect, particularly in light of a comparison between fascist and constitutional legislation on the protection of

26 *Opera Nazionale per la Protezione della Maternità e dell'Infanzia* (ONMI) was a public agency entrusted with the allocation of substantial public resources for the implementation of policies aimed at: providing material and medical support to mothers and children during pregnancy, childbirth and the postnatal period; ensuring the moral and material protection of minors until the age of majority; promoting education in matters of maternity and childcare; and delivering assistance to abandoned, morally endangered, delinquent, or mentally disordered minors.

27 Majetti M., 1921, pp. 1–4; Conti, 1935; Colao, 2016, pp. 1–29.

motherhood and childhood. The considerable economic and organisational efforts undertaken by the regime must be understood as part of a broader plan to build a totalitarian state,[28] in which every aspect of daily life was to be brought under the control of the party-State.[29] Certainly, there were man and women within the regime's institutions who were motivated by a genuine sense of solidarity with disadvantages children and marginalised women. However, the broader context must be taken into account: a system of protection and control embedded within a fascist State that, even through welfare measures, sought to subordinate the most vulnerable segments of the population to party directives.

## 4.
## Genesis of Article 31 of the Italian Constitution Through the Preparatory Works of the Constituent Assembly

As already noted, the need to provide specific legal regulation aimed for the protection of childhood and youth had entered public debate during the fascist regime, involving Italian institutions at the highest levels. In the immediate post-war period, this issue acquired renewed urgency: the conflict had only exacerbated the dramatic living conditions of young people in Italy, many of whom were personally involved in war operations. Public intervention in support of the younger generation was therefore deemed no longer deferrable.

During the years of democratic transition, the greatest political challenge in Italy was drafting a new Constitution for the newly formed Republic. The importance of child and youth protection is evidenced by the fact that the members of the Constituent Assembly proposed including an express institutional commitment in this regard.

The most appropriate place seemed to be the section on the family, in view of the close connection between family, motherhood, childhood and youth. Indeed, the debate encompassed different but intertwined themes: the need for constitutional legislation on the family, the concept of the family itself, and the relationship between public powers and family life.

28 Melis, 2018.
29 Costa, 112.

### *4.1. Two Visions Compared Within the First Subcommittee – "Rights and Duties of Citizens"*

The proposal to include specific rules on the family in the Constitution was the subject of intense debate, particularly regarding the objection that it was inappropriate to regulate, through principles and rules, an area already extensively regulated by the Civil Code.

This clash, stemming from the different ideological sensibilities of the constituent fathers, emerges clearly from the records of the Constituent Assembly. Members of the main parties that had opposed the fascist regime and had found, in resistance to the dictatorship, a common basis for rebuilding the nation, were now sitting together, and their cultural distances[30] reemerged in parliamentary work.

This tendency, which characterised the work of the Constituent Assembly, was particularly evident in the debates of the First Subcommittee charged with drafting the Constitution with regard to social and ethical relations.[31]

With regard to child and youth protection, the First Subcommittee began its discussion on the basis of an initial normative proposal submitted during the course of the work:[32]

30 Onida, 2007, pp. 33–36.

31 On 15 July 1946, for the purpose of preparing the text of the new Constitution, a special committee known as the Commission of Seventy-Five (*Commissione dei 75*) was established. The Commission was entrusted with the task of drafting the preliminary Constitution to be submitted subsequently for deliberation by the plenary Constituent Assembly.
The 75 members were divided into 3 sub-commissions: the first one was responsible for rights and duties of citizens; the second was charged with the constitutional organisation of the State and public powers; and the third dealt with economic and social relations.
A Coordination Committee (*Comitato di redazione or Comitato dei Diciotto*) was thereafter entrusted with the delicate function of harmonising, reconciling, and stylistically unifying the texts produced by the three sub-commissions.
The work of the Commission of Seventy-Five resulted in the draft Constitution (*Progetto di Costituzione*), which was transmitted to the plenary Constituent Assembly and entered the parliamentary discussion phase on 4 March 1947.
On 22 December 1947, the Constituent Assembly gave final approval to the Constitution of the Italian Republic. The enacted text was promulgated on 27 December 1947 by the Provisional Head of State, Enrico De Nicola, and entered into force on 1 January 1948.
On this point: Romanelli, 2023.

32 The provision in question, originally inserted within the first section concerning the regulation of the family, was proposed by Camillo Corsanego, Leonilde Iotti, and Aldo Moro. For the full text, see Constituent Assembly, [Stenographic Record]. Session No. XXXIII, 6 November 1946.

Article 4:

> *'The State shall provide for the adequate moral and material protection of motherhood, childhood and youth, establishing the necessary bodies for this purpose.'*

Discussion among the members of the Subcommittee focused on two crucial aspects. First, for some members, this wording appeared capable of seriously threatening the autonomy and freedom of the family.[33] Second, concern arose that this provision would allow the State to intervene in the education and training of youth according to political criteria, thereby undermining the freedom of families – to whom primary responsibility for the protection of youth belongs – and even the freedom of young people themselves, who, during the fascist years, had been enrolled in the regime's organisations and subjected to party propaganda. What drove the debate in the Subcommittee was the concern that the State may once again exercise a monopoly over education of youth.[34]

The balance between political forces, the gravity of the moment, and the objective difficulty of establishing a new order in the country influenced the progress of the work. For these reasons, the choices of the constituent fathers often represented difficult compromises between competing political orientations.[35]

33 Camillo Corsanego, having first declared his fundamental opposition to the inclusion of the provision – which he deemed unsuitable for inclusion in a Constitution – nevertheless proposed the addition of the following qualifying phrase: 'with particular regard to those children whose parents are unable to exercise parental authority.'
The President of the First Sub-Commission, Umberto Tupini, expressed serious reservations concerning any formulation that might undermine the independence of the family from State control. In the course of the debate, Tupini emphasised that, under the preceding dictatorial regime, the State had arrogated to itself the power to interfere in the education and upbringing of children within the family sphere, and warned that any trace of such an approach would be wholly incompatible with the democratic institutional order then being established.
See Constituent Assembly, [Stenographic Record]. Session No. XXXIII, 6 November 1946.

34 Giorgio La Pira and Ottavio Mastrojanni, notwithstanding their markedly different ideological premises and ideological backgrounds, expressed convergent concerns united by a single common denominator: the fear that the proposed provision might open the door to the establishment by the Republic of one or more organisations analogous to the Opera Nazionale Balilla, which, during the 20-year fascist period, had in fact assumed comprehensive control over the education, assistance and ideological formation of children and young persons from 8 to 21 years of age.
Such acute sensitivity to the political implications of terminology even led Giorgio La Pira to propose the outright suppression of the word "youth" from the text of the article, on the ground that the term had become irredeemably compromised by its intensive use in fascist propaganda and institutional practice.
See Constituent Assembly, [Stenographic Record]. Session No. XXXIII, 6 November 1946.

35 Romanelli, 2023.

This motivated constituent fathers to promote different compromise versions of the article.

To prevent the possible resurgence of fascist-type organisations, Camillo Corsanego put forward a proposal to amend the article as follows:

> *'The State shall provide adequate moral and material protection of motherhood, childhood and youth, establishing and encouraging the necessary bodies for this purpose.'*

The article, amended as proposed by Corsanego, seemed to dispel the spectre of a monopolistic state approach to the protection of childhood and youth.

It was the wording "*establishing and encouraging*" that allowed the approval of the text that became the last paragraph of Article 25 of the Draft Constitution:

Article 25:

> *'It is the duty and right of parents to feed, instruct, and educate their children. In cases of proven moral or economic incapacity on their part, the Republic shall assume responsibility for these duties.*
> *Parents owe the same duties to children born outside of marriage as they do to those born within it. The law ensures that children born outside of marriage are granted a legal status free from civil and social disadvantage.*
> *The Republic shall ensure the protection of motherhood, childhood and youth establishing and encouraging the bodies necessary for this purpose.'*

A further amendment, introduced during the drafting, did not alter the meaning of the discussed article but took on a strong symbolic and normative meaning. 120 tis the *Republic*, and not the *State* ("The Republic shall provide...") that is entrusted with this responsibility.

Although this may appear to be a minor change, in reality, this shift marks the beginning of a gradual process of abandoning a State-centric idea of the protection of youth.

### *4.2. Final Discussion in the Plenary Assembly*

The debate then moved to the Plenary Assembly and took place between 15 and 23 April 1947. The political confrontation that had occurred in the Subcommittee, caused by the different political tendencies of the constituent fathers, was fully reproduced at this stage.

The core issues were the same. On the one hand, the liberal component opposed placing the family (and family relations) 'under special surveillance of the Republic.'[36] On the other, there was concern about granting the State a monopolistic role in the education of young Italians, as had happened during the years of the regime.[37]

The deputies of the Italian Communist Party clearly expressed their support for the approval of Article 25 of the Draft Constitution.[38] In their speeches in the Plenary Assembly, they strongly advocated the need for the Republican State to intervene in the protection of motherhood, childhood, and youth, by allocating adequate financial means, enacting special legislation on youth, coordinating the activities of the

36 This position was forcefully articulated by Mario Tumminelli, representative of the *Partito dell'Uomo Qualunque*, who sharply criticised the inclusion of the provision in the Constitution and issued a stern warning to his fellow Assembly members. In his view, the cumulative effect of Article 25 (as then drafted) was that 'the child, the youth, the adult, the family—everything falls under the protection of the Republic, which thereby suppresses all private initiative and absorbs individual personality within the vast and intrusive tentacles of a State that penetrates everywhere, provides for everything, lays down general rules on education, and grants allowances to families together with other measures.'
Tumminelli directly attacked the members of the Christian Democratic Party and the Italian Communist Party who supported the adoption of the provision, in his words: 'when the child grows up, the Republic undertakes its protection "by promoting and establishing the institutions necessary thereto," which in practice means a new G.I.L. [*Gioventù Italiana del Littorio*]. The organisations are already in place: on the Communist side, the Fronte della Gioventù; on the Christian-Democrat side, the boy-scout movement.'
See Constituent Assembly, [Stenographic Record]. Session No. XCII AM, 17 April 1947.

37 Echoing the same concerns as Tumminelli, Giambattista Bosco Lucarelli spoke forcefully in the plenary sitting against the approval of Article 25, grounding his opposition in an explicitly Christian conception of social order according to which 'children belong, first and foremost, to the family.'
In his submission, the Republic must under no circumstances repeat the errors of fascism, which 'had torn children away from their families, placed a musket in their hands and dispatched them to be educated in the barracks of the G.I.L.'
See Constituent Assembly, [Stenographic record]. Session No. XCII afternoon, 17 April 1947.

38 Fausto Gullo, speaking on behalf of the Italian Communist Party during the plenary sitting, described the approval of Article 25 as 'more timely and necessary than ever' and provocatively criticised the provision not for its substance, but on the contrary for being censurable precisely because 'it does not contemplate an even broader scope of State intervention.'
See Constituent Assembly, [Stenographic record]. Session No. XCV afternoon, 18 April 1947.

various institutions dealing with problems affecting youth, as well as morally and materially supporting associations already involved in the education of children.[39]

At the end of the debate, the Constituent Assembly, at its session on 23 April 1947, approved Article 25 in the following formulation:

> *'The Republic shall facilitate with economic measures and other provisions the formation of the family and the fulfilment of related duties, with special regard to large families.*
> *Protects motherhood, childhood and youth by encouraging the necessary institutions for this purpose.'*

The disappearance of the phrase "*establishing and encouraging*" did not go unnoticed, indicating that the terms of the State's commitment to the protection of motherhood, childhood, and youth constituted a crucial point of compromise.

The term "*establishing*" evoked too strongly the idea of fascist youth organisations and the invasive role of the State.[40]

Moreover, for the same reason, the term "*bodies*" was replaced with the broader and more neutral "*institutions*." This shift indicates that the provision was not intended merely to encourage the establishment of public bodies or agencies, but also to promote specific legislation in the field of childhood and youth protection.

The text of Article 25 was transferred by the Drafting Committee to its current location as Article 31, closing the set of articles devoted to the family.

39 This was the position articulated by Giuliano Pajetta, likewise a member of the Italian Communist Party, who identified three fundamental policy guidelines that the Republic was duty-bound to pursue in this domain: 'The first is that the organisational structure of our State and governmental action must provide for the adoption of special legislation capable of coordinating the activities of the various public and private institutions concerned with youth-related issues, thereby ensuring that such issues receive effective resolution. The second aspect consists in the establishment of a State agency specifically dedicated to youth welfare, an agency that could immediately commence operations by taking over the entire complex of assets, premises and facilities formerly belonging to the G.I.L. The third aspect concerns the provision of moral and material support to those youth associations that are already actively operating in the field.'
See Constituent Assembly, [Stenographic Record]. Session No. XCVII afternoon, 19 April 1947.

40 The circumstance that the compromise ultimately achieved within the Constituent Assembly rested upon a shared determination to impose stringent limits on public intervention in this domain of social life is further evidenced by the rejection of a supplementary article proposed by Giuliano Pajetta.
The text of the amendment, which was not approved, read as follows: 'The Republic shall ensure the physical development of youth and promote their economic, moral and cultural advancement. To this end, the law shall provide for the establishment of appropriate State agencies and shall guarantee the moral and material support of the State to freely constituted youth associations.'
See Constituent Assembly, [Stenographic Record]. Session No. XCVII, 19 April 1947.

## 5.
## Brief Considerations on Article 31 of the Italian Constitution

Article 31 of the Constitution has a two-pronged character. The first paragraph complements the constitutional protection of the family already established by Articles 29 and 30 – which define the family as a natural society founded on marriage – entrusting the Republic with the constitutional task of facilitating, through economic measures and other provisions, the formation of the family and the fulfilment of its functions, with particular regard to large families.

The second paragraph identifies the protection of motherhood, childhood, and youth as a priority objective of public policy. Once again, it is the *Republic*, with the complexity of its articulations and structures, that is entrusted with this task.

The family is the privileged, though not exclusive, place of growth and protection of children and their needs. In this sense, Article 31 forms a coherent system with the constitutional provisions immediately preceding it (Articles 29 and 30), closing the circle of the new constitutional focus on family and filiation issues.

A new paradigm of juvenile law was inscribed in Aldo Moro's Report[41] to the Constituent Assembly, regarding a "natural incapacity to exercise a right" on the part of the minor, which was not to be an obstacle to the "recognition of the developing person to become a fully realised human being."

According to Moro, the 'contingent immaturity imposes the choice of legitimate representatives of the minor, to guarantee an educational direction that does not compromise in the child that formation of a person, which constitutes for him the affirmation of dignity that is the basis of a democratic constitution.' The formula proposed by Aldo Moro, therefore, recognises the primary role of the family and criticises excessive State interference: the State should not replace parents but complement their educational action.

However, there is no doubt that the current text of Article 31 of the Constitution imposes a weighty obligation of considerable significance in the area of the protection of motherhood, children, and youth.

In his Report[42] submitted to the First Subcommittee, Camillo Corsanego argued that the State must recognise and protect family unity, promote the indissolubility of marriage, and guarantee moral and legal equality between men and women. In his view, parents have the primary right to educate their children, with the State

41 Committee on the Constitution, I Subcommittee. Aldo Moro's Report on the principles of social cultural relations.

42 Committee on the Constitution, I Subcommittee. Camillo Corsanego's Report on family relations.

intervening only to supplement and supervise. It demonstrates, therefore, a middle way between State non-intervention and the monopoly feared by some constituents.

However, a closer reading of Article 31 suggests another programmatic orientation. Indeed, the text seems to entrust the Republic with a broad mandate in the protection of motherhood, childhood, and youth, supported by the power to foster institutions necessary for that purpose.

It is precisely the open-endedness of this clause (which characterises the norm as a true *programmatic provision*) that highlights the breadth of the instruments to which the Republic *must* have recourse to regulate this delicate matter.

This is a mandated task that constituents entrusted to the new Republic, as Nilde Iotti had strongly requested in her report submitted to the First Subcommittee.[43]

Iotti, an influential member of the Italian Communist Party, emphasised the essential role of the State in protecting the family and minors, proposing that the Constitution recognise the family as the fundamental nucleus of society and stressing the need for economic support for larger and poorer families. 'Motherhood cannot continue to be regarded as something of a private nature,' Iotti argued. 'The prosperity of the Nation and the development of future citizens depend on it, and society cannot remain indifferent if mothers live in precarious hygienic, sanitary and nutritional conditions, and if children are raised in environments that are morally and materially unsuitable for their development.'

A relevant contradiction emerges from this latter aspect: the words of Nilde Iotti seem to echo fascist rhetoric, which saw population growth as a guarantee for the future of Italy and considered the forced education of the youth masses to be the best way to form future citizen-soldiers. This contradiction reinforces the concerns expressed by some constituent fathers regarding the inclusion in the Constitution of an article that would commit the State to the protection of childhood and youth.

The issue becomes even more complicated given that the most fervent supporters of extensive State intervention in the protection of the younger generation were members of the Italian Communist Party, one of the main forces of the anti-fascist front in Italy.

## 6.
## Final Remarks: The Innovative Approach of Article 31

The analysis offered in the preceding pages suggests that the relationship between the juvenile policies of the fascist period and the commitment enshrined in Article

43 Committee on the Constitution, I Subcommittee. Nilde Iotti's Report on family relations.

31, paragraph 2, of the 1948 Constitution is considerably more complex than a simple narrative of either continuity or outright rejection would allow.

Materially and even terminologically, significant lines of connection are unmistakable: the fight against juvenile delinquency, the protection of abandoned children and destitute mothers, and the creation of specialised courts and public assistance agencies – all themes that traverse the two eras with remarkable persistence. Yet the meaning and purpose of these instruments undergo a profound transformation.

In the fascist framework, child-protection policies, however innovative when measured against the fragmentary measures of Liberal Italy, ultimately served the construction of a totalitarian order. Institutions such as the Juvenile Court of 1934 and the *Opera Nazionale Maternità e Infanzia* were designed not only to alleviate hardship but, above all, to integrate the youngest and most vulnerable segments of the population into the hierarchical and mobilising logic of the party-State. Assistance was therefore inseparable from control, and the child remained, ultimately, an object of national strategy.

The debates of the Constituent Assembly reveal an acute awareness of this dangerous precedent. The repeated linguistic adjustments – from "*the State shall establish*" to "*the Republic shall encourage the necessary institutions*," and from the singular *State* to the plural and democratic *Republic* – were deliberate attempts to avoid renewed monopolistic interference in family life and education.

Far from signalling a retreat, however, Article 31 affects what may be described as a quiet but decisive reorientation: the same social needs that once justified an expropriative intervention are now placed at the service of an emancipatory project grounded in the removal of obstacles to human dignity (Article 3, paragraph 2). The child is no longer a resource of the nation but a person *in fieri,* whose full development the Republic is constitutionally bound to facilitate without supplanting parental responsibility.

This slight yet radical inversion of purpose within a partly inherited institutional structure appears to constitute the distinctive contribution of the Italian constitutional model. Rather than rejecting the technical and organisational advances of the fascist period or pretending they never existed, the Constituent Assembly chose to redeem and re-found them within a democratic framework centred on the indestructible primacy of the human person, with specific regard to minors.

The child is still seen as an *object* of protection rather than as a *subject* with specific rights worthy of protection. Nevertheless, the constitutional system as a whole can be seen as the framework[44] within which a different view on the issue of minors will develop in the following decades.

44 Onida, 2007, pp. 56–60.

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# Formal Contracts in Central and Eastern European Countries: Agreed Form of Contracts

**ABSTRACT:** *A requirement to conclude a contract in a certain form may be requested by the legislator (statutory form) or the contracting parties themselves (agreed form). This study examines the agreed form of contracts and the legal consequences arising from non-compliance with that form. First, the study focuses on the form in general, the principle of consensualism as an achievement of modern law, and the types of the form based on various criteria (shape, legal effect, and origin). This is followed by analyses of the agreed form and its functions, variations, advantages, and limitations. The central analyses focus on the approaches of legislators in CEE countries towards the agreed form and legal consequences of non-compliance. Despite the numerous economic, political, and social changes these countries have undergone, the principle of consensualism and the freedom to choose the form of contracts have persisted. Hence, the applicable laws of Poland, the Czech Republic, Slovakia, Hungary, Bulgaria, Romania, Slovenia, Croatia, Serbia, Bosnia and Herzegovina, Montenegro, North Macedonia, and Albania are analysed. The author endeavours to answer what legal effect the agreement has on the form if the contracting parties did not precise whether their form will be the constitutive element of the contract or just the simple proof of its existence. The legal consequences of failing to comply with the agreed form differ across countries: in some, it leads to the nullity of the contract; in others, it makes the contract unenforceable; in certain cases, it*

**KEYWORDS:** *Form of Contract, Agreed Form, Statutory Form, Ad Solemnitatem Form, Ad Probationem Form, Form as Simple Proof.*

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# 1.
# Introduction

For a contract to be validly formed, certain conditions must be met in the moment of concluding the contract. In the civil law tradition, it is often stated that there are "four plus one" conditions. Therefore, capacity to contract, mutual consent of the expressed wills, the subject matter of the contract (lawful, clearly defined, and possible), and the legal cause (basis) of the contract (lawful, clearly defined, and possible) must always be present. Additionally, the "plus one" or fifth requirement is the form of the contracts, defined as the way in which the intent of the parties is materialised. It is described as a predetermined, external, and visible manner of expressing the content of the parties' intent in legal transactions.[1]

Why is the form considered as a "plus one" requirement? The answer is the principle of consensualism, an expression of the broader concept of freedom of the contract.[2] The principle of consensualism is accepted as an achievement of modern law and as a mark of progress in legal consciousness.[3] In accordance with this principle, a contract is typically formed and becomes legally binding based solely on the mutual consent of the parties – *solo consensu*. Under this principle, the contract is valid and enforceable as soon as the parties reach an agreement. The specific formalities (e.g. written documentation or notarisation) are not needed.[4] Hence, it is also called as the principle of informality. The principle *solus consensus obligat* became an integral part of 19th-century codifications. Moreover, the French legislator did not even formally establish it as a principle in the *Code Civil*, as it was considered self-evident.[5] The principle is not only theoretically justified, but also based on practical reasons: in today's world, the need to expedite legal transactions is essential, whereas strict formalities tend to impede this process.[6] Consensualism is embraced by all Central and Eastern European countries (hereinafter: CEE countries).

1 Karanikić Mirić, 2024, p. 324. http://doi.org/10.62733/2025.2.5-15

2 As the principle of autonomy of will applies to contract law, the freedom of contract is the groundwork of contract law. According to this principle, parties have the autonomy to decide whether to enter into a contract, choose whom they will contract with, determine the content of the agreement, and select the form the contract will take (Perović, 1990, p. 157). This freedom empowers individuals to shape their legal relationships according to their own preferences and needs.

3 Perović, 1990, p. 183.

4 It was a long journey towards the acceptance of the principle of consensualism. In Roman law, great importance was attached to the form. Special rituals had to be observed when concluding contracts, with pre-determined words that had to be spoken, and coughing or mumbling would result in the need for the ritual to be repeated (Zimmermann, 1995, p. 622).

5 Perović, 1990, p. 187.

6 Đurđević, 2014, p. 27.

Nevertheless, for certain contracts, the specific form is mandatory – meaning that the mutual consent of the parties must be expressed in a specified form. First, the legislator may prescribe a specific form for certain contracts. This form is referred to as a statutory (mandated) form. Historically, the principle of consensualism has never been applied absolutely; there have always been certain exceptions.[7] The legislator makes this kind of an exception to the principle of informality when a certain contract is particularly important, complex, or risky.[8] In these exceptional cases, the legal certainty is placed before the freedom of the contract – for example, in a contract for the sale of real estate.[9] The number of contracts whose valid conclusion requires compliance with statutory formalities has increased significantly; however, this development does not undermine the principle of consensualism, since such requirements represent narrowly defined exceptions rather than a departure from the general rule.[10] In such cases, the contract will be void if the required form was not fulfilled. Nullity as a sanction for non-compliance with the statutory form is prescribed by the laws of all CEE countries. Second, the contracting parties themselves may agree on a specific form. This type of form is referred to as an agreed form. Concluding a contract in a specific form can help the parties clarify their intentions, carefully consider the conclusion of the contract, and significantly simplify the process of proving the existence and content of the contract later on. In accordance with the principle of freedom of the contract, the contracting parties are also free to determine the legal effect of the form themselves. They may agree on whether the contract will be valid without that form or not. However, if the parties do not specify the consequences of deviating from the agreed form, the legal consequences may not always be clear. By contrast, when a statutory form is required, the legal consequences of non-compliance are defined by law. Furthermore, as I demonstrate in this paper, the legal consequences of not fulfilling the agreed form vary across CEE countries.

Whether the form is statutory or agreed, it becomes the fifth requirement for the contract to be validly concluded. Be that as it may, even if the legislator, and not the contracting parties themselves, mandates a certain form, the intent must be expressed in some way – whether orally, in written form, in electronic form, or perhaps in the notary form. Some means of expressing the intent must be present for the contract to come into existence.[11] Hence, some kind of form always exists;[12]

7 Perović and Stojanović, 1980, pp. 273–274.
8 Đurđević, 2014, p. 28.
9 Therefore, it is emphasised that old formalism (as in Roman law) is the formalism of religion and underdeveloped socio-economic relations, while modern formalism is the formalism of legal certainty (Perović and Stojanović, 1980, p. 274).
10 Dudás *et al.*, 2022, p. 254.
11 See Karanikić Mirić, 2015, p. 1297.
12 Karanikić Mirić, 2015, p. 1297.

thus, it is debatable whether the form should be considered a requirement only when demanded by the legislator or the parties. The principle of informality of the contract shall not be understood in a way that the contract in general does not need a form, but rather that contracting parties are free to decide the form in which they will conclude their contract, unless otherwise required by law.

This study examines the agreed form of contracts and the legal consequences arising from non-compliance with that form. The comparative law method is used, since the solutions adopted in Central and Eastern European (CEE) countries with regard to the agreed form of contracts and the legal consequences of non-compliance with such form are analysed. The author was motivated to address this topic because, while failure to comply with a statutory form requirement invariably results in the nullity of the contract, the legal consequences of disregarding an agreed form vary significantly across legal systems. Against this background, the paper examines and compares the approaches of Poland, the Czech Republic, Slovakia, Hungary, Bulgaria, Romania, Slovenia, Croatia, Serbia, Bosnia and Herzegovina, Montenegro, North Macedonia, and Albania, highlighting both common trends and notable divergences in their treatment of agreed contractual form and its effects.

## 2.
## Types of Form

At the outset, it is essential to begin with the different types of contractual form and to outline them briefly, as this provides the necessary framework for analysing the agreed form in light of the remaining relevant criteria. The form can be categorized based on various criteria, but three classifications of form are legally relevant. Those are the categorisations based on the appearance of the form, its legal significance and its origin.

First, if we take the appearance of the form as the criterion, there are oral, real, written, and electronic forms. The oral form may be defined as the expression of legally relevant intent through spoken words.[13] The real form (*contractus re*) requires the delivery of the object; mutual consent is not enough. It was widely accepted in Roman law,[14] but it is almost extinct in modern law.[15] The written form refers to a

13 However, the terms oral and informal are not synonyms, and oral contracts may not always be informal; for example, *stipulatio*, *dotis dicto*, *iusiurandum liberti* and *praediatura* in Roman law were oral, but strictly formal legal transactions (Karanikić Mirić, 2015, p. 1298).

14 *utuum*, *commodatum*, *depositum* and *pignus* were concluded in real form in Roman law (see Zimmermann, 1995, pp. 153–229).

15 In Serbian law, deposit is an only example of the real contract form in the Law of obligations (art. 79).

signed document. It can take the form of either a simple or qualified written form. A simple written form is a document prepared by the contracting parties themselves, with their signatures under the text being sufficient. Meanwhile, a qualified written form requires signatures under the text as well, but implies some additional requirements – for example, the involvement of a public authority, such as a notary.[16] The electronic form of a contract refers to the expression of the parties' intent through an electronic document.

Second, based on the legal significance, the form can be constitutive (*ad solemnitetem* or *ad validatem*), for evidence purposes (*ad probationem*), or for simple proof. The form is constitutive if the contract is rendered null and void when the required form is not met. In the case of the *ad probationem* form, the contract remains valid even without it. However, having the written form of contract is the only permissible evidence in case of disputes or legal proceedings. Without fulfilling this form, it becomes impossible to prove the existence and content of the contract in court. This type is considered to be contrary to the principle of free evaluation of evidence in some CEE countries, for example, former Yugoslav countries.[17] In line with the principle of free evaluation of evidence, the judge is free to rely on any evidence presented and base their decision on it. Restricting the judge from considering other facts presented, aside from the written form of the contract, goes against this principle. This form represents an expression of distrust towards other means of evidence, especially towards witnesses.[18] Thus, it is said that form *ad probationem* can only be prescribed, not stipulated.[19] If the form is agreed to be a simple proof, the contract will remain valid even if the form is not met, and the existence and content of the contract may be proved otherwise – for example, by hearing the contracting parties

16 See Karanikić Mirić, 2024, pp. 333–334.

17 However, that was not always the case. Before World War II, the Serbian Civil Code stipulated that a claim arising from a contract could not be proven in court if its value was less than 200 dinars. Additionally, after the war, according to the Regulation on the Conclusion of Contracts for the Sale and Purchase of Goods from 23 January 1947, which was repealed in 1953, all contracts involving goods valued at more than 5,000 dinars had to be concluded in written form. Therefore, these provisions significantly weakened the principle of consensualism (Perović 1990, pp. 360–361, fn. 805).

18 Karanikić Mirić, 2024, p. 351.

19 See Karanikić Mirić, 2024, p. 351. Although form *ad probationem* is not prescribed by the Serbian legislator, according to the jurisprudence, examples of this form do exist – for instance, agreement on territorial jurisdiction (prorogation agreement) and arbitration agreement (see Karanikić Mirić. 2015, p. 1303). If a contracting party enters into a dispute before a court or arbitration that, by law, lacks territorial jurisdiction without raising an objection, these kinds of agreements are considered to have been tacitly concluded. Meanwhile, if a contracting party claims that a certain court or arbitration lacks jurisdiction because there is a prorogation or jurisdictional agreement establishing such jurisdiction, they will not be able to prove it without a written form of the agreement.

and witnesses. Simply put, the contract is concluded, and the parties wish to create a document that will serve as proof of their agreement.

Third, according to its origin, the form may be statutory and agreed. The statutory form is required by law for a specific contract, while the agreed form is the shape of the contract the contracting parties have mutually determined for their agreement. In the following discussion, the author focuses on the agreed form, though all these distinctions are equally important, as the agreed form can take different shapes and carry different legal significance.

## 3.
## Agreed Form: Tightening of Statutory Rules

Legal subjects are generally free to conclude a contract in the form that suits them best. The contracting parties determine the form of the contract bearing in mind their interests in each case. This approach acknowledges that every contractual relationship is unique and the parties themselves are the ones best positioned to determine the form that ensures that their objectives, expectations, and risks are appropriately addressed. The strictness of the regulation shall vary according to the specific situation envisioned.[20] Hence, the contracting parties may agree that their contract will be concluded through a certain form, whether the contract is informal or formal according to the applicable law.

While negotiating about the content of the contract, the negotiators may also discuss the form of the contract. When they reach an agreement about the form, such agreement is called an agreement on form. The parties may choose any form from the catalogue of forms already recognised by the legislator, or they can opt for a non-institutional form requirement – for example, linking the conclusion of the contract to a practice that typically does not carry such weight in legal transactions.[21] However, the contracting parties are not allowed to use the agreed form in a way that violates public order; otherwise, the contract would be void. The agreement on form itself is an informal contract that conditions the conclusion of another contract by expressing consent regarding its content in a precisely defined form.[22] Such an agreement is inherently informal, and it can be the subject of a separate agreement or a single clause within the contract.[23] It creates an obligation for the contracting parties to conclude the contract in a certain form.

20 Suzuki-Klasen, 2022, p. 155.
21 Karanikić Mirić, 2024, p. 347.
22 Orlić, 1993, p. 275.
23 Orlić, 1993, pp. 277–278.

Typically, the contracting parties will agree on a specific form for concluding a contract when the law does not prescribe one. In these cases, the form is agreed upon to ensure clarity and protect private interests. If there had been a public interest in prescribing a form, it is assumed that the legislator would have done so.[24] The form acts as a safeguard, confirming that the parties have agreed to the terms in the agreed manner. A contract concluded in written form offers stronger and more reliable evidence of the parties' rights and obligations than a contract concluded orally.[25] Parties may opt to use the form for various reasons to gain certain advantages that a chosen form provides, such as increased evidentiary weight, minimising disputes.[26] They are bound by a contract at the time and in the manner they intend and anticipate.[27]

If the legislator already prescribes a certain form for a specific contract, the contracting parties may agree to conclude the contract in a different form. However, the agreed form must be stricter than the prescribed one.[28] Otherwise, agreeing on a less demanding form than the prescribed one would be contrary to mandatory regulations, and such a contract will be nullified. These are usually cases where the form is prescribed not only in private but also in public interest; thus, the legislator must ensure compliance with the prescribed form. Naturally, if they want to, they may make it more formal with additional requirements.

In both cases, the contracting parties may determine the legal significance of the agreed form. In other words, they may or may condition the validity of the contract on the fulfilment of a form. Hence, the agreed form may be constitutive or merely to ensure proof of the conclusion and content of the contract. In the first case, the contract will be considered concluded when the agreed form is met, and in the second case, the contract will be considered concluded as soon as the agreement is reached. Therefore, failing to observe the agreed form does not automatically render a juridical act invalid. Rather, its meaning and purpose must be assessed.[29]

## 4.
## Contract Law in CEE Countries

Historically, the CEE countries have undergone major social, political, and economic transformation over the centuries. The collapse of communism unravelled

24 Karanikić Mirić, 2024, p. 347.
25 Dudás *et al.*, 2022, p. 254.
26 Suzuki-Klasen, 2022, p. 155.
27 Suzuki-Klasen, 2022, p. 156.
28 A stricter form means that it absorbs the form prescribed by law and is also more demanding (e.g. notarial form is stricter than written form), Karanikić Mirić, 2024, p. 347.
29 Dudás *et al.*, 2022, p. 253.

the connections that had bound nations together, leading to the disintegration of the Soviet Union and Yugoslavia. This process continued with the peaceful "Velvet Divorce" in 1993, which saw the amicable separation of the Czech and Slovak republics.[30] The most significant development has been the region's reintegration with Western Europe.[31] During the 1990s, partnerships with the European Union (EU) grew stronger, eventually leading to the accession of eight former socialist states in 2004, followed by Bulgaria and Romania in 2007, and Croatia in 2013. The remaining countries have either achieved EU candidate status or are considered potential candidates.

These profound social, political, and economic transformations also spurred substantial legislative reforms. The domestic legal systems underwent a process of liberation from socialist influences. The same process unfolded in the law of obligations, leading to amendments to the applicable law, corresponding changes in judicial practice, and updates in the academic treatment of the institutions of obligations law.[32] When it comes to the form of contracts, the long-standing adoption of the principle of consensualism ended in the 16th and 17th centuries, long before the rise of socialism. It became part of the European civil law tradition and the continuation of the legacy of Roman law. Legislators in CEE countries looked upon to the first European codifications and incorporated the principle into national legislations. The principle has withstood all social, political, and economic changes.

Therefore, the applicable law in every CEE country allows the contracting parties to: 1) agree about a particular form for their contract, as long as it is not contrary to the public order, mandatory provisions, and good morals; 2) choose the form freely from the catalogue of forms prescribed by the legislator or agree that a certain practice among them be considered a required form; 3) determine the legal consequences of not following the agreed form, that is, condition the validity of the contract on fulfilling such a form. However, what happens if the parties themselves have not specified the legal significance of the form they have agreed upon – will the contract be valid or not? The answers vary across the CEE countries, depending on the applicable law. The author will analyse the legislature in CEE countries, focusing on the agreed form and the legal consequences of its non-compliance.

30 International Monetary Fund, 2014, p. 2.
31 International Monetary Fund, 2014, p. 2.
32 Cvetković and Arsenijević, 2024, p. 1048.

# 5.
# CEE – Comparative View

## *5.1. Poland*

Contract law is not treated as a separate category in Polish legislation because the Polish Civil Code (*Kodeks cywilny,* hereinafter: KC) is built around the concept of a legal transaction. The Polish legislator was influenced by the 19th-century German idea of legal transactions, with contracts being considered a specific type of legal transaction within this framework.[33] KC underwent significant amendments in 2016 aimed at its modernisation and compliance with European private law. One of the important changes regarding contract form was the reduction of the *ad probationem* form. Such change was believed to lead to a reduction in formalities in legal transactions, with an additional argument for removing this form from the Civil Code being the fact that it is not used in most legal systems.[34] However, the *ad probationem* form still exists in Polish law.

In Poland, the principle of freedom of contract implies that a contract does not need to be in writing or meet any specific formal requirements for its validity.[35] The legislator states that the parties' intent may be expressed through any form or behaviour.[36] Reaching consensus among them is considered to be enough for the valid contract but parties may agree on a certain form as well.[37] When it comes to the agreed form, the Polish legislator prescribes a unique solution. In accordance with the freedom of the form principle, contracting parties may stipulate the form and legal effects if such a form is not fulfilled.[38] Nevertheless, if legal consequences are not explicitly determined, they depend on the shape of the form. Hence, if the parties

33 Romanowski, 2013, p. 67. This is the reason why the legislator uses the term legal act rather than contract itself. Despite the legislator's reasoning and to be more precise, the author uses the term contract in this paper.
34 Kaczorowska, 2009, p. 25.
35 See, for example, the Supreme Court's decision of 28 April 1995, III CZP 166/94; Von Bar et al., 2009, p. 195.
36 Subject to statutory exceptions, the intent of a person performing a legal act may be expressed through any behaviour by that person that sufficiently reveals their intent, including expressing that intent in electronic form (declaration of intent).
37 Kryla-Cudna, 2016, p. 139.
38 See art. 76 KC.

agreed to perform the act in written, documentary,[39] or electronic form without specifying the consequences of failing to observe this form, it is assumed, in case of doubt, that the form was required solely for evidentiary purposes (*ad probationem*).[40] If the written, documentary, or electronic form is agreed upon without specifying the consequences for non-compliance, in litigation, witness testimony or statements from the parties regarding the act's performance are inadmissible as evidence.[41] The contract will be binding for them, but the contracting party who initiates legal proceedings will not be able to prove the existence of the contract nor its content. In the reform in 2016, the documentary and electronic form are prescribed as equivalent to the written form.

There are many exceptions[42] from the *ad probationem* form: a) if the requirement of a written, documentary, or electronic form is specified solely to produce certain legal effects of the act;[43] b) witness evidence or evidence in the form of declarations of the parties is admissible if both parties consent thereto;[44] c) if requested by a consumer in a dispute with an entrepreneur;[45] d) if the fact of the legal act is made probable by means of a document;[46] e) if a written, documentary, or electronic form is required for a declaration by one of the parties, in the event of non-compliance, witness testimony, or statements from the parties on the fact of the transaction's completion are also admissible upon the request of the other party;[47] f) legal transactions in relations between entrepreneurs.[48]

### *5.2. The Czech Republic*

In the Czech Republic, the applicable law on this matter is the Czech Civil Code (*Občanský zákoník*, hereinafter: COZ). It is modelled after German law as well, so the

39 The documentary form, inspired by German law, serves as a flexible option between written and oral forms. It accommodates situations where a full written signature is unnecessary, and a simple "written trace" is sufficient to identify the party's intent. Unlike the textual form, which only applies to text-based declarations, the documentary form also includes audio and audiovisual statements, making it well-suited for modern communication methods such as email and SMS (Kaczorowska, 2009, p. 25).
40 Art. 76 KC. The same holds for the stipulated form, see art. 73 and 74 KC.
41 Art. 74 para 1 KC.
42 These exceptions are prescribed for the statutory *ad probationem* form but may be applied to the agreed form as well.
43 Art. 74 para. 1 KC.
44 Art. 74 para. 2 KC.
45 Art. 74 para. 2 KC.
46 Art. 74 para. 2 KC.
47 Art. 74 para. 3 KC.
48 Art. 74 para. 4 KC.

same applies here regarding terminology and systematisation of legal acts. Thus, although the Czech legislator uses the term juridical act, the author will refer to it as a contract.

Contractual parties can conclude contracts in whatever form they choose, explicitly (e.g. in oral or written form) or in another way that clearly conveys what the party intended, unless specific formalities are required by law or have been mutually agreed upon by the parties.[49] If a contract is not made in the form agreed by the parties or provided by a statute, it is considered void.[50] Nevertheless, lack of the form prescribed by the legislator results in voidness, while non-compliance of the agreed formalities leads to voidability (relative nullity).[51] The courts interpret the written form requirement quite strictly – the complete intent of the parties must be clearly discernible from the written document; it is not enough that the contract's content is only understood by the parties themselves.[52]

There are three mitigations for these sanctions. First, the law allows for the correction of form defects in contracts if addressed by the parties.[53] The parties may correct the defect after the conclusion of the contract, by complying with the required form afterwards (supplementation of form).[54] Second, if any part of the contract lacks the required form, it does not automatically invalidate the entire agreement – only the part in question may be invalidated.[55] Thus, if the contract includes several acts – for example, multiple clauses – the lack of form for one part does not necessarily invalidate the whole contract. Only the part that fails to meet the formal requirements may be affected. Third, if a required form is missing, the contract may be invalid only if performance has not yet started.[56] This rule applies to the cases where a specific form is required under Book Four of the Civil Code as well, which regulates inheritance law and related matters.[57]

49 The written form in Czech law may be the simple form and by official record, while the oral form is not explicitly prescribed. The requirements for the written form are fulfilled if a legal act is completed electronically in a way that allows the act to be recorded and identifies the person executing it (Fiala and Hurdík, 2020, pp. 36, 46). See art. 559 OZ.
50 Fiala and Hurdík, 2020, p. 36.
51 Fiala and Hurdík, 2020, p. 46.
52 See Supreme Court 3 Cdo 227/96 (Von Bar et al., 2009, p. 196).
53 Art. 582 para. 1 COZ.
54 Dudás *et al.*, 2022, p. 259.
55 Art. 582 para. 1 COZ.
56 Art. 582 para. 2 COZ.
57 Art. 582 para. 2 COZ.

### *5.3. Slovakia*

In Slovakia, the applicable law on the matter of the contract is the Slovak Civil Code (*Občiansky zákonník*, hereinafter SOZ). The same approach applies here to the terminology and classification of legal acts, following the model of German law.

According to SOZ, a declaration of intent may be made by action or omission, explicit or expressed in another way that leaves no doubt as to what the party intended to convey.[58] Moreover, the Slovak legislator prescribed that a legal act is invalid if it is not made in the form required by law or agreed upon by the parties.[59] Failure to comply with the statutory form requirement, regardless of its source, results in the invalidity of the contract.[60] However, if the form is agreed upon by the parties, the sanction will not result in voidness, but voidability (relative nullity).[61] Thus, the contract is considered valid unless the person affected by such an act claims its invalidity, but the one who caused the invalidity cannot claim it.[62] This provision prevents a person from challenging the validity if they are the one who caused the defect, for example, by failing to follow the form.

### *5.4. Hungary*

Hungarian Civil Code (*Polgári Törvénykönyv*, hereinafter: Ptk) recognizes the principle of autonomy of the will in Section 6:58, which states that parties are free to establish the content of their contract, subject to the limitations imposed by law. Regarding the form, the principle is further clarified in the latter provisions of the Code.[63] Hungarian law gives the flexibility to the parties in a way how they form legal relationships, ensuring that formalities do not prevent valid agreements from arising when intent is clear. A legal declaration can be made orally, in writing, or through implied conduct.[64] The recognition of implied conduct as a valid form of expressing intent on the one hand allows the legal system to consider real world scenarios where

58 Art. 35 para. 1 SOZ.
59 Art. 40 SOZ. See Fiala and Hudrig, 2017, p. 38.
60 However, if it is a commercial contract and the requirement of a written form is established only for the protection of a certain party, then the contract is voidable, even if this requirement of the form follows from the law, unless it is a contract in areas of corporate law (see Dudás et al., 2022, p. 284).
61 Art. 40a SOZ. See Fiala and Hudrig, 2017, p. 38.
62 Art. 40a SOZ.
63 Unike Polish, Slovak and Czech legislator, Hungarian legislator has consistently avoided adopting the high level of abstraction found in the BGB (Vékas, 2010, p. 95).
64 See art. 6:4 para. 2 Ptk. Nevertheless, it does not prevent legal provisions or parties from requiring a written form for a contract to be valid (Kriston and Sápi, 2019, p. 74).

written or oral declarations are impractical and, on the other hand, restricts the legal recognition of silence or abstention to situations where the parties expressly agree. Hence, the section avoids potential misunderstandings or abuses where one party might wrongly assume consent through silence.[65]

When it comes to the agreed form, the outdated version of Ptk (1959) prescribed that a form specified by the parties' agreement would only be a condition for the validity of the contract if it was expressly agreed upon.[66] However, the legislator let the contracting parties to remedy their contract.[67] Namely, in those cases, the contract became valid if it was performed or at least partially performed ("upon acceptance of the performance or part thereof").[68]

The applicable Ptk states that if the law stipulates certain form or it is agreed upon between the parties, the contract is only valid if it complies with that form.[69] *A contrario*, not following both stipulated or agreed form leads to the invalid contract.[70] The second paragraph of article 6:6 prescribes the principle of parallelism of forms – any amendment, modification, or termination of a contract or legal act must follow the same form as that which was used for the original act. Hence, Hungarian legislator treats the stipulated form and the statutory form in a similar manner in terms of legal consequences. Whether the form is mandated by law or agreed upon, the contract will only be valid if the required form is followed.[71] However, there is an exception for written form. Terms that are not qualified as substantial may form part of the contract even if they are not set out in writing, and the same approach applies to amendments of existing contracts.[72]

Nevertheless, the performance has remained the remedy. In certain cases, fulfilling obligations can remedy formal defects in contracts, especially in long-term business agreements where formal errors shouldn't invalidate a contract that has already served its purpose.[73] According to the article 6:94 Ptk, the acceptance of performance remedies the formal defects. It is not necessary for both parties

65 See art. 6:4 para. 4 Ptk.
66 See Art. 217 para. 2 Ptk (1959), Available at: https://njt.hu/jogszabaly/1959-4-00-00 (Accessed: 17 December 2025).
67 Szitás, Dudás, 2023, p. 187.
68 Art. 217 para. 2 Ptk (1959), Available at: https://njt.hu/jogszabaly/1959-4-00-00 (Accesed: 17 December 2025). See more Von Bar et al., 2009, p. 197.
69 Art. 6:6 para. 1 Ptk.
70 Szitás, Dudás, 2023, p. 188.
71 In the old version of the Hungarian Civil Code (Act IV of 1959), art. 217 para 2 stated that if a contract specified that amendments must be made in a particular form (e.g., in writing), then any modifications not meeting this formality would generally be invalid. This requirement was designed to give legal certainty to the original contract terms and ensure that any changes would only be recognized if they followed the agreed-upon formalities.
72 Dudás *et al.*, 2022, p. 263.
73 Kriston and Sápi, 2019, p. 17.

to fulfil their obligations – it is sufficient for one party to accept the performance, which creates an obligation for the other party.[74] However, a contract lacking formal requirements becomes valid only to the extent it has been performed.[75] There is no possibility to demand the fulfilment of the remaining obligations based on partial performance. As a rule, convalidation of a contract by the will of the parties produces *ex tunc* effects, although the law also permits the parties to agree that the ground of invalidity be eliminated only with *ex nunc* effect.[76] Additionally, it is important to note that performance can only remedy the lack of a simple written form. On the other hand, if the law requires that it be recorded in a public deed or in a private deed with full probative force, or if the contract is aimed at the transfer of ownership of real property, performance does not remedy the nullity resulting from the failure to observe the mandatory formality.[77]

### *5.5. Romania*

The Romanian Civil Code (*Codul Civil,* hereinafter: RCC) came into force in 2011, when it replaced the previous 1864 Civil Code, marking a significant modernisation of Romanian private law by incorporating principles from both civil law traditions and EU law. Romanian law recognises informal, formal, and real (in rem) contracts (presupposing the delivery of the goods, otherwise the contract is not concluded).[78] Article 1169 establishes the principle of contractual freedom, stating that parties are free to conclude any contract and determine its content, within the limits imposed by law, public order, and good morals. Additionally, RCC states that the contract is concluded by the simple agreement of the parties' wills, unless the law requires a specific formality for its valid conclusion.[79]

When it comes to the agreed form, the RCC prescribes that when, during negotiations, one party insists on reaching an agreement on the form, the contract is not concluded until an agreement is reached.[80] This means that the contracting parties cannot conclude the contract until they reach a consensus on the form, even if only one of them insists on a certain form. However, if the parties have agreed that a contract should be concluded in a certain form, which the law does not require,

74 Kriston and Sápi, 2019, p. 17.
75 Kriston and Sápi, 2019, p. 17.
76 Szitás, Dudás, 2023, p. 188.
77 Art. 6:94, para. 1 Ptk.
78 Dudás et al., 2022, pp. 269–270.
79 Art. 1178 RCC.
80 Art. 1185 RCC.

the contract is considered valid even if the form was not respected.[81] On the other hand, if the form is required by law and form is not fulfilled, the contract is subject to absolute nullity and cannot be remedied by performance.[82]

Thus, the Romanian legislator clearly distinguishes between the statuary and stipulated form. The idea is to avoid unnecessary invalidation of contracts over formalistic issues where public interest is not intrigued, as long as the parties' intent is clear and mutual consent is evident. This solution indeed promotes contract validity by ensuring that the absence of an agreed but non-mandatory form does not nullify an agreement, so long as the other required elements of the contract are in the place.

### *5.6. Bulgaria*

The Bulgarian Obligations and Contracts Act (*Закон за задълженията и договорите,* hereinafter: BOCA), dating back to the mid-20th century, regulates the requirements for concluding the contract. BOCA reflects the principle of consensualism in Bulgarian law, where the mere expression of mutual intent is sufficient to form a contract, without a specific form being required unless mandated by law.[83] The legislator lists several grounds for nullity of contracts, emphasising the importance of legal compliance and moral considerations in contract formation. If a contract lacks essential elements, such as consent, subject matter, or the legally prescribed form – it is void.[84]

Although not stated explicitly, in accordance with the principle of consensualism, parties are free to stipulate the form of the informal contracts.[85] However, what happens if such a form is not fulfilled, since the law does not provide the answer? The Bulgarian legal theory is divided on this question. According to one opinion, parties may condition the validity of the contract on the adherence to a form not prescribed by law, just as they can condition the legal effect on, for example, the agreement of a term or condition.[86] According to another view, the fact that the parties have agreed on a form as a condition for validity does not make the contract formal, as the signing by the parties does not carry ceremonial significance but merely represents

81 Art. 1241 para. 2.

82 Art. 1241 para. 1. Not even the voidability is the sanction for non-compliance with the agreed form, see Căzănel, 2021, pp. 50–51. About the impossibility to remedy the nullity through the performance see Szitás, Dudás, 2023, pp. 192–194.

83 The exception is prescribed by art. 18 BOCA, stating that contracts for the transfer of ownership or the establishment of other real rights on immovable property must be concluded by a notarial deed.

84 Art. 26 para. 2 BOCA.

85 The Bulgarian law also recognises *ad probationem* form if content of a transaction values over BGN 5,000. See art. 164 of the Bulgarian Civil Procedure Code (Von Bar et al., 2009, p. 196).

86 Коев [Koev], 2014, p. 111.

the final consent of the party who signed it.[87] Arguments from Bulgarian law – that is, art. 26 para. 2 of the BOCA – state that the reason for nullity can only be the absence of a form prescribed by law, thus only a statutory norm, not a norm stipulated by private individuals.[88] However, both viewpoints agree that if the agreed form is not adhered to, the contract does not produce legal effects. According to the first viewpoint, this is explained by the fact that the parties conditioned the legal effect on the agreed form. Per the second viewpoint, the failure to comply with the agreed form results in the legal act not producing legal consequences, but not because the form was not fulfilled, but because a previously assumed obligation was not fulfilled.[89] Hence, if the parties have explicitly agreed that their contract must be concluded in a specific form, then that form becomes a binding condition for the validity of the contract.

### *5.7. Serbia, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, and North Macedonia*

The countries mentioned in the title are grouped together because they share their law of obligations. The Socialist Federal Republic of Yugoslavia (SFRY), a one-party communist state formed after World War II, existed from 1963 to 1992. This federation included what are now the countries of Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, and North Macedonia. The obligations law in this state was predominantly regulated by a federal *Law on Obligations* (*Zakon o obligacionim odnosima*, hereinafter: ZOO[90]) that came into force in 1978. After a decade of preparation, ZOO was remarkably forward-thinking for its era, notable for three main reasons: its central role within the Yugoslav legal framework, its innovative provisions, and its limited reliance on the socialist legal tradition.[91] The draft for ZOO (*Skica za Zakonik o obligacijama i ugovorima*) was written by Mihailo Konstantinović, a professor at the University of Belgrade. Although the legislator adopted most of the text, certain provisions were modified, removed, or added. With the collapse of socialism, the Law on Obligations underwent changes only in terms of its fundamental principles and concepts. The Federal Law on Obligations continued to function as a republican law in all the former republics of the SFRY, and its relevance has not been questioned.[92]

87 Ibid., p. 111.
88 Ibid., 2014, p. 112.
89 Ibid., 2014, pp. 122–113.
90 It is called *Zakon o obligacionim odnosima* in Serbia, Bosnia and Herzegovina, and Montenegro. In Slovenia, the official name is *Obligacijski zakonik*, while the law is named *Zakon o obveznim odnosima* in Croatia and *Zakon za obligacionite odnosi* in North Macedonia.
91 See Tot, 2024.
92 Cvetković and Arsenijević, 2024, pp. 1049–1050.

The legislator prescribes the possibility for the parties to stipulate the contract form.[93] There are two options for them: to agree that such a form will be the condition for the validity of the contract or to stipulate such a form only as a simple proof of the concluded contract. In the first case, the contract will be void, but in the second case, the contract will be valid, and the contract parties will have the contractual obligation to fulfil the stipulated form. The *ad probationem* form cannot be stipulated, since it is not recognised by the applicable law.[94] ZOO prescribes that a contract not concluded in the agreed form has no legal effect if the parties have conditioned the validity of the contract on a special form.[95]

What is the case when parties do not precise the reasoning and the purpose behind the agreed form? According to the majority of jurisprudence,[96] in case of doubt, it is assumed that the agreed form is constitutive, under the threat of absolute nullity. This position is in line with art. 70 para. 2 of the ZOO. Since the contracting parties are renouncing the principle of informality, it should be assumed that they have a deeper reason for wanting to conclude their contract in a specific form, rather than merely ensuring proof – this assumption is more plausible and better reflects the actual intentions of the parties.[97] However, there are different opinions as well. The reasoning behind this approach by a minority of jurisprudence lies in logical deduction based on the relationship between the rule and exception. Specifically, the informality of contracts is a general principle, while *forma ad solemnitatem* is an exception that should be interpreted narrowly. Since this deviates from the principle of informality, the exception should be accepted only when the contracting parties have unequivocally expressed their mutual intent.[98] Serbian courts adhere to the first standpoint, favouring the presumption of the *ad solemnitatem* form.[99]

However, nullity cannot be invoked if the contracting parties have fulfilled their obligations, either in full or in substantial part.[100] Since the agreed form is always established in private interest, the legislator provides for the possibility of validation through performance.

93 See art. 69 in the Serbian and Bosnian ZOO, art. 54 in Slovenian ZOO, art. 289 in Croatian ZOO, art. 63 in Montenegrin ZOO, and art. 61 in Macedonian ZOO.

94 See Karanikić Mirić, 2015, p. 1303.

95 Art. 70 para 2 in the Serbian and Bosnian ZOO, art. 55 para 2 in Slovenian ZOO, art. 290 para 2 in Croatian ZOO, art. 64 para 2 in Montenegrin ZOO, and art. 62 para 2 in Macedonian ZOO.

96 Karanikić Mirić, 2024, p. 349; Orlić 1993, p. 284–286; Perović, 1990, p. 364.

97 See Orlić, 1993, p. 285, fn. 598.

98 See Orlić, 1993, p. 285, fn. 597.

99 The decision of the Supreme Court of Serbia, Gž. 3413/56, dated 1 January 1957 (Orlić, 1993, p. 285). See also Decision of the District Court in Valjevo, Gž. No. 1421/05 of 21 October 2005 [Online]. Available at: https://pn2.propisi.net/?di=sp16983&dt=sp&dl=16983 (Accessed: 13 December 2025).

100 Art. 73 in Serbian and Bosnian ZOO, art. 58 in Slovenian ZOO, art. 294 in Croatian ZOO, art. 68 in Montenegrin ZOO, and art. 65 in Macedonian ZOO.

### *5.8. Albania*

The Civil Code of the Republic of Albania (*Kodi Civil i Republikës së Shqipërisë*, hereinafter: CCA) prescribes the freedom of the form, stating that the legal transaction may be made by any undoubtful expression of will.[101]

Nonetheless, different legal effects for non-compliance with the statutory and the agreed forms are provided. CCA states that the contract not concluded in the form expressly required by the law is void, while in other cases, the legal transaction is valid, but cannot be proved by witnesses.[102] Accordingly, the legislator restricts the contracting parties in terms of proving the existence and content of the contract. Therefore, the agreed form is the *ad probationem* form in Albanian law, while the legislator distinguishes between non-compliance with a form prescribed by law and a form agreed upon by the parties.

## 6.
## Concluding Remarks

The form of a contract is defined as the external shape of the contract – the materialisation of the parties' intent. Since their will must be expressed, every contract must have a certain form. Therefore, it is incorrect to say that the form is an element of the contract only when required by law or explicitly agreed upon by the parties. The form can be classified based on several criteria. According to the criterion of how it is expressed, the form can be oral, real, written, or electronic. The Polish legislator also includes the documentary form in this category. Based on its legal effect, the form can be *ad solemnitatem*, *ad probationem*, or a simple proof form. Finally, based on its origin, we distinguish between statutory and agreed forms.

CEE countries have experienced profound social, political, and economic changes, particularly after the fall of communism. These transformations prompted significant legislative reforms, including in contract law, where the enduring principle of consensualism was preserved despite the shifts in societal structures. Today, legal systems in CEE countries permit contracting parties to agree on specific forms for their contracts, with certain exceptions where public interest is intrigued. Despite the principle of informality, the legislators allow contracting parties to conclude a contract in a certain form – the agreed form. Parties may opt for the form for various reasons pertaining to their private interest, but primarily to facilitate proving the existence and content of their contract in the event of a dispute. Thus, parties may

101 Art. 80 CCA.
102 Art. 83 para. 2 CCA.

conclude a contract in a specific form if the legislator does not mandate a particular form for their contract or impose a stricter form than that mandated by law. However, it is important to emphasise that they cannot agree on a less stringent form than that required by the legislator. Since the provisions on legal form are mandatory, a contract that loosens the required form would be void. Contracting parties may decide on the consequences of non-compliance, except for legal systems that do not recognise the *ad probationem* form. Furthermore, parties may even integrate established practices as contractual requirements, with the legal implications of such agreements varying across jurisdictions.

Regarding the non-compliance with the form parties themselves have agreed to, CEE countries can be divided into four categories. The first group of countries treats non-compliance with the agreed form the same as non-compliance with the statutory form, prescribing nullity as the sanction for both. In this category, the author includes Hungary, Serbia, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, North Macedonia, and Bulgaria. Nevertheless, the legislator in the mentioned countries tended to mitigate such strict sanction, ensuring the possibility of validation of contract through its performance. The second group encompasses countries where not fulfilling the agreed form results in voidability (relative nullity), while not meeting the statutory form requirements leads to voidness (absolute nullity) of the contract. The Czech Republic and the Slovak Republic are representatives of this group. The Czech and Slovak legislators believe that non-compliance with the agreed form does not justify the same treatment as non-compliance with the statutory form, prescribing a stricter sanction for the latter. CEE countries in the third group recognise the *ad probationem* form and link this form to the consequences of not fulfilling the agreed form. Poland and Albania belong to this group. Finally, the only representant of the fourth group is Romania, where a contract cannot be concluded unless parties agree on the form they (or one of them) want to impose, but the contract is considered valid even if the agreed form is not fulfilled.

While it is understandable and indeed justified that modern legislatures seek to mitigate the legal consequences of non-compliance with agreed form in comparison to the much stricter consequences attached to the breach of a statutory form requirement, such mitigation should not amount to a complete disregard of the parties' agreement on form. In contrast to Romania, other legal systems adopt a more nuanced and balanced approach by preserving the binding force of the agreed form while softening its effects through mechanisms such as convalidation, the qualification of invalidity as relative rather than absolute, or by limiting the role of form to evidentiary purposes. These solutions better reflect the principle of party autonomy and the contractual significance of an agreed form, without equating it to the mandatory form prescribed by law. Although at first glance, these solutions appear divergent, they ultimately pursue the same underlying objective: to uphold the

contract and give effect to the parties' true intent, while still distinguishing between statutory form, which protects public interests and legal certainty, and agreed form, which primarily reflects party autonomy.

Jurisprudence is divided on the legal effect of a contract when its form is agreed upon by the parties, but the legal consequences of that form are not explicitly defined. This question arises in the first group of countries, where the sanction for not meeting the requirements is voidness. Can it be assumed that the contracting parties intended to condition the validity of the contract on a specific form, or did they merely wish to ensure evidence of the contract's existence to prove its existence and content in a simple way? The legislators do not answer this question, entrusting it to legal theory. Only Hungarian law before the reform explicitly expressed an opinion on the matter. There are two perspectives on this issue. Most of the jurisprudence assumes that the agreed form is constitutive and subject to absolute nullity in case of non-compliance, reflecting a deeper intent beyond mere proof. By contrast, the minority view argues that the *ad solemnitatem* form should be narrowly interpreted as an exception to the general principle of informality, applicable only when the parties have clearly expressed such an intent.

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# Admissibility and Tasks of the Advisory Board in Family Businesses Under Austrian Law

**ABSTRACT:** *The establishment of an advisory board is becoming increasingly popular in Austrian family businesses. Austrian company law, however, provides neither an explicit legal basis for the establishment of an advisory board nor a definition of what constitutes an advisory board. The permissibility of establishing additional bodies is a function of private autonomy and freedom of organisation in the articles of association. An advisory board constituted under the law of obligations can be distinguished from an advisory board as an optional body of the company. Rights and obligations differ depending on the basis on which the advisory board is established. Furthermore, depending on the tasks assigned, advisory boards close to the shareholders can be distinguished from those that are close to the directors and those that are close to the supervisory board. Certain tasks that can be assigned to an advisory board are particularly important in family businesses. Involving the advisory board in the company succession process at an early stage is essential, as the advisory board can support this emotional decision with its advice. In family businesses, disputes between shareholders can quickly escalate as they lead to emotional family disputes. To prevent such an escalation, an advisory board can serve as a moderator and mediator. However, it should be noted that not all tasks may be transferred to an advisory board. Depending on the type of company, some tasks are mandatory responsibilities of the respective body. In some cases, the composition of the advisory board is also decisive. This article discusses which tasks may be delegated to an advisory board in a GmbH (Gesellschaft mit beschränkter Haftung – private limited company) or in a partnership.*

**KEYWORDS:** *Advisory Board; Family Business; Optional Body; Mandatory Responsibilities.*

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## 1.
## Introduction

Although Austrian companies frequently use the advisory board model, Austrian company law provides neither an explicit legal basis for the establishment of an advisory board nor a definition of what constitutes an advisory board.[1] However, it does not explicitly prohibit the establishment of additional bodies in the company. The permissibility of establishing additional bodies is a function of private autonomy and freedom of organisation in the articles of association. In addition to the mandatory bodies (general meeting, directors and possibly a supervisory board), optional bodies, such as an advisory board, can also be established.[2]

Advisory boards are particularly popular in family businesses. Various tasks can be assigned to an advisory board, including advising and monitoring the management, approving certain transactions, and settling disputes between shareholders. Shareholder conflicts can escalate quickly, especially in family businesses, as emotional family conflicts can spill over into the company. In this case, an advisory board composed of non-family members can be used to mediate between conflicting parties.

However, it should be noted that not all tasks may be transferred to an advisory board. This article discusses which tasks may be delegated to an advisory board in a GmbH (*Gesellschaft mit beschränkter Haftung*: private limited company) or in a partnership.

## 2.
## Practical Importance of the Advisory Board

The practical importance of an advisory board in family businesses is illustrated by a 2024 study from Germany, which shows that almost 80% of family businesses have an advisory board (or a supervisory board).[3] In contrast, according to a 2019 study, around 18.5% of medium-sized companies in Austria have an advisory board.[4] The Austrian Code of Conduct for Family Businesses (*Österreichischer Kodex für*

1 Kalss, 2025, § 43 ref.n. 1-2; Kalss and Probst, 2025, ref.n. 14/151; Auer, 2024, pp. 275–276; Frotz, 2022, att. §§ 29-33, ref.n. 1-2; for the legal situation in Germany see Bayer, 2011, p. 76.

2 See Kalss, 2025, § 43 n. 1; Kalss and Probst, 2025, ref.n. 14/151; Frotz, 2022, att. §§29-33 n. 1-2; see also Auer, 2024, p. 276. http://doi.org/10.62733/2025.2.5-15

3 PwC Deutschland, 2024.

4 FH Wien der WKW, 2019.

*Familienunternehmen*)[5] from 2022 explicitly contemplates the possibility of and recommends establishing an advisory board for family businesses.

## 3. Legal Basis for the Advisory Board Under Austrian Company Law

The admissibility of establishing an advisory board for a GmbH follows from Section 20 (2) of the GmbHG (*GmbH-Gesetz*: GmbH-Act), which mentions 'further bodies' in addition to the director, the supervisory board, and the general meeting. It provides no further explanation.[6] Section 20 (2) of the GmbHG, therefore, expressly contemplates the existence of optional bodies in the GmbH.[7] While the admissibility of optional bodies, such as an advisory board, is not mentioned in other company forms, private autonomy and freedom of organisation in the articles of association provide the basis for the establishment of such bodies.[8]

An advisory board can be established in two ways: pursuant to the aforementioned 'further bodies' provision or under the law of obligations. For an advisory board to be established by the shareholders as a body, it must be stipulated in the articles of association.[9] It is also possible to establish an advisory board at a later date by amending the articles of association. However, the advisory board, which was established at the level of the articles of association, only has a corporate body function if it has been assigned sufficient monitoring and participation rights and has a certain degree of organisation.[10] The advisory board must also be assigned an explicit and comprehensible area of competence in the articles of association.[11]

If an advisory board is established without any basis in the articles of association, it is an advisory board under the law of obligations that has no rights or obligations as a corporate body.[12] Generally, depending on the tasks involved, these have an expert advisory function or serve as information-collection centres. An advisory board established under the law of obligations can be assigned various tasks despite not

5 Österreichischer Kodex für Familienunternehmen, 2022, p. 13.
6 Auer, 2024, pp. 276-277.
7 Kalss, 2025, § 43 ref.n. 27; Frotz, 2022, att. §§29-33 n. 2.
8 Nowotny, 2008, p. 700.
9 Kalss, 2025, § 43 ref.n. 14; Kastner, 1983, p. 99; Nowotny, 2008, p. 700; Reich-Rohrwig, 1981, p. 510; on the German legal position Priester, 2014, p. 524; Wiedemann and Kögel, 2020, p. 59.
10 Kalss, 2025, § 43 ref.n. 16; OGH 08.05.2013, 6 Ob 42/13i regarding the advisory board of the private foundation.
11 OGH 04.05.2004, 4 Ob 14/04v.
12 Reich-Rohrwig, 1981, p. 510; Frotz, 2022, att. §§29-33 ref.n. 57; Bayer and Hommelhoff, 2023, § 52 ref.n. 171.

having the status of a corporate body. These include advising the directors and shareholders, acting as a mediation instrument in shareholder disputes, or participating in company succession processes.[13] The regulations of the advisory board under the law of obligations apply equally to GmbHs and partnerships.[14] Breaches of the advisory board under the law of obligations, therefore, only trigger consequences under the law of obligations regarding the contractual partner.[15]

## 4.
## Advisory Board Close to the Shareholders, the Directors, and the Supervisory Board

In addition to being categorised according to whether it was established based on articles of association or under the law of obligations, advisory boards can also be subdivided according to whether they are close to the shareholders, the directors, or the supervisory board. This classification follows the simple connection to each body. While the first type of subdivision is based on the form of organisation, the decisive distinguishing feature between advisory boards that are close to the shareholders, those that are close to the directors, and those that are close to the supervisory board is task assignment. The advisory board can be categorised according to the advisory board's task portfolio;[16] however, mixed forms are common.[17]

### *4.1. Advisory Board in the GmbH*

#### *4.1.1. Advisory board close to the shareholders*

An advisory board close to the shareholders is an optional body to which functions are transferred that are exercised by the shareholders without a dispositive structure.[18] The advisory board is granted a right of approval regarding certain

13 Frotz, 2022, att. §§29-33 ref.n. 3, 57; Wiedemann and Kögel, 2020, pp. 38–40, 100-101.
14 Compare Kalss, 2025, § 43, ref.n. 30, 65.
15 Frotz, 2022, att. §§29-33, ref.n. 58; Bayer, 2011, pp. 78–79.
16 Kalss, 2025, § 43, ref.n. 3; Frotz, 2022, att. §§29–33, ref.n. 5; see also Heidinger, 1989, pp. 380–401; Fritz, 2005, p. 164.
17 Frotz, 2022, att. §§29-33, ref.n. 5.
18 Frotz, 2022, att. §§29-33, ref.n. 14; Heidinger, 1989, p. 398; Kalss, 2025, § 43, ref.n. 44-45.

shareholder decisions but can also be assigned tasks that are generally fulfilled by the shareholders.[19]

The permissibility of transferring tasks that are reserved for the shareholders without a special arrangement in the articles of association has a basis in Section 35 (2) sentence 1 of the GmbHG. It provides that the catalogue of competences of the general meeting can be both expanded and restricted by amending the articles of association.[20]

However, restrictions on admissibility must be observed, which means that not all tasks and competences may be transferred to an advisory board. In addition to the general limitation of admissibility of immorality (Section 879 ABGB; *Allgemeines bürgerliches Gesetzbuch* – Austrian Civil Code),[21] Section 4 (2) of the GmbHG must also be considered. Section 4 (2) of the GmbHG clarifies that agreements may not deviate from the mandatory provisions of the GmbHG.[22] No mandatory responsibilities of the general meeting may be transferred to another body by amending the articles of association.[23] These are a few core competences. Generally, in the case of mandatory responsibilities, no approval rights may be established in favour of the advisory board. If the advisory board had a right of approval, the shareholders would be bound to the involvement of the advisory board even in the case of mandatory shareholder responsibilities, which would restrict the shareholders' freedom of choice. Thus, the exclusive shareholder responsibility would be nullified.[24] Regarding the mandatory responsibilities of the general meeting, however, the advisory board may be used as a purely advisory body or to prepare the decision by the shareholders.[25] In the case of mere consultations or preparatory acts by the advisory board, the sole decision-making right of the shareholders is not affected, meaning that the decision-making power remains with the shareholders.[26]

19 Auer, 2024, p. 282; Koppensteiner and Rüffler, 2007, § 35, ref.n. 46, 48; Schneiderbauer and Krebs, 2018, pp. 286-287; see also Baumgartner, Mollnhuber and Torggler, 2014, § 35, ref.n. 38; Aburumieh, Arlt and Gruber, 2024, § 35, ref.n. 10, 16.

20 Krebs, 2022, p. 44; Harrer, 2018, § 35, ref.n. 78-85; Koppensteiner and Rüffler, 2007, § 35, ref.n. 47-49; Enzinger, 2021, § 35, ref.n. 112-116; Auer, 2024, p. 282.

21 Koppensteiner and Rüffler, 2007, § 4, ref.n. 2; Schmidsberger/Duursma, 2018, § 4, ref.n. 2.

22 Koppensteiner and Rüffler, 2007, § 4, ref.n. 2; Krebs, 2022, p. 45.

23 Heidinger, 1989, pp. 398-401; Koppensteiner and Rüffler, 2007, § 35, ref.n. 45; Schneiderbauer and Krebs, 2018, pp. 285–286.

24 Krebs, 2022, pp. 113–115; for the permissibility of establishing a right of approval in favour of the advisory board in the case of exclusive shareholder responsibilities, see Koppensteiner and Rüffler, 2007, § 35, ref.n. 46; Aburumieh, Arlt and Gruber, 2024, § 35, ref.n. 10; Schneiderbauer and Krebs, 2018, p. 287; Auer, 2024, p. 282.

25 Heidinger, 1989, p. 398; Schneiderbauer and Krebs, 2018, p. 285; Krebs, 2022, p. 45.

26 Kalss, 2025, § 43, ref.n. 9; Reich-Rohrwig, 1996, ref.n. 4/504; Krebs, 2022, p. 45; Hölters, 1979, p. 11.

#### 4.1.1.1. Mandatory Shareholder Responsibilities

##### 4.1.1.1.1. General Meeting as the Supreme Body

The general meeting is the supreme body of the GmbH.[27] The authority over competence (*Kompetenzkompetenz*) is the expression of the general meeting as the supreme body of the GmbH. The general meeting decides which body performs which tasks and whether optional bodies are established or abolished. The authority over competence means that the general meeting can decide on the establishment of bodies and on the transfer of dispositive tasks to other bodies. In any case, the position of the general meeting as the supreme body must not be undermined by the establishment of an advisory board.[28] The authority over competence, therefore, remains with the general meeting. The general meeting can abolish the advisory board or withdraw the delegated tasks at any time due to its authority over competence.[29]

##### 4.1.1.1.2. Amendment to the Articles of Association

According to Section 49 of the GmbHG, the articles of association may only be amended by the shareholders themselves. This is because parties outside the company do not pursue the same interests as the shareholders themselves, which means that the principle of autonomy of the association stipulates that key decisions affecting the company, for example, amendments to the articles of association or dissolution of the company, may only be made by the shareholders.[30] The exclusive competence may also not be restricted by the agreement of an additional approval by an advisory board. This would grant the advisory board an unauthorised veto over the general meeting when amending the articles of association.[31]

##### 4.1.1.1.3. Appointment and Dismissal of Directors

The appointment and dismissal of directors as a mandatory responsibility of the general meeting is not regulated in Section 35 of the GmbHG. Nevertheless,

27 Koppensteiner and Rüffler, 2007, § 35, ref.n. 2; Aburumieh, Arlt and Gruber, 2024, § 35, ref.n. 1.
28 Frotz, 2022, att. §§29-33, ref.n. 15; Heidinger, 1989, p. 398.
29 Frotz, 2022, att. §§29-33, ref.n. 15; Lange, 2006, p. 899.
30 Hüffer and Schäfer, 2020, § 45, ref.n. 14; Krebs, 2022, p. 48.
31 Koppensteiner and Rüffler, 2007, § 35, ref.n. 46; Nowotny, 2017, ref.n. 4/514; Krebs, 2022, p. 48.

the prevailing opinion assumes that the appointment and dismissal of directors are mandatory responsibilities of the general meeting.[32]

Koppensteiner/Rüffler[33] and Arnold/Pampel[34] argue that there is no mandatory shareholder competence in the appointment and dismissal of directors, as the admissibility of the power of appointment (*Entsendungsrecht*) would contradict this and Section 15 (1) sentence 3 of the GmbHG does not contain any requirement for a shareholder resolution. Rather, the lack of mention of the appointment and dismissal of directors in Section 35 (2) of the GmbHG indicates a dispositive competence. Furthermore, the shareholders retain the authority over competence (*Kompetenzkompetenz*), which means that they can reassign the appointment and dismissal of directors at any time, and thus the sovereignty of the association (*Verbandssouveränität*) is not violated.[35] This opinion also holds that a transfer of responsibility to another body must be permissible, as shareholder powers of appointment are also recognised. Because of the permissibility of powers of appointment, mandatory responsibility cannot accrue to the general meeting.[36]

An initial counter to this minority opinion is to note that Section 35 (2) of the GmbHG does not provide an exhaustive list of the mandatory responsibilities of the general meeting.[37] In its decision 6 Ob 183/18g, the Austrian Supreme Court (OGH) invalidated the other arguments put forward by Koppensteiner/Rüffler and Arnold/Pampel regarding the permissibility of transferring the appointment and dismissal of directors to another body. On the one hand, the authority over competence (*Kompetenzkompetenz*) of the general meeting is not a sufficient means of ensuring the influence of the shareholders on the appointment of directors because of the legal and temporal requirements. Although the general meeting, as the supreme decision-making body of the GmbH, retains the authority over competence (*Kompetenzkompetenz*), a three-quarters majority of the validly cast votes is required to amend the articles of association in accordance with Section 50 (1) of the GmbHG. Because of these increased requirements, a withdrawal of the transfer of the right to appoint the directors is uncertain. Moreover, the right of the advisory board to appoint the directors cannot be equated with a power of appointment granted to a specific shareholder, as a shareholder with special rights is at least part of the 'shareholder community'.

32 Heidinger, 1989, p. 399; Nowotny, 2017, ref.n. 4/149; Reich-Rohrwig, 1983, p. 514; Reich-Rohrwig, 1996, ref.n. 4/516; Kalss and Eckert, 2004, p. 99; Zib, 2014, § 15 ref.n. 12; Ratka et al, 2020, § 15, ref.n. 40; Krebs, 2022, pp 71-74; Auer, 2024, p. 283; Harrer, 2024, p. 121.
33 Koppensteiner and Rüffler, 2007, § 15, ref.n. 14.
34 Arnold and Pampel, 2018, § 15 Rz, ref.n. 61.
35 Koppensteiner and Rüffler, 2007, § 15, ref.n. 14; Arnold and Pampel, 2018, § 15 Rz ref.n. 61; see also Enzinger, 2020, p. 871.
36 Ibid.
37 Baumgartner, Mollnhuber and Torggler, 2014, § 35,ref.n. 1.

Furthermore, in the opinion of the Austrian Supreme Court, a historical interpretation shows that the intention of the historical legislator explicitly provided for the appointment and dismissal of directors as a mandatory shareholder competence. The draft law for the GmbHG provided for the appointment of directors to be a mandatory competence of the shareholders in Section 35 (2) of the GmbHG, but this was removed before the law was submitted to the Imperial Council (*Reichsrat*), as the historical legislator assumed that this mandatory task would result anyway from Section 15 (1) of the GmbHG. Regulating the appointment and dismissal of directors as a mandatory shareholder responsibility is intended to strengthen the general meeting as the supreme decision-making body of the GmbH.[38] The fact that the shareholders can intervene in the operational business of the GmbH by appointing the directors distinguishes the GmbH from the *Aktiengesellschaft* (stock company).

Appointment and dismissal must be assigned to the same body, as dismissal is the *contrarius actus* to appointment.[39] A different distribution of appointment and dismissal powers leads to practical difficulties. For example, the body authorised to dismiss the director can dismiss a director it does not like at any time, while the body authorised to appoint, without having reached an agreement with the dismissing body in advance, does not know whether and for how long the appointed director will hold this position.

Thus, an advisory board is not allowed to appoint or dismiss the directors.

The mechanism of a binding right of nomination is similar to a right of appointment, but it is also different in some respects. While the appointment of directors is made directly by the advisory board when the appointment authority is transferred, the appointment authority remains with the shareholders when a binding nomination right is introduced in favour of the advisory board.[40] However, the shareholders' freedom of choice is restricted, as they may only deviate from the proposed candidate for an important reason. According to prevailing opinion,[41] a binding nomination right cannot be transferred to another body, as the mechanism is similar to the transfer of appointment authority. A binding nomination right restricts the shareholders' freedom of choice with regard to the candidate.[42]

In contrast to a right of nomination, which binds the general meeting to a proposal, a non-binding right of proposal or right of recommendation has no binding effect on the general meeting. The freedom of choice of the general meeting is, therefore, not impaired, which means that the position of the general meeting as the supreme body

38 Krebs, 2022, p. 74.
39 Harrer, 2024, p. 122; Kalss, 2025, § 43, ref.n. 35.
40 Harrer, 2024, pp. 121-122, 124; Krebs, 2022, p. 76; Rüffler, 2021, pp. 228–231.
41 Heidinger, 1989, p. 399; Ratka et al, 2020, § 15, ref.n. 40-41; Krebs, 2022, pp. 76–77.
42 In general OGH 21.03.2019, 6 Ob 183/18g.

is not affected.[43] A non-binding right of proposal can be transferred to the advisory board.[44] This enables the advisory board in a family business to participate in the appointment of the director by recommending the most suitable external director or the most suitable director from among the family members.[45]

Contrary to case law and prevailing opinion in Austria, it is undisputed under German law that personnel competence can be transferred to a different body than the general meeting.[46]

#### 4.1.1.1.4. Squeeze-Out of Shareholders

For the GmbH, the squeeze-out of shareholders is explicitly and exclusively regulated in the GesAusG (*Gesellschafter-Ausschlussgesetz* – Squeeze-out Act).[47] According to the GesAusG, a minority shareholder can be excluded at the request of the main shareholder, which entails the transfer of shares to the main shareholder, provided that a simple majority of the votes cast at the general meeting exists in accordance with Section 4 (1) of the GesAusG and the main shareholder agrees. The main shareholder is the individual or legal entity that owns at least 90% of the shares. Although the main shareholder will have the necessary majority for the squeeze-out resolution, the mandatory resolution requirement promotes shareholder information, legal clarity, and legal protection because of the possibility of contesting the resolution.[48] The mandatory participation of the shareholders in the decision is, therefore, a shareholder protection instrument.[49] Thus, a general meeting resolution is mandatory, and the transfer of responsibility to another body is also prohibited.[50]

According to Section 4 (1) of the GesAusG, the articles of association may provide for a larger majority or further requirements. Permissible further requirements are, in any case, rights of approval or attendance rights of certain shareholders.[51] The possibility of agreeing on a higher consensus quorum and further requirements for the admissibility of the squeeze-out in accordance with the GesAusG results from the protective purpose of the provision. Minority shareholders are to be adequately

43 Krebs, 2022, p. 77.
44 Heidinger, 1989, p. 399; Kalss, 2025, § 43, ref.n. 35; Krebs, 2022, p. 77.
45 See also on the personnel competence of the advisory board in the family business under German law Kormann, 2008, pp. 365–371.
46 Mehringer and von Thunen, 2021, p. 121, Wiedemann and Kögel, 2020, pp. 86–87; Kormann, 2008, pp. 365-371; Koeberle-Schmid, Groß and Lehmann-Tolkmitt, 2011, pp. 901-902.
47 Kalss and Probst, 2025, ref.n. 18/131; Artmann and Rüffler, 2024, p. 495.
48 Kalss, 2021, § 4 ref.n. 3, 10; Krebs, 2022, p. 62.
49 Kalss, 2021, § 4 ref.n. 3; see also Krebs, 2022, p. 62.
50 Krebs, 2022, p. 62.
51 Kalss, 2021, § 4 ref.n. 20.

protected by further agreements.[52] In principle, no rights of approval may be agreed in favour of the advisory board in the case of mandatory responsibilities of the general meeting, as this would otherwise interfere with the sole decision-making authority of the general meeting. In the case of a shareholder squeeze-out, however, minority shareholders should be protected. Minority protection is strengthened by the right of approval of an additional body without unduly interfering with the sole decision-making authorisation of the shareholders.[53] According to Section 1 (4) of the GesAusG, the squeeze-out of shareholders can also be excluded by a regulation in the articles of association,[54] whereby the right of approval of an advisory board does not disproportionately interfere with the rights of the majority shareholder.[55] An advisory board can, therefore, be granted a right of approval for the squeeze-out of shareholders under the GesAusG if there is an agreement in the articles of association.

#### 4.1.1.1.5. Mandatory Responsibilities of the General Meeting According to Section 35 of the GmbHG

Those tasks of the general meeting that are regulated in Section 35 (1) in conjunction with (2) of the GmbHG may not be transferred to an advisory board, as these responsibilities are explicitly mandatory competences of the general meeting.[56] These include the adoption of the annual financial statements, a possible profit appropriation resolution, the discharge of the directors and the supervisory board members, the repayment of additional payments, the assertion of compensation claims to which the company is entitled against the directors and the supervisory board members, and the appointment of a legal representative if the company cannot be represented by either the directors or the supervisory board. Furthermore, a resolution of the shareholders must be obtained in the first two years after registration of the company, if the contract concerns agreements by which the company is to acquire existing or to-be-constructed assets or immovable property permanently intended for its business operations for an amount corresponding to more than 20% of the share capital.

52 Ibid.
53 Krebs, 2022, p. 117.
54 Kalss, 2021, § 1 ref.n. 38.
55 Krebs, 2022, p. 117.
56 Enzinger, 2021, § 35, ref.n. 109; Reich-Rohrwig, Kuhn and Rubin-Kuhn, 2021, ref.n. 1.172; Heidinger, 1989, pp. 399–400.

#### 4.1.1.2. Dispositive Shareholder Responsibilities

##### 4.1.1.2.1. Section 35 (2) of the GmbHG E Contrario

The other responsibilities regulated in Section 35 (1) of the GmbHG are dispositive. Those shareholder responsibilities are transferable.[57] These include demanding payments on the initial capital contributions, deciding on the admissibility of granting registered commercial power of attorney and power of attorney, and measures for auditing and monitoring the directors.

In addition to these dispositive responsibilities, which arise *e contrario* from Section 35 (1) in conjunction with (2) of the GmbHG, the advisory board can be assigned other tasks that are generally fulfilled by the shareholders. These include the right to issue instructions to the directors and to approve the transfer of shares.

##### 4.1.1.2.2. Right to Issue Instructions to the Directors

By law, the shareholders have the right to issue instructions to the directors in accordance with Section 20 (1) of the GmbHG. This right to issue instructions enables the shareholders to take the initiative and intervene directly in the management of the company.[58] This ability to act on their own initiative distinguishes the right to issue instructions from a mere right of approval.[59] The instructions are binding and must be followed by the directors, as long as they are not illegal.[60] For an instruction to be binding, a resolution must be passed by the general meeting. It is not possible for the majority shareholder to directly instruct the director to carry out an action.[61] Only a sole shareholder can issue instructions informally.[62]

An advisory board may be granted the right to issue instructions to the directors.[63] This is because the explicit wording of Section 20 (1) of the GmbHG does not imply that

57 Heidinger, 1989, pp. 400-401; Schneiderbauer and Krebs, 2018, p. 291; Kalss, 2025, § 43 ref.n. 45.
58 Torggler, 2014, § 20, ref.n. 14; Enzinger, 2025, § 20, ref.n. 30-31; Koppensteiner and Rüffler, § 20 ref.n. 9; Rieder, 2024, § 20, ref.n. 9; Arnold and Pampel, 2018, § 20, ref.n. 25.
59 Krebs, 2022, pp. 127–128.
60 Enzinger, 2025, § 20, ref.n. 32; Koppensteiner and Rüffler, § 20, ref.n. 9; Rieder, 2024, § 20, ref.n. 12; Nowotny, 2017, ref.n. 4/179-4/180.
61 Koppensteiner and Rüffler, § 20, ref.n. 9; Rieder, 2024, § 20, ref.n.10; Enzinger, 2025, § 20, ref.n. 31; Nowotny, 2017, ref.n.. 4/179.
62 Nowotny, 2017, ref.n. 4/179; Enzinger, 2025, § 20, ref.n. 31.
63 Arnold and Pampel, 2018, § 20, ref.n.. 23, 27, 31; Koppensteiner and Rüffler, 2007, § 20, ref.n. 18, § 35, ref.n. 55; Aburumieh, Arlt and Gruber, 2024, § 35, ref.n. 16; Heidinger, 1989, p. 395; Kalss, 2025, § 43, ref.n. 45; Reich-Rohrwig, Kuhn and Rubin-Kuhn, 2021, ref.n. 1/176; Reich-Rohrwig, 1981, p. 512; Nowotny, 2017, ref.n. 4/179, 4/192; Schneiderbauer and Krebs, 2018, pp. 289–290; Krebs, 2022, pp. 129–131.

the general meeting has exclusive competence.[64] A right to issue instructions can also be transferred to a supervisory board and, therefore, to an advisory board.[65]

#### 4.1.1.2.3. Approval of the Transfer of Shares

In addition to the regulation of the notarial deed obligation, Section 76 (2) sentence 3 of the GmbHG determines the possibility of binding the transfer of shares to other agreements set out in the articles of association. In general, the rights of approval are granted to certain shareholders or the company. This is known as *Vinkulierung*.[66] Furthermore, approval may only be required for the transfer of shares to non-family members[67] or for certain types of share transfer (e.g. only in the case of a gift).[68] If it is agreed in the articles of association, the transfer restriction has a proprietary effect, which means that a lack of approval makes the transfer invalid.[69]

According to prevailing opinion, the requirement for approval is not a mandatory responsibility of the shareholders and can be transferred to an advisory board.[70] The transfer of the approval requirement to an advisory board does not inadmissibly interfere with the rights of the shareholder willing to transfer, as the shareholder can apply for court approval to replace the approval of the advisory board in accordance with Section 77 of the GmbHG if the advisory board does not give its approval.[71] Although Section 77 of the GmbHG stipulates that approval can be granted by the court if the 'approval of the company is necessary for the transfer of the share' and this approval has been refused, this also includes the lack of approval of the advisory board.[72] The court may approve the transfer if the shareholder concerned has paid the initial capital contribution in full; there are no sufficient reasons for refusing the

64 Krebs, 2022, p. 129.

65 Arnold and Pampel, 2018, § 20, ref.n. 23, 27, 31; also Koppensteiner and Rüffler, § 20, ref.n. 18; Aburumieh, Arlt and Gruber, 2024, § 35, ref.n. 16; Reich-Rohrwig, Kuhn and Rubin-Kuhn, 2021, ref.n. 1/176; Nowotny, 2017, ref.n. 4/179, 4/192.

66 Rauter, 2024, § 76, ref.n. 54, 102; Koppensteiner and Rüffler, 2007, § 76, ref.n. 4; Huf, 2024, § 76, ref.n. 12; Nowotny, 2017, ref.n. 4/310; Fantur and Zehetner, 2000, p. 429.

67 Rauter, 2024, § 76, ref.n. 70; Kalss, 2018, p. 1294; Hartlieb, Saurer and Zollner, 2024, pp. 124–125.

68 Rauter, 2024, § 76, ref.n.. 70; Hartlieb, Saurer and Zollner, 2024, p. 126.

69 Rauter, 2024, § 76, ref.n. 75; Koppensteiner and Rüffler, 2007, § 76, ref.n. 7; Schopper, 2018, § 76, ref.n. 26; Tichy, 2000, p. 201, Fantur and Zehetner, 2000, p. 430.

70 Reich-Rohrwig, 1981, p. 513; Koppensteiner and Rüffler, 2007, § 76, ref.n. 5; Rauter, 2024, § 76, ref.n. 101; Schopper, 2018, § 76, ref.n. 25; Heidinger, 1989, p. 401; Huf, 2024, § 76, ref.n. 18; Schneiderbauer and Krebs, 2018, p. 291; Fantur and Zehetner, 2000, pp. 428–429; Krebs, 2022, p. 100.

71 For Section 77 GmbHG see Rauter, 2025, § 77, ref.n. 1-47; Zollner, 2014, § 77, ref.n. 1-17; Hoffenscher-Summer and Hinteregger, 2024, § 77, ref.n. 1-35.

72 Hoffenscher-Summer and Hinteregger, 2024, § 77, ref.n. 6; Schopper, 2018, § 77, ref.n. 3; Zollner, 2014, § 77, ref.n. 9; Koppensteiner and Rüffler, 2007, § 77, ref.n. 3.

approval; and the transfer can take place without harming the company, the other shareholders, or the creditors.[73]

The provision on the transfer of approval for the transfer of shares to the advisory board must be formulated clearly as, if the wording is unclear, the company is responsible for approval in cases of doubt. In this case, the company is understood to be the general meeting.[74]

### *4.1.2. Advisory Board Close to the Directors*

The transfer of management powers to the advisory board can also be flexibly organised. This only concerns the internal relationship of the company. Although it is permissible to transfer management powers to the advisory board, this must not paralyse the management or totally rule out the decision-making powers of the directors.[75] The mandatory responsibilities must remain with the directors. If management tasks are transferred to the advisory board, a supervisory board (that may exist) has a duty of monitoring.[76]

Instead of the direct transfer of management tasks, an advisory board can also be assigned rights of approval that go beyond negative control and consequently involve the advisory board members making their own entrepreneurial decisions. This results in an indirect change in decision-making authority from the directors to the advisory board.[77]

The limits of the permissible transfer of tasks are responsibilities that must be fulfilled by the directors. These may not be transferred to another body, either by an agreement in the articles of association or by a shareholders' resolution. These mandatory director tasks include the opening of bankruptcy proceedings and entries in the commercial register.[78]

In addition, the company must be represented by the directors in accordance with Section 18 (1) of the GmbHG. The directors, therefore, have a monopoly on representation.[79] The directors' monopoly on representation as a corporate body determined

73 Koppensteiner and Rüffler, 2007, § 77, ref.n. 3-4; Rauter, 2025, § 77, ref.n. 12-19; Hoffenscher-Summer and Hinteregger, 2024, § 77, ref.n. 10-18.

74 Rauter, 2024, § 76, ref.n. 103; Koppensteiner and Rüffler, 2007, § 76, ref.n. 5; Nowotny, 2017, ref.n. 4/310; Tichy, 2000, p. 75; Kalss, 2018, p. 1295; Fantur and Zehetner, 2000, pp. 428–429; Ley-Grassner and Hiermayer, 2020, p. 88.

75 Kalss, 2025, § 43, ref.n. 33; Heidinger, 1989, p. 396.

76 Heidinger, 1989, pp. 395–396; see also Reich-Rohrwig, 1981, p. 512.

77 Heidinger, 1989, p. 396; Schneiderbauer and Krebs, 2018, p. 287.

78 Heidinger, 1989, pp. 396–397; Schneiderbauer and Krebs, 2018, p. 287.

79 Enzinger, 2025, § 18, ref.n. 1, 5; Rieder, 2024, § 18, ref.n. 2; Koppensteiner and Rüffler, 2007, § 18, ref.n. 5; Arnold and Pampel, 2018, § 18, ref.n. 14.

by the GmbHG may not be undermined as it is a mandatory provision.[80] The advisory board may only represent the company externally if the shareholders have elected the advisory board as a special representative to conduct legal disputes against the directors in accordance with Section 30l (2) of the GmbHG. This also applies to the representation of the company in legal transactions with directors (Section 30l (1) of the GmbHG).[81]

#### *4.1.3. Advisory Board Close to the Supervisory Board*

According to prevailing opinion,[82] an optional body can also be established as an advisory board close to the supervisory board. The tasks assigned are similar to the tasks of the supervisory board or overlap with its tasks. It is questionable which tasks similar to those of the supervisory board can specifically be transferred to an advisory board, because employee participation as defined by Section 110 of the ArbVG (*Arbeitsverfassungsgesetz* – Labour Constitution Act) must not be undermined.[83] First and foremost, it is necessary to determine whether a supervisory board exists in the GmbH. This is because employee participation rights would only be undermined if the statutory minimum rights of the supervisory board were restricted by an additional body.[84]

##### 4.1.3.1. Advisory Board Instead of a Supervisory Board

If neither a mandatory nor an optional supervisory board exists and an advisory board is established that has the core competences of a supervisory board, all mandatory provisions of the supervisory board are applicable to this advisory board, which is similar to a supervisory board.[85] The term 'supervisory board' must, therefore, be understood in a functional way. A body, regardless of its designation, that performs

80 Rieder, 2024, § 18, ref.n. 2.
81 Heidinger, 1989, p. 397; Kastner, 1983, p. 102; Reich-Rohrwig, 1996, ref.n. 4/507; Heidinger, 2018, § 29, ref.n. 65.
82 Kalss, 2025, § 43, ref.n. 36-43; Frotz, 2022, att. §§29-33, ref.n. 10-13; Heidinger, 2018, § 29, ref.n. 55, 59-64; Reich-Rohrwig, 1981, pp. 510-512; Schneiderbauer and Krebs, 2018, pp. 287-289; Heidinger, 1989, pp. 380-394; other opinion Kastner, 1983, pp. 99–101.
83 Frotz, 2022, att. §§29-33, ref.n. 10-13; Reich-Rohrwig, 1981, pp. 510-512; Kalss, 2025, § 43, ref.n. 36-38; Heidinger, 1989, pp. 383–394.
84 Heidinger, 1989, p. 386; Reich-Rohrwig, 1981, pp. 510–512; Schneiderbauer and Krebs, 2018, pp. 287–288; other opinion Kastner, 1983, p. 100.
85 OGH 27.09.2006, 9 ObA 130/05s; Reich-Rohrwig, 1981, pp. 511–512; Kalss, 2025, § 39, ref.n. 36; Nowotny, 2008, p. 700; Kalss and Probst, 2025, ref.n. 14/164.

the core tasks of the supervisory board is subject to the provisions applicable to a supervisory board.[86] Applying the regulations for the supervisory board to an advisory board similar to a supervisory board ensures that employee participation rights in accordance with Section 110 of the ArbVG are safeguarded and cannot be undermined. Otherwise, a potential would arise for deception of third parties, as a body is entrusted with the fulfilment of supervisory board responsibilities that does not have to comply with the mandatory statutory provisions.[87]

The statutory minimum competences of a supervisory board include monitoring the management, convocation of the general meeting for the benefit of the company, examination of the annual financial statements, the proposal for the distribution of profits and reporting to the next general meeting, reporting to the general meeting on self-dealing by the directors, and the rights of approval according to Section 30j (5) of the GmbHG.[88] If the statutory minimum competences of the supervisory board are transferred to an advisory board, the advisory board is to be qualified as a supervisory board and the mandatory provisions for the supervisory board are also applicable to the advisory board.[89] If only specific tasks of the supervisory board are transferred to the advisory board, this does not change its legal qualification.[90] Whether the rights and duties of the advisory board are congruent with the minimum competences of the supervisory board to such an extent that the advisory board is qualified as a supervisory board must always be examined on a case-by-case basis.[91]

#### 4.1.3.2. Advisory Board Alongside a Supervisory Board

According to prevailing opinion, there is no risk of undermining the employee participation provisions if the GmbH has a supervisory board and if the articles of association or a shareholders' resolution do not transfer its minimum powers to the advisory board.[92] The minimum competences of the supervisory board may not be impaired by displacing the allocation of competences to the advisory board.[93] A reduction of responsibilities is not to be assumed if the responsibilities are

86 Heidinger, 1989, pp. 380–381; Kalss, 2025, § 43, ref.n. 36.
87 Heidinger, 1989, p. 384; other opinion Koppensteiner and Rüffler, 2007, § 35, ref.n. 54; Auer, 2024, pp. 280–281.
88 Heidinger, 1989, pp. 383–384; Reich-Rohrwig, 1981, p. 512; Schneiderbauer and Krebs, 2018, p. 289; Kalss, 2025, § 43, ref.n. 36, 38; Frotz, 2022, att. §§29-33, ref.n. 11-12.
89 Kalss, 2025, § 43, ref.n. 36, 38; Frotz, 2022, att. §§29-33, ref.n. 11; Reich-Rohrwig, 1981, p. 511.
90 Reich-Rohrwig, 1981, p. 512; Kalss, 2025, § 43, ref.n. 37; Frotz, 2022, att. §§29-33, ref.n. 12.
91 Frotz, 2022, att. §§29-33, ref.n. 12.
92 Heidinger, 1989, p. 386; Reich-Rohrwig, 1981, pp. 510–512; Koppensteiner and Rüffler, 2007, § 30j, ref.n. 28; Heidinger, 2018, § 29, ref.n. 63.
93 Koppensteiner and Rüffler, 2007, § 30j, ref.n. 28; Heidinger, 2018, § 29, ref.n. 63.

concurrent.[94] If both an advisory board and a supervisory board have the right of approval, the employee representatives are involved in the supervisory board's decision.[95]

In the case of concurrent competence connected with rights of approval in accordance with Section 30j (5) of the GmbHG, the approval of the supervisory board is also required in addition to the approval of the advisory board; if the advisory board approves but the supervisory board votes against, the transaction may not be carried out. An undermining of employee participation rights is, therefore, excluded.[96]

### *4.2. The Advisory Board in the Partnership*

An advisory board can also be established in partnerships.[97] The permissibility of an advisory board as a corporate body is based on private autonomy and the freedom to organise the articles of association.[98]

In a partnership, as in a GmbH, a rough differentiation can be made – depending on the tasks assigned – between an advisory board close to the shareholders, an advisory board close to the directors, and an advisory board close to the supervisory board.

#### *4.2.1. Advisory Board Close to the Shareholders*

In a general partnership (*Offene Gesellschaft* – OG) or limited partnership (*Kommanditgesellschaft* – KG), an advisory board can be established in the same way as in corporations to fulfil the tasks of the shareholders. However, even in a partnership, certain decisions must be made exclusively by the shareholders. These limits initially correspond to those of the GmbH.[99] These include, in particular, the dissolution of the partnership[100] and the amendment to the articles of association.[101] For example, the decision to increase the liability of a limited partner (*Erhöhung der Haftsumme*

94 Koppensteiner and Rüffler, 2007, § 30j, ref.n. 28; Heidinger, 1989, pp. 390–392; Schneiderbauer and Krebs, 2018, p. 288.
95 Schneiderbauer and Krebs, 2018, p. 288.
96 Koppensteiner and Rüffler, 2007, § 30j, ref.n. 28; Heidinger, 1989, p. 392; Schneiderbauer and Krebs, 2018, p. 288.
97 Enzinger, 2022, § 114, ref.n. 30; Schopper and Walch, 2016, § 114, ref.n. 240; Kalss, 2025, § 43, ref.n.. 55; Nowotny, 2008, p. 700; Kastner, 1983, p. 104.
98 Kalss, 2025, § 43, ref.n. 55; Nowotny, 2008, p. 700; Reichert and Ullrich, 2024, § 19, ref.n. 57.
99 Buth and Hermanns, 1996, p. 598.
100 Buth and Hermanns, 1996, p. 598; Kalss, 2025, § 43, ref.n. 60.
101 Scheel, 2023, p. 76; Kalss, 2025, § 43, ref.n. 60.

*eines Kommanditisten*) may only be made by the shareholders of a limited partnership (KG).[102] In partnerships, the principle of self-organisation(*Prinzip der Selbstorganschaft*) must also be observed, as only the shareholders themselves may take management measures and influence the managing partners through instructions.[103]

#### 4.2.1.1. Amendment to the Articles of Association

Amending the articles of association in a partnership is the exclusive responsibility of the shareholder.[104] According to the dispositive provision of Section 119 (1) of the UGB (*Unternehmensgesetzbuch* – Business Code), any shareholder resolution requires the consent of all shareholders authorised to participate in the resolution. An amendment to the articles of association can, therefore, only be made unanimously if there is no deviating provision in the articles of association.[105] According to Section 119 (2) of the UGB, the requirement of unanimity can be deviated from in the articles of association, and majority resolutions can be declared sufficient.[106] The possibility of introducing majority resolutions considers the (possibly existing) interest of the shareholders in adopting resolutions in a simplified manner.[107] The principle of sovereignty of the association (*Verbandssouveränität*), which is also acknowledged in partnership law, prohibits transferring the amendment to the articles of association to an advisory board.[108] This is because the amendment to the articles of association interferes with the structure of the company, which requires a shareholder resolution in which all shareholders can participate.[109] The sole responsibility of the shareholders to amend the articles of association must also be observed in partnership law as a mandatory restriction of private autonomy.[110]

102 Scheel, 2023, p. 76.
103 Schopper and Walch, 2016, § 114, ref.n. 240; Kalss, 2025, § 43, ref.n. 57, 61; Fritz, 2005, p. 166; Nowotny, 2008, p. 700.
104 Kalss, 2025, § 43, ref.n. 60; Kraus, 2019, § 119, ref.n. 10; Appl, 2023, § 119, ref.n. 14; Sanders, 2017, p. 967; Scheel, 2023, p. 76.
105 Kraus, 2019, § 119, ref.n.12; Appl, 2023, § 119, ref.n. 14, 30; Haglmüller, 2019, § 119, ref.n. 7, 12.
106 Kraus, 2019, § 119, ref.n. 13; Appl, 2023, § 119, ref.n. 33; Haglmüller, 2019, § 119, ref.n. 13; Thöni, 2016, § 119, ref.n. 6.
107 Appl, 2023, § 119, ref.n. 40; Haglmüller, 2019, § 119, ref.n. 13.
108 Weipert and Oepen, 2012, p. 603.
109 See Voormann, 1990, p. 89, who affirms this at least in the case of interventions in the core area of the shareholders' legal position.
110 Schäfer, 2019, § 109, ref.n. 30-31; Schauer, 2018, § 108, ref.n. 16.

#### 4.2.1.2. Transfer of Shares

According to Section 124 (1) of the UGB – for the KG according to Section 161 (2) in conjunction with Section 124 (1) of the UGB – the shares (in the KG this also applies to limited partners (*Kommanditisten*))[111] are only transferable if all shareholders agree to the transfer of shares.[112] This provision is a dispositive legal restriction on transferability.[113] The articles of association may stipulate that a majority resolution is sufficient or that the approval of the shareholders is only required for certain transfers (e.g. transfers outside the family).[114]

It is questionable whether a right of approval for the transfer of shares can be transferred to an advisory board. It is sometimes assumed that a right of approval can be transferred to an advisory board, regardless of its composition.[115] The sovereignty of association (*Verbandssouveränität*) is not violated if the articles of association agree that the advisory board decision can be cancelled by a unanimous shareholder resolution, and thus the shareholder resolution 'overrules' the advisory board resolution.[116] In contrast, some authors assume that the composition of the group of shareholders is an exclusive concern of the shareholders and that this is an irrevocable shareholder right.[117] In a partnership, particular caution is required when transferring shares, as this decision carries considerable weight because of the personal liability of the shareholders.[118] However, an advisory board can, in my opinion, be assigned a right of approval irrespective of its composition, as the requirement of shareholder approval can also be completely waived in accordance with Section 124 (1) of the UGB by a regulation in the articles of association. In this case, the shareholders could, therefore, freely dispose of their shares. The implementation of a right of approval in favour of the advisory board protects the other shareholders more than a complete waiver of approval. Furthermore, the shareholder willing to transfer is not more restricted in free transferability than under the dispositive transfer restriction of Section 124 (1) of the UGB. In any case, the shareholder willing to transfer retains the possibility of cancellation in accordance with Section 132 of the UGB.

111 OGH 19.01.2016, 2 Ob 41/15s; Koppensteiner and Auer, 2020, § 124, ref.n. 3.
112 Koppensteiner and Auer, 2020, § 124, ref.n. 3; Eckert, 2019, § 124, ref.n. 3; Artmann, 2019, § 124, ref.n. 6; Zib, 2016, § 124, ref.n. 6.
113 Zib, 2016, § 124, ref.n. 6, 18; Koppensteiner and Auer, 2020, § 124, ref.n. 3.
114 Schauer, 2017, ref.n. 2/766; Eckert, 2019, § 124, ref.n. 3; Zib, 2016, § 124, ref.n. 19; Artmann, 2019, § 124, ref.n. 6.
115 Reichert and Ullrich, 2024, § 19, ref.n. 90.
116 See also Reichert and Ullrich, 2024, § 19, ref.n. 90.
117 Weipert and Oepen, 2012, p. 594; Voormann, 1990, p. 92.
118 Artmann, 2019, § 124, ref.n. 6; Weipert and Oepen, 2012, pp. 594–595.

#### 4.2.1.3. Right to Issue Instructions

Because of the principle of self-organisation (*Prinzip der Selbstorganschaft*), only shareholders may issue instructions to the directors (who have to be shareholders) and thus influence the management of the company.[119] A right to issue instructions exercised by third parties would undermine the principle of self-organisation, as in this case, the right to make decisions would be transferred to non-shareholders. A right to issue instructions may, therefore, only be transferred to (and exercised by) an advisory board if it is composed exclusively of shareholders.[120] An instruction issued to a director by an advisory board composed of third parties must, therefore, be disregarded by the director, as being invalid.[121]

### *4.2.2. Advisory Board Close to the Directors*

In a partnership, the principle of self-organisation (*Prinzip der Selbstorganschaft*) applies, which means that management authorisation may only be fulfilled by shareholders.[122] Decisions on management measures may, therefore, only be taken by shareholders who are entrusted with management and may not be transferred to non-shareholders.[123] Advisory boards that merely advise the shareholders do not affect the principle of self-organisation, as the management function remains the responsibility of the managing partners. This form of advisory board is, therefore, permissible, regardless of whether the advisory board is composed exclusively of shareholders or partially or even exclusively of external experts.[124]

Management authorisation may only be transferred to an advisory board close to the directors if it is composed exclusively of shareholders.[125] If management authorisation is transferred to an advisory board composed solely of shareholders, the principle of self- organisation is maintained. However, Section 114 (4) sentence 2 of the UGB permits the delegation of the exercise of management to third parties on the

119 Schopper and Walch, 2016, § 114, ref.n. 244; Weipert and Oepen, 2012, p. 592.
120 Kastner, 1983, p. 104; Schopper and Walch, 2016, § 114, ref.n. 244; other opinion Grunewald, 2011, pp. 284-285 (each advisory board, regardless of its composition, can be assigned a right to issue instructions if the general partner (Komplementär) is a legal entity); Weipert and Oepen, 2012, p. 592 (regardless of the composition of the advisory board, the transfer of a right to issue instructions is not permitted).
121 Schopper and Walch, 2016, § 114, ref.n. 244.
122 Schopper and Walch, 2016, § 114, ref.n. 242; Haglmüller, 2019, § 114, ref.n. 41; Enzinger, 2022, § 114, ref.n. 27.
123 For details see Enzinger, 2022, § 114, ref.n. 23–29; Schopper and Walch, 2016, § 114, ref.n. 159-211.
124 Schopper and Walch, 2016, § 114, ref.n. 241; Haglmüller, 2019, § 114, ref.n. 43; Kastner, 1983, p. 104.
125 Schopper and Walch, 2016, § 114, ref.n. 242; Enzinger, 2022, § 114 ref.n. 31; Kastner, 1983, p. 104.

basis of a provision in the articles of association.[126] The position as a (corporate) director is not transferred to the third parties because of the principle of self-organisation. Therefore, in the case of delegation of the exercise of management to an advisory board, the principle of self-organisation is maintained, as the shareholders retain ultimate decision-making power and can generally instruct and remove the advisory board at any time.[127]

### *4.2.3. Advisory Board Close to the Supervisory Board*

Partnerships are not required by law to have their own supervisory bodies, but for reasons of private autonomy and the freedom to organise the articles of association, an optional supervisory body can also be established in a partnership.[128]

A distinction regarding the existence or non-existence of a supervisory board, as in the case of a GmbH, is therefore, not necessary.

The tasks can be similar to those of a supervisory board in a GmbH; in particular, monitoring functions and rights of approval can be transferred to such an advisory board in the partnership.[129] The articles of association must specify the measures for which a right of approval exists. The catalogue of approvals in Section 30j (5) of the GmbHG can be used here, which means that a more extensive right of approval exists than under the dispositive provisions of Section 116 (2) or Section 164 of the UGB, which grant the non-managing partners or limited partners (*Kommanditisten*) a right of approval for extraordinary transactions.[130]

An advisory board with rights of approval and monitoring tasks can be established in a partnership, regardless of whether the advisory board is composed of shareholders or non-shareholders.[131] However, managing partners may not themselves be members of a monitoring advisory board, as self-monitoring is not permitted.[132] In this case, the principle of self- organisation (*Prinzip der Selbstorganschaft*) is not impaired by the establishment of an advisory board composed of non-shareholders. A mere right to approve certain management measures does not undermine the managing partners' right of initiative and responsibility for the management of the

126 Schopper and Walch, 2016, § 114, ref.n. 183; Schauer, 2017, ref.n. 2/482.
127 Haglmüller, 2019, § 114, ref.n. 42; Schauer, 2017, ref.n. 2/482.
128 Kastner, 1983, p. 104.
129 Kalss, 2025, § 43, ref.n. 63; Enzinger, 2022, § 114, ref.n. 30; Reichert and Ullrich, 2024, § 19, ref.n. 72-73; Mutter, 2024, § 8, ref.n. 20; Scheel, 2023, pp. 181–182.
130 Kalss, 2025, § 43, ref.n. 63; see also Mutter, 2024, § 8, ref.n. 20.
131 Schopper and Walch, 2016, § 114, ref.n. 241; Enzinger, 2022, § 114, ref.n. 31; Haglmüller, 2019, § 114, ref.n. 43; Scheel, 2023, pp. 181-182; Mutter, 2024, § 8, ref.n. 19; see also Kastner, 1983, p. 104.
132 Mutter, 2024, § 8, ref.n. 19.

company.[133] A right of approval serves as an instrument of preventive supervision, which does not violate the principle of self- organisation.[134] The right of approval is not a decision-making power.

A reservation of approval would only be inadmissible if it constituted a comprehensive right of approval. This would be the case if almost every management measure required the approval of the advisory board. This would transfer the management function from the managing partners to the advisory board.[135] As rights of approval are already unproblematic in principle, which leads to preventative monitoring, general monitoring must also be permissible.[136]

## 5.
## Special Tasks in the Family Business

### *5.1. The Advisory Board in Company Succession*

In many cases, the shareholders first think about establishing an advisory board when planning the succession.[137] The passing generation should decide in good time who is responsible for the succession process and how it should be organised. The generational change is sometimes referred to as the 'Achilles heel' of the family business.[138] The advisory board can be entrusted with the often emotionally difficult decision of who, among several potential successors, is best suited to ensure the continuation of the company, based on their qualifications, knowledge, and experience.[139] However, there is no direct decision-making authority or right to issue instructions to the current shareholders as to who should take over the operational activities as a director, and this decision cannot be transferred to an advisory board.[140] The advisory board may, however, have a non-binding right to suggest who is best suited as a director from the perspective of the advisory board.

133 Scheel, 2023, p. 181.
134 Scheel, 2023, p. 181.
135 Scheel, 2023, p. 181.
136 Regarding the admissibility of monitoring, see Schopper and Walch, 2016, § 114, ref.n. 241; Scheel, 2023, p. 182; Mutter, 2024, § 8, ref.n. 19-22; Kastner, 1983, p. 104; Enzinger, 2022, § 114, ref.n. 31; Haglmüller, 2019, § 114, ref.n. 43; Kalss and Probst, 2025, ref.n. 14/170.
137 Sanders, 2017, p. 966; Mehringer and von Thunen, 2021, pp. 116-117; Wiedemann and Kögel, 2020, pp. 33–34.
138 Wiedemann and Kögel, 2020, p. 100.
139 Wiedemann and Kögel, 2020, pp. 33-34; Sanders, 2017, p. 966; see also Kalss, 2025, § 43, ref.n.5.
140 OGH 21.03.2019, 6 Ob 183/18g.

### *5.2. The Advisory Board as a Mediator and Moderator*

As a rule, the 'senior director' and the 'junior director' work together during the transition phase in the company succession process. This overlap in management is intended to ensure a smooth change of directors.[141] This phase of joint management is characterised by an increased potential for conflicts between senior and junior directors because of their different approaches. A conflict between the predecessor and successor can be exacerbated by a close family relationship.[142] An advisory board composed exclusively or predominantly of experts from outside the family can act as an independent mediator between the parties and quickly put an end to any conflict that arises.[143]

The increasing number of shareholders, which is the result of succession processes, can lead to conflicts at the shareholder level. The interests of the shareholders can differ entirely, depending on whether they have an operational role in the family business.[144] The advisory board, which is composed exclusively of non-family members, is ideally suited as a conflict resolution instrument in the form of a mediation office (*Mediationsstelle*) to resolve the conflicts between the shareholders and prevent a stalemate at the shareholder level.[145]

In its capacity as a moderator or mediator, the advisory board has no decision-making powers. The advisory board draws up proposals for dispute resolution and mediates between the family members. However, the advisory board does not make any decisions.[146]

## 6.
## Conclusion

Austrian company law provides neither a legal definition of an advisory board nor an explicit legal basis for its establishment. The admissibility of an advisory board results from private autonomy. Furthermore, 'other bodies' are mentioned in addition to the director, the general meeting, and the supervisory board in Section 20 (2) of the GmbHG.

141 Scheel, 2023, p. 61.
142 Scheel, 2023, p. 61.
143 Scheel, 2023, p. 61; Reich and Bode, 2017, p. 1800.
144 Sanders, 2017, p. 967.
145 Kalss, 2025, § 43, ref.n. 5; Kalss and Probst, 2025, ref.n. 14/152; Mehringer and von Thunen, 2021, p. 117, 122–123; Wiedemann and Kögel, 2020, p. 34; Scheel, 2023, p. 55.
146 Scheel, 2023, p. 55.

An advisory board can be established under the law of obligations, but also as an optional body. Only an advisory board that is established as a corporate body can assume corporate body functions. The functions assumed by an advisory board depend on the specific provisions in the articles of association. Important decisions, such as amendments to the articles of association or appointments of directors, may only be made by the shareholders themselves because of the principle of autonomy of association. In the case of partnerships, the principle of self-organisation (*Prinzip der Selbstorganschaft*) must also be observed. In any case, preparatory actions and advisory activities are permitted even if the respective bodies fulfil mandatory responsibilities.

In family businesses, the succession process must be well planned. An advisory board should also be involved in this process to advise on the selection of the most suitable successor. However, the advisory board must not be assigned a binding right of nomination or the authority to appoint. An advisory board in a family business is also often entrusted with the task of acting as a mediator in shareholder disputes. This function is highly relevant, as disputes regarding the company can escalate in family businesses thanks to equally emotional conflicts within the family. In its capacity as a mediator, the advisory board does not make any decisions itself, but only mediates between the parties to a dispute.

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# Cultivating Clarity: A Macedonian Law Perspective on Agreements as to Succession and Their Distinction From the Lifetime Support Agreement and the Agreement on Assignment and Distribution of Property During Lifetime

**ABSTRACT:** *At the intersection of legal foresight and intricate tapestry of familial legacies, agreements as to succession emerge as pivotal instruments, charting a course for the seamless transfer of assets and responsibilities upon an individual's passing.*
*The subject of this study is the approach of Macedonian law to the agreements as to succession, the reasons why they are not regulated in the governing legal system, as well as the efforts aimed at establishing their legal regulation through the legal reform expected with the drafting of the new Civil Code of the Republic of North Macedonia. To define agreements as to succession, as specific mortis causa agreements, the author distinguishes them from the lifetime support agreement and agreement on assignment and distribution of property during lifetime, as inter vivos agreements of great importance for inheritance law, through detailed legislative, theoretical, and practical analysis. Through this analysis, an in-depth delineation of the differences between these agreements is made, alongside an emphasis on their similarities, due to which Macedonian jurisprudence replaces agreements as to succession with the lifetime support agreement and the agreement on assignment and distribution of property during lifetime. Finally, this research concludes by presenting proposed solutions for the future reform of Macedonian inheritance law, concerning agreements as to succession, thereby encapsulating the overall aim of this study.*
**KEYWORDS:** *Agreements as to Succession, Lifetime Support Agreement, Agreement on Assignment and Distribution of Property During Lifetime, Legal Reform.*

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# 1. Introduction

In many modern legal systems, *agreements as to succession* have traditionally provided a clear, contractual basis for determining the transfer of property upon death. These agreements, most broadly defined, are unilaterally irrevocable contracts that refer to the estate of the contracting party upon their death,[1] and they can appear in several forms, such as: 1. *Agreement as to succession – as a basis for universal succession* (agreement as to succession in the narrower sense), whereby the contracting parties usually determine that the one who outlives the other will be their heir, or possibly that the heir will be a third party;[2] 2. *Agreement as to succession – as a basis for singular succession* (contractual legatee), whereby the contracting parties stipulate that the object of the agreement will be a certain item or right from the inheritance;[3] and3. *Negative inheritance agreement,* whereby the legal heir renounces their share of the inheritance (future inheritance).[4] However, as interesting as these contractual forms may sound, Macedonian legislation declares them null and void, which is why they are not the main subject of analysis of this research. Rather than focusing on these agreements directly, this study examines the specific agreements that are considered to be their presumed substitutes. Bearing this in mind, we are faced with the dilemma of whether Macedonian law's negative attitude towards the agreement as to succession is justified. To resolve this quandary, the study closely examines the agreement as to succession, analysing its characteristics and advantages in comparison to other related institutes, to evaluate whether this agreement should be reintroduced into Macedonian inheritance law.

Agreements as to succession are key components of inheritance law in many legal systems, often carrying more legal weight than wills or statutory laws of succession. However, in the Macedonian legal system, they have been void for nearly seven decades, leaving a gap in its inheritance law.[5] The fact that every form of these agreements was once part of Macedonian inheritance law, and at one point all of their forms were legally declared null and void, raises an important question: *Why were the agreements as to succession abolished and what impact has their absence had on families and legal professionals dealing with inheritance matters today?*

1 Спировиќ Трпеновска, Мицковиќ и Ристов [Spirovic Trpenovska, Mickovic and Ristov], 2010, p. 24.
2 Ibid., pp. 24–25. http://doi.org/10.62733/2025.2.5-15
3 Ibid., p. 25.
4 Ibid.
5 Ристов [Ristov], 2011, pp. 91–92.

Historically, *agreements as to succession* were introduced into Macedonian inheritance law through the *Serbian Civil Code*[6] of 1844, which recognised them as a primary method of asset distribution. Yet, after World War II, these agreements were abolished as part of broader legal reforms that viewed them as outdated remnants of feudalism. The 1955 *Federal Inheritance Law*[7] formally replaced them with certain *inter vivos* agreements that have some inheritance-related effects. The void created by the abolition of these agreements has been filled by the *lifetime support agreement* and the *agreement on assignment and distribution of property during lifetime*.[8] Despite criticism, the same legal approach was adopted in the first *Macedonian Republican Law on Inheritance*[9] in 1973 and continued in the 1996 *Law on Inheritance*.[10] In the following years, one substantial modification concerning these agreements was made. In 2001, with the enactment of the *Law on obligations,*[11] the *lifetime support agreement* and the *agreement on assignment and distribution of property during lifetime* were incorporated into and remain regulated by it. However, as assumed substitutions for *agreements as to succession* in their classic form of contractual appointment of heirs and beneficiaries, these replacements fail to fully address the complexities of inheritance law, particularly in protecting necessary heirs and creditors.

Although *agreements as to succession* are not currently regulated under Macedonian law, there is a provision in the *Act on Private International Law*[12] of 2020 that allows such agreements to be valid if they conform to the laws of the country where each of the parties had their habitual residence at the time of concluding the agreement.[13] This indicates the need for formal regulation, because, without decisive regulation of *agreements as to succession* in Macedonian law, this norm remains ineffective. In this context, the *preliminary draft of the Macedonian Civil Code*[14] proposes the reintroduction of *agreements as to succession*, aligning Macedonian inheritance practices with modern European countries, where these agreements remain essential.

6 See more extensively at: Петковиќ [Petkovic], 1939.
7 „*Службен лист на СФРЈ*“ бр. 20/55, 12/65 и 42/65 [Official Gazette of the SFRY" No. 20/55, 12/65 and 42/65].
8 Хаџи Василев-Вардарски [Hadji Vasilev-Vardarski], 1983, p. 66.
9 „*Службен весник на СРМ*“ бр. 35/73 и 27/78 [Official Gazette of the Republic of Macedonia" No. 35/73 and 27/78].
10 „*Службен весник на Република Македонија*“ бр. 47/96 [Official Gazette of the Republic of Macedonia" No. 47/96.].
11 „*Службен весник на Република Македонија*“ бр.18/2001; 4/2002; 5/2003; 84/2008; 81/2009 и 161/2009 [Official Gazette of the Republic of Macedonia" No. 18/2001; 4/2002; 5/2003; 84/2008; 81/2009 and 161/2009].
12 „*Службен весник на Република Северна Македонија*“ бр.32/2020 [Official Gazette of the Republic of Macedonia" No.32/2020].
13 *Act on Private International Law* (2020), Art. 55 para. 2.
14 Работна верзија на Македонскиот Граѓански Законик [Draft version of the Macedonian Civil Code ](not published).

Ultimately, the study argues for the reintroduction of *agreements as to succession* in Macedonian law, arguing that such a reform would provide greater legal certainty, protect family legacies, and ensure creditor rights, thereby bringing Macedonian inheritance law in line with modern European legal standards. By reintroducing these agreements, Macedonian law can better meet the needs of its citizens in matters of inheritance, offering a more structured and transparent system for the future.

## 2.
## Historical Context of the Agreements as to Succession in Macedonian Inheritance Law

Though *agreements as to succession* gained prominence in the Middle Ages, their origins date back even further. Some historical sources suggest that these agreements were present in ancient Sumerian,[15] Egyptian, and Greek legal systems,[16] while others point to their existence in ancient Babylon, where individuals could arrange the transfer of their assets upon death while still alive.[17] Some scholars also believe that the exact origins of these agreements are unknown; what we do know is that Roman law strictly prohibited agreements related to future inheritance, whether made by the testator or the heirs.[18] However, during the post-classical period, Emperor *Justinian I* allowed such agreements in the form of gifts in the event of death, provided they could be revoked until the testator's death.[19] Despite differing views, it is widely accepted that modern *agreements as to succession* find their roots in medieval Germanic and Prussian law, particularly in agreements made between spouses to transfer property upon death.[20]

As previously mentioned, under the Serbian Civil Code of 1844, Macedonian inheritance law formally recognised *agreements as to succession*, which remained part of its legal framework for over thirty years.[21] According to this Code, priority in inheritance was given to the heir designated by the *agreement as to succession*, and only in the absence of such an agreement would the inheritance pass to the testamentary heir, or, in the absence of a will, to the legal heirs.[22]

15 Ѓурић-Милошевић [Djuric-Milosevic], 2024, p. 9.
16 Антић [Antic], 1986, pp. 512–513.
17 Barton, 1904, pp. 256–276.
18 Ѓурић-Милошевић [Djuric-Milosevic], 2024, p. 14.
19 Ibid., p. 15.
20 Ристов [Ristov], 2011, p .84.
21 Read more about the impact of The Serbian Civil Code on Macedonian Inheritance Law at: Спировић Трпеновска, Мицковић и Ристов [Spirovic Trpenovska, Mickovic and Ristov], 2011, pp. 44–47.
22 Видић [Vidic], 2004, cited in Ристов [Ristov], 2011, p. 85.

Following World War II, significant shifts in social, legal, and political structures influenced changes in inheritance law on the Balkans. The 1946 *Law on the Nullity of Legal Provisions, enacted before 6 April 1941 and during enemy occupation*,[23] declared many legal acts null and void, including the *Serbian Civil Code,* which resulted in the formal abolition of agreements as to succession. Subsequently, following the recommendations of the Federal Supreme Court – according to which only those who are called to inherit according to a statement of last will or by law can be considered heirs[24] – the judiciary began rejecting these agreements, viewing them as relics of a feudal past designed to preserve the wealth and power of the nobility.[25]

Then, in 1955, the *Federal Inheritance Law* further reinforced this position, rendering agreements on future inheritance, legacies, and even testamentary content agreements null and void.[26] This marked the end of *agreements as to succession* as a legal basis for inheritance in Macedonia. In their place, new *inter vivos* contracts were introduced – the *lifetime support agreement* and the *agreement on assignment and distribution of property during lifetime* – carrying certain inheritance-related implications. Although these agreements have faced ongoing academic criticism, they continue to exist in Macedonian law today, without any significant amendments.
The legal stance regarding the removal of *agreements as to succession* was maintained in the first *Republic Law on Inheritance* (1973), and the same principles were adopted in the current *Law on Inheritance* (1996).[27]

The core distinction in the historical development of these agreements, since the independence of the Republic of Macedonia, lies in their shift after 2001, when the *lifetime support agreement* and the *agreement on assignment and distribution of property during lifetime* were brought under the regulation of the Macedonian *Law on Obligations*.[28] This move has raised questions about their nature, as it places their inheritance law characteristics in doubt. By embedding these agreements within the framework of obligations law, this development has sparked ongoing debates in legal theory and practice.[29] Scholars and practitioners alike are divided on whether these agreements can still be viewed as having succession-like qualities, or if they should be considered strictly as *inter vivos* contracts under obligations law, devoid of genuine inheritance implications. This ambiguity underscores the need for clearer

23 *„Службен лист на ФНРЈ“* бр. 86 од ["Official Gazette of the FPRJ" No. 86], 25.10.1946.
24 Хаци Василев-Вардарски [Hadji Vasilev-Vardarski], 1982, p. 215.
25 Blagojević, 1955, p. 60.
26 Ристов [Ristov], 2011, p. 85.
27 *Law on inheritance* (1996), Art. 7, 8, 10 and 132.
28 *Law on Obligations* (2001), Art. 1022–1028 and Art. 1029–1035.
29 See more at: Спировиќ Трпеновска, Мицковиќ и Ристов [Spirovic Trpenovska, Mickovic and Ristov], 2010, pp. 37-41; Хаци Василев-Вардарски [Hadji Vasilev-Vardarski], 1983, p. 219; Манчев [Manchev], 1997, pp. 22–26.

legal definitions and potential reform in Macedonian inheritance law to address these concerns.

## 3.
## Lifetime Support Agreement

The *lifetime support agreement* was, as previously noted, formally recognised and categorised as a named contract in the legal framework of the former Socialist Federal Republic of Yugoslavia, with the enactment of the 1955 Federal *Law on Inheritance* and subsequently reinforced in the 1973 *Law on Inheritance*. Prior to 1955, it was considered an unnamed contract, with the parties exclusively determining its name and substance.[30] However, by including a special section entitled '*Lifetime Support Agreement*', the contract acquired a distinct legal character and well-defined requirements. This formal recognition signalled the move from a flexible, informal arrangement to a standardised legal agreement that is commonly recognised in legal transactions and regulations.

In Macedonian law, the *lifetime support agreement* is defined as an agreement involving a provider who offers lifelong care to a recipient in exchange for the recipient's property or a portion of it, transferred only after the recipient's death.[31] In accordance with its characteristics, this is a consensual, bilaterally binding, burdensome, aleatory, causal, strictly formal, and mixed-nature agreement.[32] It is bilateral because it creates mutual rights and obligations for both the provider and recipient. The provider's obligations begin during the recipient's lifetime, but their rights to the property take effect only after the recipient's death. This makes the agreement reciprocal, as both parties provide something in exchange.[33] It is also aleatory because the support depends on unpredictable elements, such as the recipient's lifespan.[34] Legally, it has a mixed nature because the obligations of support are effective *inter vivos*, while property transfer occurs *mortis causa*.[35] It is strictly formal, requiring adherence to a legal procedure, and is causal, as each party enters it with specific goals – lifelong support and property acquisition. In that sense, according to the *Law on Obligations*, this agreement must be executed in written form and verified by either a court or a notary, with the presence of both parties and two witnesses.[36] However, the *Law on*

30 Манчев [Manchev], 1997, p. 21.
31 *Law on Obligations* (2001), Art. 1029.
32 Галев и Дабовиќ Анастасовска [Galev and Dabovic Anastasovska], 2021, pp. 451–452.
33 Мицковиќ и Ристов [Mickovic and Ristov], 2016a, p. 254.
34 Ibid., p. 255.
35 Ѓуриќ-Милошевиќ [Djuric-Milosevic], 2024, p. 85.
36 *Law on Obligations* (2001), Art. 1030.

*Notaries*[37] *states that even where a legal matter is not required to be executed in the form of a notarial deed,* legal transactions involving the acquisition, transfer, or limitation of property rights, particularly for real estate, or rights for which public books are kept, must be *solemnised* by a notary.[38] Furthermore, the Law emphasises the need to comply with the form of a public deed (*notarial deed* or *private deed solemnised by a notary*) for legal matters involving the transfer of ownership rights.[39] These rules emphasise the significance of formalising the *lifetime support agreement* through a notarised act to ensure it is legally enforceable and in accordance with existing property laws. The meticulous formality in question resembles that required for a *notarial testament*,[40] emphasising its vital and binding nature. In contrast to traditional agreements as to succession, it does not provide a legal basis for inheritance. Instead, it is categorised as an *inter vivos* (during lifetime) agreement under the Law on Obligations, meaning it functions primarily as a contractual arrangement rather than a traditional inheritance instrument.

The reason why this *inter vivos* agreement is considered a substitute for *agreements as to succession* is because the *lifetime support agreement* has an inheritance law aspect, as the property that is the subject of the agreement is transferred after the death of the disposing party and does not enter their estate upon death.[41]

However, despite having some inheritance-related implications, the *lifetime support agreement* is fundamentally different from *agreements as to succession*, and this distinction is critical in understanding its role in the Macedonian legal system. First, the most fundamental distinction is that *agreements as to succession* serve as a direct legal basis for inheritance. In contrast, the *lifetime support agreement*, while having some indirect inheritance-related effects, does not serve as a legal basis for invoking inheritance. Second, with *agreements as to succession*, the mandatory heirs' compulsory share is protected (they can exercise their right to a reserved part of the inheritance), while the *lifetime support agreement* can exclude the rights of mandatory heirs entirely,[42] leading to disputes over the validity and intentions of the agreement. Another key difference is that *agreements as to succession* ensure that not only the rights but also the obligations of the deceased are passed on to the heirs, thereby protecting the rights of creditors.[43] In the *lifetime support agreement*, the provider of support is not liable for the debts of the recipient after their death, unless

37 *„Службен весник на Република Македонија"* бр.55/2007; 86/2008; 139/2009; 135/2011; 72/2016; 142/2016 и 233/2018 ["Official Gazette of the Republic of Macedonia" No.55/2007; 86/2008; 139/2009; 135/2011; 72/2016; 142/2016 и 233/2018].
38 *Law on Notaries* (2016), Art. 55 para. 1.
39 Ibid., Art. 55 para. 1.
40 *Law on Notaries* (2016), Art. 67.
41 Мицковиќ и Ристов [Mickovic and Ristov], 2016a, p. 267.
42 Ibid., p. 266.
43 Мицковиќ и Ристов [Mickovic and Ristov], 2016b, p. 71.

specifically agreed upon.[44] This lack of responsibility for outstanding debts can create complexities for creditors seeking to settle claims. Finally, unlike *agreements as to succession*, the *lifetime support agreement* can be unilaterally terminated or revoked, especially if the relationship between the provider and the recipient deteriorates to the point where cohabitation becomes unbearable.[45] This revocability adds a layer of flexibility but also legal uncertainty.

While the *lifetime support agreement* continues to be utilised for providing care to individuals, particularly the elderly, it has received widespread criticism. Legal academics say that it is frequently used to dodge inheritance laws, thus selecting a '*de facto*' successor, while failing to comply with the formalities and safeguards involved with formal succession procedures.[46] This has given rise to ongoing discussions in legal theory and practice over whether these agreements, given their consequences, should be regarded as *agreements as to succession* or fall exclusively under the purview of obligation law.

Moreover, there are calls for reform, arguing that the reintroduction of defined *agreements as to succession* would provide a clearer legal framework that balances the needs of the deceased, heirs, and creditors while reducing the possibility of estate disputes, thereby addressing the shortcomings that the *lifetime support agreement* currently has. Until such reforms are implemented, the debate regarding the true nature of these agreements persists, emphasising the need for statutory clarity to prevent misuse and promote fairness in inheritance matters.

## 4.
## Agreement on Assignment and Distribution of Property During Lifetime

The *agreement on assignment and distribution of property during lifetime* has been a consistent aspect in the legal systems of the former Yugoslav republics, tracing its roots to the principles established by the Federal *Law on Inheritance* of 1955, which were later included in each of the republics' inheritance legislations.[47] This specific agreement has undergone several changes throughout the years. The adaptations range from minor adjustments of certain provisions to more significant changes,

44 Law on Obligations (2001), Art. 1032.
45 *Law on Obligations* (2001), Art. 1033 para. 2.
46 Ристов [Ristov], 2011, p. 94.
47 Крстић [Krstic], 2021, p. 159.

including the reclassification of the agreement from inheritance law to obligations law, accompanied by further revisions to its legal framework.[48]

Macedonian law defines the *agreement on assignment and distribution of property during lifetime* as a legal contract in which a grantor decides to transfer all or part of their property to their descendants during their lifetime.[49] This agreement originates from a long-standing tradition rooted in everyday practices where elders who could no longer work their land would distribute it among their descendants during their lifetime, ensuring its upkeep and continuity within the family.[50] Once an informal practice based on customary norms, it was later formalised into legal provisions to bring clarity and structure to property transfers that occur before the owner's death.[51] Through the *Law on Obligations* in Macedonian law, the *agreement on assignment and distribution of property during lifetime* is now recognised as an *inter vivos* agreement, meaning it takes legal effect while the grantor is still alive, and it must meet several strict legal requirements to be valid.

The *agreement on assignment and distribution of property during lifetime* is consensual because it concludes when the contracting parties agree on its essential elements; is formal because it is concluded in writing in the form of a public deed with the participation of a competent authority; is unilaterally binding or, in some cases, bilaterally binding; can be in a form of a gift or a burden, depending on whether the ancestor did or did not ask for anything in return from the descendants; and is a causal contract because the purpose for which it is concluded is visible, which is the distribution of the transferor's property to his descendants during his lifetime.[52]

This agreement must be executed in writing and duly notarised,[53] satisfying the form of a public deed, that is, a notarial deed or a private deed solemnised by a notary,[54] and it must be agreed upon by all descendants and spouse of the grantor, who will be called to inherit their estate by law.[55] This consent requirement ensures that all parties who could potentially inherit the property in the future have the opportunity

48 In Croatia, the Federation of BiH, and Republika Srpska, the agreement on assignment and distribution of property during lifetime is regulated by the laws governing inheritance within the special chapter entitled 'Inheritance Contracts'. Meanwhile, the legislation of Serbia, Slovenia, Montenegro, and North Macedonia went in a different direction and regulate this agreement under the regulations governing obligation relations within the framework of a special chapter of the law determined only for this contract. Read more on the regulation of the agreement on assignment and distribution of property during lifetime in the former Yugoslav republics at: Крстић, 2021, pp. 159–175.

49 *Law on Obligations* (2001), Art. 1022.

50 Мицковиќ и Ристов [Mickovic and Ristov,], 2016a, p. 246.

51 Ibid., Art. 1022–1028.

52 Галев и Дабовиќ Анастасовска [Galev and Dabovic Anastasovska], 2021, pp. 431–432.

53 *Law on Obligations* (2001), Art. 1023 para. 2.

54 *Law on Notaries* (2016), Art. 67.

55 Ibid., Art. 1023 para. 1.

to agree or disagree with its assignment before the grantor's death. If any descendant does not initially provide their consent to the agreement, they have the option to do so later using the same legal form.[56] This feature attempts to prevent disagreements and ensure that property distribution is transparent and mutually accepted by all family members concerned.

Although the *agreement on assignment and distribution of property during lifetime* does not share many similarities with *agreements as to succession*, there is one significant similarity. Under both types of agreements, the property transferred does not form part of the grantor's estate upon their death.[57] In other words, the property assigned through the agreement is not subjected to the usual probate process that governs the remaining assets of the estate.[58] This can result in a more efficient and rapid transfer of assets to the intended recipients, avoiding the delays that frequently accompany probate proceedings.

However, despite this similarity, the *agreement on assignment and distribution of property during lifetime* fundamentally differs from a classic agreement as to succession in terms of its legal nature and effects. One of the primary differences is that the *agreement on assignment and distribution of property during lifetime* is an *inter vivos* agreement that takes effect during the grantor's life, while the *agreement as to succession* is designed to come into force only after the grantor's death (*mortis causa*).[59] This discrepancy has important legal implications. The *agreement as to succession* provides a binding legal basis for exercising inheritance rights and specifies how the grantor's estate will be allocated following their death. However, the *agreement on assignment and distribution of property during lifetime* enables the transfer of property ownership during the grantor's life, essentially getting around the statutory rules of inheritance law.[60] Another important difference is the level of protection for mandatory heirs' rights. Under Macedonian inheritance law, mandatory heirs – such as the spouse, children, and other close family members – are entitled to a compulsory share of the estate, which cannot be freely disposed of by the deceased through a will or other legal instruments.[61] Under the *agreement as to succession*, these heirs' rights are preserved and protected, ensuring that they receive their rightful share. However, the *agreement on assignment and distribution of property during li*fetime does not safeguard this compulsory share, meaning the grantor could potentially use this agreement to exclude mandatory heirs entirely from receiving property.[62]

56 Ibid., Art.1023 para. 4.
57 Крстић [Krstic], 2021, p. 13.
58 Мицковиќ и Ристов [Mickovic and Ristov], 2016a, p. 267.
59 Ристов [Ristov], 2011, p. 89.
60 Крстић [Krstic], 2021, p. 103.
61 *Law on Inheritance* (1996), Art. 30–49.
62 Ѓуриќ-Милошевиќ [Djuric-Milosevic], 2024, p. 88.

This flexibility can lead to situations where the property is distributed in a manner that disregards the rights of mandatory heirs, which can lead to disputes and claims after the grantor's death. Moreover, the *agreement as to succession* provides a more comprehensive transfer of rights and obligations. It not only outlines who will inherit the property but also ensures that any obligations or debts associated with the estate are transferred along with the assets. This means that the contractual heirs are responsible for the debts of the deceased, which provides a measure of protection for creditors. In contrast, the *agreement on assignment and distribution of property during lifetime* does not transfer such obligations, and descendants who receive property through this agreement are not liable for any debts of the grantor, which can limit creditors' ability to recover debts from the estate.[63] The rules surrounding the revocability of these agreements further highlight their differences. *Agreements as to succession* are binding and cannot be unilaterally revoked or dissolved. This rigidity ensures that the arrangements made by the grantor are honoured after their death, offering peace of mind to both the grantor and beneficiaries. Conversely, the *agreement on assignment and distribution of property during lifetime* is more flexible. It can be unilaterally revoked by the grantor, particularly in cases of '*extreme ingratitude*' from the recipient.[64] This provision allows the grantor to retract the agreement if the beneficiary behaves in a manner that is deemed disrespectful or harmful, but it also introduces a level of legal uncertainty, which does not exist in the case of *agreements as to succession*.

In practice, these disparities have sparked arguments regarding whether it is appropriate to use agreements such as the *agreement on assignment and distribution of property during lifetime* to fulfil succession planning purposes.[65] While these agreements are officially regarded as obligation law contracts rather than inheritance instruments, they have significant implications for the distribution of one's assets after their death. Critics argue that this practice undermines the principles of inheritance law, as it allows property to be transferred in a way that can circumvent the protections offered to mandatory heirs. Supporters, however, see these agreements as a method that provides property owners a greater degree of autonomy to handle their assets as they see fit.[66]

Given the limitations of the *agreement on assignment and distribution of property during lifetime*, there are clear advantages to regulating *agreements as to succession*, particularly if it is to be reintroduced into Macedonian law. *Agreements as to succession* would provide greater legal certainty, as they cannot be revoked or altered unilaterally, reducing the likelihood of disputes after the grantor's death.

63 Ibid.
64 *Law on Obligations* (2001), Art. 1028.
65 Ѓурић-Милошевиќ [Djuric-Milosevic] , 2024, p. 88.
66 Ibid.

They would also more effectively safeguard the interests of both family members and creditors, by ensuring that mandatory heirs receive their estimated share and that the payment of debts is properly managed. Additionally, *agreements as to succession* would provide greater control to individuals over how their assets are managed and distributed, without the need to seek consent of all descendants, providing an appropriate and straightforward method of estate planning that is more closely aligned with the grantor's intentions.

## 5.
## Legal Reform: Reintroduction of Agreements as to Succession in the First Macedonian Civil Code

Even though *agreements as to succession* have been absent from Macedonian inheritance law for nearly 70 years, scholarly opinion remains divided as to their justification. In this context, it is stressed that these agreements prevent potential disagreements regarding the allocation of the estate following the disposing party's death and allow for the conservation of entire agricultural land.[67] The scholarly viewing of these agreements as inherently feudal is outdated and has no place in current legislation. This assertion is confirmed by the legal practice of several European countries, such as the legislations of France, Austria, Germany, and Switzerland, all of which support the claim that inheritance agreements are a legal foundation for invoking inheritance rights.[68] Taking into consideration the specifics of the *lifetime support agreement* and the *agreement on assignment and distribution of property during lifetime*, as well as their practical application so far, it cannot be ignored that they are used as an indirect way of determining contractual heirs.[69] Precisely because of that, reintroducing and decisively regulating *agreements as to succession* in Macedonian law would address the gaps in our inheritance law, which the previously mentioned *inter vivos* agreements have been unsuccessfully trying to fill for decades. In that sense, the jurisprudence believes that the acknowledgement of *agreements as to succession* as legally binding inheritance law instruments allows for greater freedom in the organisation of legal relationships, simultaneously enabling a higher level of legal certainty and, most importantly, meeting the needs and capabilities of the parties involved.[70]

In the upcoming inheritance law reforms, it is crucial that *agreements as to succession*, in their classic form of contractual appointment of heirs and beneficiaries,

67 Мицковиќ и Ристов [Mickovic and Ristov], 2016b, pp. 70–71.
68 Мицковиќ и Ристов [Mickovic and Ristov], 2016b, pp. 57–60.
69 Ibid., p. 72.
70 Stojanović, 2003, pp. 176–177.

be introduced as a legal basis for invoking inheritance and be regulated in detail, following the example of many modern legal systems. In accordance with this statement, the *preliminary draft of the Macedonian Civil Code (Book Four: Inheritance Law)*[71] proposes the reintroduction of *agreements as to succession*, aligning Macedonian inheritance practices with numerous European countries where these agreements remain essential.[72]

The proposed Civil Code defines *agreements as to succession* as contracts through which married or cohabiting partners agree to transfer all or part of their property upon death (*mortis causa*) and can either designate one partner as the sole heir or establish mutual inheritance between both partners.[73] This agreement would be designed to represent a form of commitment only between married couples or registered cohabiting partners,[74] enabling them to create reciprocal inheritance rights or designate one of them as the heir to all or a portion of their estate. This limitation in relation to the contractual parties highlights the intention of the legislator to align succession arrangements with the safeguards of family law, aiming to maintain *agreements as to succession* as a tool to uphold long-standing familial ties and obligations.

To meet the strict requirements for its legal form, *agreements as to succession* must be concluded in the form of a notarial deed in the presence of married or cohabiting partners.[75] This formal requirement for notarisation emphasises the significance of the agreement by ensuring that both parties fully comprehend the agreement's contents and effects. In this process, the notary plays an important role in providing oversight and ensuring that the agreement's legal obligations are met. This method not only validates the partners' intentions but also prevents future disputes or challenges to the agreement's legitimacy.

As a typical *mortis causa* legal tool, the legal effect of *agreements as to succession* occurs at the time of the death of the contractual testator,[76] activating the transfer of property rights as outlined in the agreement. However, for the purpose of ensuring that close family members still retain their statutory inheritance rights to a portion of the estate, as well as creditors' rights to recover their debt, this agreement would protect the rights of mandatory heirs to a compulsory share of the inheritance[77] and enable the protection of the rights of creditors. *Agreements as to succession* would

71 Работна верзија на Македонскиот Граѓански Законик, Книга 4, *Наследноправни односи [Draft version of the Macedonian Civil Code, Book 4, Inheritance Law Relations],* (not published), Art. 5:150–5:156.
72 Ристов [Ristov], 2011, p. 94.
73 *Preliminary draft version of the Macedonian Civil Code* (not published), Art. 5:150.
74 Ibid., Art. 5:151.
75 Ibid., Art. 5:152.
76 Ibid., Art. 5:153 para. 1.
77 Ibid., Art. 5:153 para. 2.

also leave room for flexibility, allowing the contractual testator to dispose of the property that is the subject of the agreement during their lifetime, unless otherwise stipulated in the agreement.[78]

The terms established in *agreements as to succession* may only be modified with the consent of both contracting parties, and any changes or modifications must be made in the same legal form as the agreement itself.[79] This demand for consensus emphasises the parties' equilibrium of rights and obligations, guaranteeing that none of them can unilaterally change the agreement to their benefit. However, by requiring modifications to be made in the same form as the original agreement, the law preserves the agreement's integrity and protects both parties.

The agreement as to succession, stipulated as an agreement concluded only between married couples or registered cohabiting partners, naturally ends with the divorce of the marriage or its annulment, as well as the termination of the extramarital union.[80] However, one of the married or cohabiting partners could unilaterally revoke and terminate the agreement if the contractual heir has violated a moral or legal norm with his behaviour, which is the legal basis for exclusion from inheritance[81] in accordance with statutory inheritance norms.[82] In these situations, the agreement as to succession permits the aggrieved party to unilaterally revoke the agreement, preventing them from having to leave their estate to a partner who has harmed their partnership.

Finally, the *preliminary draft of the Macedonian Civil Code* proposes establishing a *Register of Agreements as to Succession*, becoming a part of the existing *Register of Wills*, which will subsequently become the *Register of Agreements as to Succession and Wills*.[83] To ensure clarity and accountability, Macedonian law requires that *agreements as to succession* and *wills* be recorded in a public registry run by the Notary Chamber of North Macedonia.[84] The Register is a public record maintained by the Notary Chamber in accordance with the law,[85] which provides an official record of all *agreements as to succession* and *wills*. Data regarding the Register is submitted at the (contractual) testator's request by competent courts, notaries, lawyers, and persons who drew up the *agreement as to succession* or will.[86] However, the data from the Register cannot be made available to anyone before the (contractual) testator's death, except for the testator, the persons who drew up the *agreement as to succession*,

78 Ibid., Art. 5:153 para. 3.
79 Ibid., Art. 5:154.
80 Ibid., Art. 5:156.
81 Ibid., Art. 5:155.
82 Law on inheritance (1996), Art. 46–48.
83 *Preliminary draft version of the Macedonian Civil Code* (not published), Art. 5:149.
84 Ibid., Art. 5:149 para. 1.
85 Ibid., Art. 5:149 para. 2.
86 Ibid., Art. 5:149 para. 3.

or a person specially authorised by them.[87] The registration requirement is intended to avoid future disputes about the agreement's legitimacy or conditions. However, registration, while suggested, is not mandatory for the agreement's legal validity; therefore, an unregistered agreement is nonetheless legally binding.[88]

To conclude, the idea grounded in the essence of the *preliminary draft of the Macedonian Civil Code* to restore *agreements as to succession* is an important step towards modernising the country's inheritance law. Macedonian legal system stands to benefit from harmonising with European legal frameworks, in which such agreements play an important role in estate planning. The provisions outlined, including strict notarial formalities, guarantee protection for mandatory heirs and creditors, and the establishment of a formal public registry for *agreements as to succession* intends to provide legal clarity, protect family and financial interests, and maintain individuals' control over their assets during their lifetime.

## 6.
## Conclusion

The inclusion of *agreements as to succession* into Macedonian inheritance law is a significant step towards modernising and improving the legal tools for estate planning. This proposed amendment, as stated in the *preliminary draft of the Macedonian Civil Code*, recognises the historical and practical relevance of *agreements as to succession*, while resolving long-standing legal loopholes in current legislation. By realigning Macedonian law with European legal standards, where such agreements are widely accepted, formally regulated and applied in practice, this development signifies a transition towards an inheritance system that prioritises legal certainty and foreseeability, as well as the protection of interests of all parties concerned.

This study delves into the evolution and current status of *agreements as to succession* in Macedonian inheritance law, shedding light on a gap in the legal system that has existed since the 1950s. This void was initially filled by specific *inter vivos* agreements – the *lifetime support agreement* and the *agreement on assignment and distribution of property during lifetime*. Both evolved over time but neither addressed the comprehensive requirements of classic, traditional, *mortis causa* agreements. From a historical viewpoint, *agreements as to succession* played an important role before being eliminated as part of post-World War II reforms, when they became ruins of the past, altering the development of inheritance law on the Balkans.[89]

87 Ibid., Art. 5:149 para. 4.
88 Ibid., Art. 5:149 para. 5.
89 See more about the inheritance law of the Socialist Federal Republic of Yugoslavia post-World War II at: Blagojević, 1955, pp. 60–61.

The *lifetime support agreement* and *agreement on assignment and distribution of property during lifetime*, as observed in this study, demonstrate that, while useful in certain contexts when dealing with property distribution, they do not provide the same level of security or legal certainty as the conventional *agreements as to succession*.[90] The lack of a direct legal basis for inheritance, the vulnerability of mandatory heirs' rights, as well as the limitations on creditors' safeguards, all indicate that these agreements only partially achieve the goals generally associated with the *agreements as to succession*. Furthermore, their categorisation under obligation law complicates their role, especially when they seek to substitute traditional succession arrangements.

Addressing the need of urgent inheritance law reform, the *agreement as to succession* proposed in the *preliminary draft of the Macedonian Civil Code* includes important structural aspects such as the need for a strict form of a public deed, drawn up by a Notary, in the form of a *notarial deed* or a *solemnised private deed,* alternatives for mutual inheritance among married or cohabiting partners, and carefully managed revocation conditions. *Agreement as to succession*, distinguishes itself from *inter vivos* agreements, by enabling asset transfer arrangements that take effect *mortis causa*, while providing greater certainty in estate distribution and avoiding the potential manipulation of inheritance rights associated with the *lifetime support agreements* or the *agreement on assignment and distribution of property during lifetime*. The establishment of a public registry for *agreements as to succession* improves transparency and accountability by allowing authorised parties to access the content of the agreements only under certain conditions, ensuring privacy and trust. This feature is particularly significant in a context where reliable record-keeping can aid in avoiding potential inheritance disputes. Also, despite the fact that the act of registration is not mandatory for legal legitimacy, it does help to ensure the agreement's enforceability by certifying its provisions and protecting the parties' intents and interests. Finally, the approach of the *preliminary draft of the Macedonian Civil Code* on *agreements as to succession* allows for a more modern and dependable probate procedure that balances one's autonomy and family interests. This modernisation will bring Macedonian law closer to European standards in the field of inheritance law, assuring transparency and certainty for future generations.

Reintroducing *agreements as to succession* in Macedonian inheritance law is, in my opinion, a critical step forward, going beyond simply conforming with European standards. Bearing in mind the arguments in favour of these agreements, the *Commission for Drafting the Civil Code of the Republic of North Macedonia* accepted the concept that *agreements as to succession* should be legally reintroduced in the

90 See more about the differences between the agreement as to succession and other related institutions at: Ристов [Ristov], 2011, pp. 88–89.

Macedonian legal system, considering them in the *preliminary draft of the Macedonian Civil Code*. This reform addresses the critical need for a legal tool that accurately represents the complex nature of family dynamics and property rights in modern Macedonia. Unlike current solutions, provided by the *lifetime support agreements* or the *agreement on assignment and distribution of property during lifetime*, *agreements as to succession* could enable a clear legal structure that protects the individual intentions and wishes, while honouring inevitable inheritance rights. This development is not merely about legal modernisation but about creating a respectful environment and stability within families. For me, this reform would transform the Macedonian inheritance system by balancing tradition and progression, ultimately ensuring that family legacies are both protected and thoughtfully honoured.

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Gellért NAGY*

# EU Citizenship: A Constitutional Law Perspective on the Activist Case Law of the Court of Justice of the European Union

**ABSTRACT:** *The institution of citizenship of the European Union (EU) is one of the key milestones of European integration. However, it is linked to the nationality of a Member State because, under the Treaties, only persons holding the nationality of a Member State are citizens of the Union. This poses a significant challenge for future integration, as it requires developing a coherent approach to citizenship issues. Thus, EU citizenship raises questions in the context of multilevel constitutionalism: whilst the rules governing the acquisition and loss of nationality remain within the discretionary powers of the Member States, these rules strongly influence EU citizenship and the rights associated with this status. In line with these findings, it is also worth noting the case law of the Court of Justice of the European Union (CJEU), which can be considered particularly pro-active and activist in its approach. In the present contribution, we aim to focus primarily on the relationship between EU citizenship and nationality. To this end, two recent CJEU cases will be presented (both concerning the loss of EU citizenship). Although the factual backgrounds of the two cases differ, we believe that reviewing these judgments together is the best way to highlight the specific features of the constitutional-law approach to EU citizenship and the consequences of the activist case law of the CJEU.*
**KEYWORDS:** *Citizenship of the European Union, Nationality, Case Law of the Court of Justice of the European Union, Brexit, Judicial Activism, Multilevel Constitutionalism.*

## 1.
## Introduction

The citizenship of the European Union (hereinafter: EU citizenship) is one of the most significant achievements of European integration, rooted in the idea of bringing

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"*the Union closer to its citizens.*"[1] In the first phase of European integration, EU law primarily recognised citizens only as economically active persons, namely workers.[2] However, as early as 1975, Leo Tindemans, then Prime Minister of Belgium, called for the recognition of certain special rights for citizens of the Member States of the European Community.[3] Later on, the Single European Act contained certain provisions that forecasted the establishment of EU citizenship.[4] Furthermore, in 1988, the Commission submitted a proposal to establish the right to vote and stand as a candidate in municipal elections,[5] thus promoting the recognition of certain political rights at the European level. In addition, the Court of Justice of the European Communities anticipated, in a judgment issued in 1989, that some form of EU citizenship could be established in the future.[6] In these early years of integration, the Court continued to play a significant role in "*constitutionalising*" EU citizenship by extending the interpretation of certain rights.[7]

The turning point finally came with the Maastricht Treaty, which established the concept of EU citizenship. However, even at its inception, some Member States expressed reservations, fearing the "*erosion of national citizenship.*"[8] The relevant legal literature of the time also expressed scepticism.[9] To somewhat address these reservations, the *Declaration on nationality of a Member State* (Declaration No. 2) was annexed to the Maastricht Treaty, which states that '*the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.*'[10] Since, under Article 51 of the Treaty on European Union, the annexes to the Treaties form an integral part thereof,

1 Oosterom-Staples, 2018, p. 436.
2 Mohay and Szalayné, 2011, p. 183., Milassin, 2022, p. 12.
3 Fábián, 2018, 142. The so-called Tindemans Report included rights such as '*equal access to public offices, dismantling of border controls, promotion of school and student exchange programmes, mutual recognition of diplomas and improved consumer protection*.' See Kadelbach, 2009, p. 447. One might observe that all these goals set out in 1975 were fulfilled in the following decades. http://doi.org/10.62733/2025.2.5-15
4 Fábián, 2018, p. 142.
5 Kadelbach, 2009, p. 447.
6 Fábián, 2018, 142. See Judgment of 2 February 1989 on Case 186/87 Ian William Cowan v Le Trésor public. In the given case, during a preliminary ruling procedure, the CJEU emphasised that the prohibition of discrimination '*must be interpreted as meaning that in respect of persons whose freedom to travel to a Member State, in particular as recipients of services, is guaranteed by Community law that State may not make the award of State compensation for harm caused in that State to the victim of an assault resulting in physical injury subject to the condition that he hold a residence permit of be a national of a country which has entered into a reciprocal agreement with that Member State.*' Thus, the CJEU, based on community law provisions, linked certain rights to the status of a citizen of a Member State.
7 Milassin, 2012, p. 12, 15.
8 Oosterom-Staples, 2018, p. 438.
9 Craig and de Búrca, 2015, p. 853.
10 Treaty on European Union – Declaration on nationality of a Member State.

the discretionary power of the Member States to regulate rules governing national citizenship has been articulated in the Founding Treaties.[11] Based on this reasoning, it seems clear that '*national autonomy in nationality matters is not affected at all by the creation of a European citizenship.*'[12] Nevertheless, as we will see in the present contribution, the situation is somewhat more complex than the above opinion formulated in 1998 suggests. The Court of Justice had already sought to nuance this approach in the renowned *Micheletti* case[13].

In recent decades, the institution of EU citizenship has been at the centre of debate; hence, the constitutional analysis remains relevant. This is particularly true in light of the Court of Justice of the European Union (hereinafter: CJEU) activist case law, which has significantly influenced the development of EU citizenship.[14] For all these reasons, the present contribution reviews recent CJEU case law, with a particular emphasis on the constitutional aspects of EU citizenship, focusing on cases related to the loss of citizenship.

## 2. Citizenship of the European Union as 'A Pale Shadow of Its National Counterpart'[15]

Under Article 20 (1) of the Treaty on the Functioning of the European Union, '*[e]very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*'[16] A similar provision is contained in Article 9 of the Treaty on European Union.[17] The second sentence of these provisions, which underlines one of the "*crucial features*"

11 Oosterom-Staples, 2018, p. 439.
12 de Groot, 1998, p. 122.
13 Judgment of 7 July 1992 in Case C-369/90 Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria. For details, see de Groot, 1998, p. 123.
14 See the three seminal judgments of the CJEU: Judgment of 2 March 2010 in Case C-135/08 Janko Rottmann v Freistaat Bayern; Judgment of 8 March 2011 in Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm); and Judgment of 5 May 2011 in Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department. For more on the case law of the CJEU, see Lenaerts, 2013, pp. 569–583 or Kochenov, 2011, pp. 74–91. Kochenov highlighted that these cases are pivotal as '*for the first time in its jurisprudence, the ECJ has established that EU citizenship alone can trigger the application of EU law in several situations.*' Kochenov, 2011, p. 59.
15 Kostakopoulou, 2007, p. 625.
16 Article 20(1) of the Treaty on the Functioning of the European Union.
17 Article 9 of the Treaty on European Union: '*In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*'

of EU citizenship, namely its complementarity[18] – was incorporated into the original text by the 1999 Treaty of Amsterdam, as a reaction to an annex attached to the Danish Act of Ratification of the Maastricht Treaty.[19] Based on this sentence, we can confirm that EU citizenship '*does not abolish national citizenship or replace it, national citizenship being a condition for acquiring the citizenship of the European Union.*'[20] This complementary nature is also reflected in secondary EU law. Article 2 (1) of Directive 2004/38/EC provides that '*Union citizen means any person having the nationality of a Member State.*'[21]

One can rightly observe from these provisions that '*EU citizenship establishes a direct link between the citizens of the Member States and the European Union, while it remains attached to national citizenship, nationality.*'[22] According to another opinion, '*EU citizenship is a distinct social and legal status putting the individual in a direct legal relationship with the EU.*'[23] Though the same scholar has highlighted that, under international law, EU citizenship cannot be understood as an actual citizenship or nationality.[24] A similar concept exists only in Africa, under the umbrella of the Economic Community of West African States (ECOWAS).[25]

Against this background, when it comes to conceptualising EU citizenship, one has to point out that its personal scope '*is defined in terms of nationality of a Member State*'[26], since EU citizenship '*cannot be acquired alone, nor can it be forfeited without giving up nationality.*'[27] On this basis, EU citizenship can be regarded as secondary, given that it is strongly linked to nationality.[28] To be precise, '*the relationship of EU*

18 Kadelbach, 2009, p. 452., Craig and de Búrca, 2015, p. 854.
19 Oosterom-Staples, 2018, p. 439.
20 Fábián, 2018, p. 143.
21 Article 2(1) of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
22 Csehi, 2025, p. 77.
23 Worster, 2018, pp. 351–352. This relationship between a citizen and the environment in which he or she lives (the EU in our case) is examined by the "citizenship practice theory." See in this sense Wiener, 2017, p. 255.
24 Worster, 2018, pp. 350–351. In this regard, it is salient to point out that even though nationality and citizenship are interdependent, they "*are not congruent,*" as citizenship '*describes the adherence to a body politic in a way that identifies a person as a full member thereof.*' Kadelbach, 2009, p. 449. Nonetheless, in this article we will use "*nationality*" and "*citizenship*" interchangeably, in order to avoid confusion when reviewing the case law of the CJEU.
25 Under Article 1 of the Revised Treaty of the ECOWAS, community citizen means '*any national of Member States who satisfy the conditions stipulated in the Protocol defining Community citizenship.*'
26 Oosterom-Staples, 2018, p. 431.
27 Kadelbach, 2009, p. 451.
28 Varga, 2019, p. 181.

*citizens to the European Union is limited to the fact that the state of their nationality [...] is a member of the European Union.*'[29]

It is precisely this relationship between national citizenship and EU citizenship that raises the main questions. By linking EU citizenship to nationality, the rights associated with it[30] (i.e. right to move and reside freely within the territory of the Member States,[31] the right to vote and stand as a candidate in the European Parliamentary elections,[32] the right to vote and stand as a candidate in the municipal elections in the Member State in which he resides,[33] right to protection by diplomatic and consular authorities,[34] right to petition,[35] right to apply to the European Ombudsman,[36] and the right to information and access to documents[37] are essentially subject to national regulations. On this basis, EU citizenship appears as a legal institution within the multilevel constitutional system[38] that lies at the intersection of national and EU levels. According to Stefan Kadelbach, from the perspective of multilevel constitutionalism, EU citizenship is '*a mere subsidiarity institution that expresses the existing degree of joint policy organised at the Union level in terms of individual rights.*'[39] At the same time, even though EU citizenship '*contributes to the democratisation of the EU,*'[40] It is not connected to a given community.[41] Due to this shortcoming, '*the Union regarded as a*

29 Ganczer, 2022, p. 36.
30 Some of these rights related to the EU citizenship are affiliated with nationality, whilst others are not. Gyeney, 2023, p. 308. In the meantime, some scholars consider that relating citizenship only to rights might be problematic, since "*rights are central to citizenship, but only if they are linked to the principal source of legitimation: the citizens of the polity.*" However, the issue of the nature of polity is "*still an unanswered question*" in the European integration, that's why EU citizenship is "*hard to position.*" See Seubert, 2018, p. 27.
31 Article 20(2) point a) and Article 21 of the Functioning of the European Union.
32 Article 20(2) point b) of the Functioning of the European Union. With regard to the right to vote and stand as a candidate in the European Parliamentary elections, it is necessary to mention the *Delvigne* judgment (Judgment of 6 October 2015 in Case C-650/13 Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde) of the CJEU, which specifically addressed this political dimension of EU citizenship. In essence, the CJEU recognised in the Judgment that Article 39 (2) of the Charter of Fundamental Rights of the European Union ('*Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot*') recognises the participation of EU citizens in elections. See Gyeney, 2020, p. 11.
33 Article 22 of the Functioning of the European Union.
34 Article 20(2) point c) and Article 23 of the Functioning of the European Union.
35 Article 20(2) point d) of the Functioning of the European Union.
36 Article 24(3) of the Functioning of the European Union.
37 Article 24(4) of the Functioning of the European Union.
38 According to Stefan Kadelbach, any 'parallel considerations between national and Union citi*zenship only make sense when considering this background [i.e. of a multilevel system].*' Kadelbach, 2009, p. 452.
39 Kadelbach, 2009, p. 470.
40 Lenaerts, 2016, p. 164. Besides indirect democracy, a form of participative democracy is also linked to EU citizenship, namely the citizens' initiative. See Lenaerts, 2016, pp. 164.
41 Lashyn, 2021, p. 364.

*"compound of states" [...] cannot currently possess a legitimising community of its own.*'[42] Nevertheless, one should not forget that the establishment of EU citizenship was a major step in the process of constitutionalisation,[43] and was part of the '*attempt to move from a mainly economic community to a political union.*'[44]

If we examine this relationship from the perspective of competences, certain aspects are particularly noteworthy. It goes without saying that one of the most pivotal characteristics of nationality is the discretionary power of states in this regard.[45] In other words, it falls within the exclusive competence of states to determine the exact requirements for acquiring or conditions for losing citizenship; i.e., this issue falls within the scope of the *domain réservé*.[46] This is confirmed likewise by Article 3(1) of the European Convention on Nationality, adopted by the Council of Europe in 1997, under which '*each State shall determine under its own law who are its nationals.*'[47] At the same time, in recent years, the CJEU has issued several rulings that set certain limits on this discretionary power. For example, the CJEU highlighted that '*Member States must, when exercising their powers in the sphere of nationality, have due regard to EU law and, in particular, to the principle of proportionality.*'[48] Taking relevant EU law provisions into account is particularly important in regulating the loss of nationality, as this also entails the loss of EU citizenship. Against this background, it can be said that:

> *'it is for the Court [of Justice of the European Union] to rule on the questions referred by the national court which concern the conditions in which a citizen of the Union may, because he loses his nationality, lose his status of citizen of the Union and thereby be deprived of the rights attaching to that status.*'[49]

42 Kadelbach, 2009, p. 470.
43 Lashyn, 2021, p. 362.
44 Craig and de Búrca, 2015, p. 852.
45 Varga, 2019, p. 174.
46 Ganczer, 2022, p. 29.
47 Article 3(1) of the European Convention on Nationality.
48 Judgment of 5 September 2023 in Case C-689/21 X v Udlændinge- og Integrationsministeriet. Reasoning 30.
49 Judgment of 2 March 2010 on Case C-135/08 Janko Rottmann v Freistaat Bayern. Reasoning 46.

Based on these findings, certain scholars concluded that '*the Court adopted a proactive stance in the effort to "construct" a new status for European nationals.*'[50] Moreover, these CJEU conclusions likewise influenced the case law of the constitutional courts of the Member States. For example, in Decision No. 362 of 2019, the Constitutional Court of Romania expressly referred to these findings.[51]

In this context, it is of utmost importance to review recent CJEU case law to assess how EU citizenship affects domestic nationality law. Citizenship is a public law relationship between a state and an individual, entailing both rights and obligations.[52] The claim that EU citizenship affects this relationship raises unique questions. For example, as some scholars observed, '*tensions between member countries and the Union regarding the personal scope of EU citizenship arise regularly.*'[53]

Similarly, one might venture to observe a '*shift from nationality to residence as a criterion for the acquisition of certain national citizenship rights*' as '*Union citizenship generates rights for nationals of a Member State by virtue of their residing in another Member State.*'[54] In this context, the principle of non-discrimination must also be mentioned. Under Article 18 of the Treaty on the Functioning of the European Union, '*[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be*

50 Skrbic, 2019, p. 19. Nonetheless, Skrbic also pointed out that cases concerning EU citizenship are decided by the CJEU based on two different approaches: in certain judgments, the Court focuses primarily on Article 20(1) of the Treaty on the Functioning of the European Union and on the status of EU citizenship as such, whilst the majority of cases related to EU citizenship are still viewed from the perspective of the freedom of movement (Article 21 of the Treaty on the Functioning of the European Union) and thus decided on the basis of a "functional", internal market-oriented approach. See Skrbic, 2019, pp. 19–20.

51 Decision No. 362 of 2019 of the Constitutional Court of Romania. Published in Official Gazette No. 568 of 2019. Reasoning 34–36. The Constitutional Court also emphasised that 'the withdrawal of Romanian citizenship also results in the loss of the citizenship of the European Union.' Reasoning 34.

52 Gyeney, 2023, p. 307. By analogy, EU citizenship should represent a public law relationship between a natural person and an international organisation. See Fábián, 2018, 143. Yet this relationship is a complex issue from a constitutional law perspective, raising serious questions. Moreover, contrary to national citizenship, there are no additional duties attached to EU citizenship. See Kochenov, 2014, pp. 482–498.

53 Lashyn, 2021, p. 364.

54 Besson and Utzinger, 2008, p. 194. It is interesting to note that, as early as 1998, certain scholars argued that the basis of EU citizenship should be residence, instead of nationality, as this would unify differences created by divergent nationality laws. Garot, 1998, p. 229, 233. At the same time, this solution would excessively extend EU citizenship and the rights associated with it, since even third-country nationals (if they reside in a Member State of the EU) could be eligible for EU citizenship. For this reason, it would be difficult to accept such a solution.

*prohibited*.'[55] In essence, this principle protects EU citizens from becoming "*second class citizens*" in a Member State of which they are not nationals.[56]

In addition to these issues, the recent loss of EU citizenship resulting from the loss of nationality of a Member State has also raised concerns. In what follows, the present contribution will reflect on the loss of EU citizenship through an in-depth analysis of recent CJEU case law.

## 3.
## Cases Related to the Loss of EU Citizenship

Generally, one can observe that the CJEU '*has used its competence to mould Member States' competence in nationality matters, by requiring them to observe international and EU standards*.'[57] Thus, recent case law seeks to limit measures taken by Member States that affect EU citizenship.[58] This activist case law can, to some extent, be justified, as the CJEU wishes to protect EU citizenship and, in particular, the rights associated with it. Moreover, there are several positive aspects of this activist approach. For example, the CJEU established that '*the Treaty provisions on EU citizenship create certain autonomous rights, independent of other Treaty provisions governing movement and residence*.'[59] It is beyond doubt that this finding strengthens the protection of certain rights. Similarly, although Member States remain competent to regulate the requirements for acquiring or losing citizenship, the CJEU emphasised the need to respect certain fundamental principles, such as the principle of proportionality[60] (as expressed in the *Rottmann* case[61]) or loyalty towards the European community[62]. Thus, '*EU law does not directly regulate the conditions under which Member States confer nationality, but indirectly regulates aspects of this process*.'[63]

Recently, loss of EU citizenship has arisen in two radically different cases. In general, such citizenship can be lost in two ways: (I) by losing the nationality of a Member State, (II) by the Member State's withdrawal from the EU.[64] The two cases presented below illustrate how these scenarios can occur in practice.

55 Article 18 of the Treaty on the Functioning of the European Union.
56 Oosterom-Staples, 2018, p. 435.
57 Oosterom-Staples, 2018, p. 446.
58 Papp, 2022, p. 44.
59 Craig and de Búrca, 2015, p. 853.
60 Oosterom-Staples, 2018, p. 446.
61 Ganczer, 2022, p. 31.
62 Kadelbach, 2009, p. 451.
63 Craig and de Búrca, 2015, p. 854.
64 Takó, 2022, pp. 106–108.

In the first case, the High Court of Eastern Denmark referred a question to the CJEU seeking a preliminary ruling.[65] According to the facts of the case, the applicant in the proceedings before the national court (hereinafter X) was a dual US–Danish citizen, who lost his Danish citizenship at the age of 22 pursuant to Article 8(1) of the Law on Danish nationality, under which

> *'[a] person born abroad who has never been resident in Denmark and who has also not spent time there in circumstances indicating a close attachment to Denmark shall lose his or her Danish nationality upon reaching the age of 22, unless he or she would thereby become stateless. The Minister for Refugees, Migrants and Integration, or the person whom he or she authorises for that purpose, may, however, upon application submitted before that date, allow nationality to be retained.'*[66]

Although X had applied to retain her citizenship, she did so after reaching the age of 22; thus, the Danish authorities deduced that the second sentence of Article 8(1) could not apply to her. Moreover, the authorities likewise found that X had spent a maximum of 44 weeks in Denmark during her life, which is insufficient to develop a close relationship with the state. In 2018, X contested the decision of the Danish authorities before the Copenhagen District Court, referring, *inter alia*, to the case law of the Court of Justice, in particular to the *Tjebbes and Others*[67] Judgment.[68]

In his Opinion, Advocate General Szpunar emphasised that, based on the case law of the CJEU, two main principles have to be taken into account when examining the consequences of loss of nationality, namely (I) '*the competence of the Member State as regards the acquisition and loss of nationality must be exercised having due regard to EU law*'[69] and (II) '*judicial review must be carried out in the light of EU law and, in particular, in the light of the principle of proportionality.*'[70]

65 Judgment of 5 September 2023 in Case C-689/21 X v Udlændinge- og Integrationsministeriet.
66 Article 8(1) of the Law on Danish nationality.
67 Judgment of 12 March 2019 in Case C-221/17 M.G. Tjebbes, G.J.M. Koopman, E. Saleh Abady, L. Duboux v Minister van Buitenlandse Zaken. The case in question arose in relation to a substantially similar Dutch national regulation.
68 Judgment of 5 September 2023 in Case C-689/21 X v Udlændinge- og Integrationsministeriet. Reasoning 10–24.
69 Opinion of Advocate General Szpunar in Case C-689/21 X v Udlændinge- og Integrationsministeriet. Reasoning 45.
70 Ibid., Reasoning 46.

In examining the question referred for preliminary ruling, the CJEU emphasised that it is not incompatible with EU law to prescribe the loss of citizenship for reasons of public interest,[71] however

> *'having regard to the importance which primary EU law attaches to citizenship of the Union which [...] constitutes the fundamental status of nationals of the Member States, it is for the competent national authorities and the national courts to determine whether the loss of nationality of the Member State concerned, when it entails the loss of citizenship of the Union and the rights attaching thereto, has due regard to the principle of proportionality.'*[72]

At the same time, the CJEU stressed that, although Member States may require that an application for retaining citizenship be submitted within a reasonable time,[73] this should be preceded by informing the person concerned[74] and

> *'that person must have a reasonable period in which to make a request to the competent authorities for an examination of the proportionality of the consequences of that loss and, where appropriate, the retention or recovery ex tunc of that nationality.'*[75]

Furthermore, the examination of the request for retaining citizenship '*must include an individual assessment of the situation of the person concerned*.'[76]

Based on all these findings, the CJEU concluded that Article 20 of the Treaty on Functioning of European Union and Article 7 of the Charter of Fundamental Rights of the European Union do not preclude a national legislation such as the Danish one. This is true provided that (I) within a reasonable time (which cannot begin to run before the given person was duly informed), the persons concerned can lodge an application for the retention of the nationality; (II) the national authorities, during the course of the procedure for retention, can review the proportionality of the consequences of the loss of citizenship from an EU law perspective; and (III) where appropriate, the procedure allows the *ex tunc* recovery of citizenship.[77] These conclusions of the CJEU

71 Judgment of 5 September 2023 in Case C-689/21 X v Udlændinge- og Integrationsministeriet. Reasoning 37.
72 Ibid., Reasoning 38.
73 Ibid., Reasoning 43.
74 Ibid., Reasoning 48.
75 Ibid., Reasoning 50.
76 Ibid., Reasoning 54.
77 Ibid., Decisional part.

(which also bear the hallmarks of judicial activism in our view[78]) accurately reflect the impact of EU citizenship on the discretionary powers of the Member States about the rules governing citizenship.

The second relevant judgment arose in the context of Brexit.[79] EP, a UK citizen, had been living in France for several decades and was married to a French citizen. Nonetheless, following the UK's withdrawal from the EU, EP was removed from the electoral roll in France, thereby deprived of the right to vote in municipal elections. EP argued before the French domestic courts that she was also unable to participate in UK elections, as under the applicable national provisions, persons who have resided abroad for more than 15 years are not eligible to vote. On this basis, EP contended that the withdrawal of the UK from the EU cannot lead to an automatic loss of the EU citizenship status and, by extension, the rights associated with it. Considering these facts, the Court of Auch referred questions to the CJEU for a preliminary ruling.[80] It is evident that the factual background of the present case differs significantly from that of the previous one. Whilst in the previous case, EU citizenship ceased upon the loss of the nationality of a Member State, in the present case, it was the withdrawal of a Member State (the UK) that led to the termination of EU citizenship.

The Court of Justice, whilst examining the request for preliminary ruling, emphasised that the inseparable link between EU citizenship and the possession of a nationality should apply not only when it comes to establishing, but also in the case of retention of EU citizenship.[81] Thus, since 1 February 2020, UK nationals are no longer citizens of a Member State, but nationals of a third country.[82] Accordingly, they have

78 Generally, as mentioned above, the CJEU has taken an activist position when examining issues related to EU citizenship. In this way, for example, '*both the scope ratione personae and the scope ratione materiae of Union citizenship rights have gradually been broadened.*' Besson and Utzinger, 2008, p. 185. Furthermore, '*[a]s a result of this extremely active case-law, EU citizenship is gradually emancipating and turning into a more inclusive form of social and political membership, which is in line with universal human rights guarantees.*' Besson and Utzinger, 2008, p. 192. According to another opinion expressed in the legal literature, the activist case law affects the discretionary powers of the Member States in four main areas: '*1. proportionality assessments in cases of withdrawal of citizenship […]. 2. Combating the commercialization of citizenship […]. 3. Procedural reforms in naturalization […]. 4. Limits of state discretion.*' Chronowski, 2025, p. 76.

79 Judgment of 9 June 2022 in Case C-673/20 EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE). Some scholars argue that "EU citizenship was an important factor" in Brexit. Schmidt, 2017, p. 17. This further highlights that an analysis on the institution is topical.

80 Ibid., Reasoning 30–37.

81 Ibid., Reasoning 48.

82 Ibid., Reasoning 56.

lost their EU citizenship and the rights attached to this status.[83] This is the automatic result '*of the sole sovereign decision taken by the United Kingdom to withdraw from the European Union.*'[84] Taking into account all these factors,

> *'neither the competent authorities of the Member States nor their courts may be required to carry out an individual examination of the consequences of the loss of the status of citizen of the Union for the person concerned, in the light of the principle of proportionality.'*[85]

As evident, this conclusion of the CJEU is significantly different from the one set out in the above-presented *Udlændinge- og Integrationsministeriet* case. At the same time, as already mentioned, the facts of the case were completely distinct. Emphasising this, the CJEU also pointed out that

> *'[t]he cases in which the Court set out the obligation to carry out an individual examination of the proportionality of the consequences of the loss of Union citizenship concerned specific situations falling within the scope of EU law, where a Member State had withdrawn its nationality from individual persons, pursuant to a legislative measure of that Member State […] or an individual decision taken by the competent authorities of that Member State. The case law arising from those various judgments cannot therefore be applied to a situation such as that in the main proceedings.'*[86]

As a result of these findings, one cannot require Member States to treat UK nationals as EU citizens or to recognise the rights attached to this status, such as the right to vote or stand as a candidate in municipal elections.[87] At the same time, it is worth mentioning that following Brexit, both the UK and the remaining 27 Member States have secured the preservation of some acquired rights through numerous agreements (e.g., the UK has managed to conclude bilateral agreements with Poland,

83 Ibid., Reasoning 58. At the same time, some scholars have reached a different conclusion. According to William Thomas Worster, the loss of EU citizenship because of Brexit is arbitrary and violates the principles of non-retroactivity and non-discrimination. See Worster, 2018, pp. 341–363.

84 Judgment of 9 June 2022 in Case C-673/20 EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE). Reasoning 59. According to certain views expressed in the legal literature, whilst it is a logical consequence that as a result of Brexit, citizens of the UK have lost their EU citizenship, this '*negatively affects EU citizenship insofar this concept—apart from granting rights—aims to create a bond between the citizen and the EU.*' Schewe, 2020, p. 137.

85 Ibid., Reasoning 61.

86 Ibid., Reasoning 62.

87 Ibid., Reasoning 71.

Luxembourg, Portugal, and Spain on the right to vote or stand as a candidate in municipal elections).[88]

## 4. Conclusions

The establishment of EU citizenship – and thus the creation of a strong, direct link between the citizens and the EU – was a long-standing issue that influenced discussions on European integration for decades. At the same time, reservations were expressed from the outset by certain Member States, particularly concerning their discretionary powers to regulate national citizenship. Under the current provisions of the Treaties, EU citizenship is linked to nationality and thus occupies a fragile position within the multilevel constitutional system of the EU.

In addition, the activist case law of the CJEU–which is useful in that it protects the rights associated with this status–may also raise questions about the role of EU citizenship in a multilevel constitutional system. As Imre Vörös pointed out, due to the case law, '*new areas of law are coming into collision.*'[89] Nonetheless, it is salient to emphasise that the CJEU seems to have found the right balance on these issues thus far. As highlighted in the Hungarian legal literature:

> *'[i]t follows from the case law of the CJU that, in practice, it always seeks to strike a balance between national and EU interests. On the one hand, it respects the discretionary power of the Member States, as they continue to have competence over the content of nationality laws [...]. On the other hand, it recognises the principle of effective connection in the nationality laws of the Member States.'*[90]

Recently, some highly relevant questions have arisen regarding the loss of EU citizenship, both under certain national regulations and as a result of Brexit. These two situations led to different conclusions of the Court of Justice. The main findings of the two judgments presented in this contribution are summarised in the table below.

88 Gyeney, 2023, pp. 314–315.
89 Vörös, 2012, p. 241.
90 Chronowski, 2025, p. 74. At the same time, according to other Hungarian scholars, the Founding Treaties did not allow for such an expansive interpretation as that adopted by the CJEU in relation to an issue falling within the *domain réservé* of the Member States. See Ganczer, 2022, p. 41.

**Table 1:** Review of the recent case law of the CJEU (source: author's own research)

| Case of X v Udlændinge-og Integrationsministeriet | Case of EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE) |
|---|---|
| A national legislation under which certain persons may, under certain circumstances, lose their nationality and thus their EU citizenship is not contrary to EU law provisions, if:<br>(I) within a reasonable time (which cannot begin to run before the given person was duly informed), the persons concerned can lodge an application for the retention of nationality;<br>(II) the national authorities – during the course of the procedure for retention – can review the proportionality of the consequences of the loss of citizenship from an EU-law perspective;<br>(III) where appropriate, the procedure allows the ex tunc recovery of citizenship. | The loss of EU citizenship as a result of the withdrawal of a Member State from the EU is an automatic consequence of that state's sovereign decision. This situation cannot be regarded as equivalent to the loss of EU citizenship resulting from the loss of nationality, which is governed by national regulations.<br>In this context, '[t]he loss of rights of UK citizens is the logically consistent consequence of the democratic decision taken and in which the majority decided to leave the EU.'[91] |

91 Schewe, 2020, p. 135.

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Norbert RICHTER-SITKO*

# Status of Workers on Digital Platforms – Remarks From a Polish Labour Law Perspective

**ABSTRACT:** *Digital solutions have changed the way workers perform their work. We can now see more flexible forms of employment, moving towards a series of individual tasks or gig-work projects. A decisive influence on the changes in employment is the development of digital platforms, which has intensified with the COVID-19 pandemic. Employment through digital platforms is not a classical form of performing work; nevertheless, there is no doubt that it requires a specific legal regime for the protection of workers' rights. The current study explores the following themes: first, it examines the complexity of digital platforms and platform work. Second, it focuses on provisions related to obtaining a correct employment status by platform workers in the directive on improving working conditions in platform work (2024/2831) and how this status affects their rights. Lastly, it presents de lege ferenda postulates from the perspective of the Polish labour market.*
**KEYWORDS:** *Welfare Platform Work, Labour Law, Digital Labour Platforms, Legal Presumption, Employment Relationship*

## 1.
## Introduction

The rise of digital technologies has profoundly impacted the nature of employment, giving rise to a new form of work characterised by flexibility and fragmentation. The impact of these digital solutions has been particularly pronounced during the pandemic COVID-19, which has accelerated the use of and reliance on digital platforms. The growth of digital platforms and their incorporation into the labour market have given rise to a new dynamic in employment relationships but simultaneously raised considerable concerns regarding job security, fair remuneration, and adequate

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social protection.[1] Consequently, this model requires a review of traditional employment classifications and worker rights, as existing legal frameworks often fail to address the complexities of platform work. The traditional employment framework, designed for more stable and long-term employment relationships, is inadequate for capturing the unique characteristics of platform work. This legal gap exposes platform workers to significant vulnerability, underscoring the urgent need for the establishment of specific legal regimes to ensure the protection of their rights and address the peculiarities of their employment conditions.[2]

This study involves a comprehensive analysis of the phenomenon of platform work. First, the complexity of platform work and digital platforms is characterised, considering their operation and the various roles they play in contemporary labour markets. Second, the study focuses on the European Union's (EU) Directive on improving working conditions in platform work, concentrating particularly on provisions related to obtaining correct employment status and ensuring fair working conditions. Third, it involves a critical examination of the status of individuals engaged in work through digital platforms in Poland. The analysis considers how their vague status affects their workers' rights to safe and healthy working conditions, collective rights, and labour law protection. Lastly, it presents *de lege ferenda* postulates from the perspective of the Polish labour market with a view to integrating and protecting platform workers within the national and European legal framework.

## 2.
## Platform Work and Digital Labour Platforms

Platform work can be described as a form of employment that uses an online platform to enable organisations or individuals to access other organisations or individuals to solve problems or provide services in exchange for payment. Additionally, several characteristics can be identified that distinguish platform work from traditional work: paid work organised by a digital platform; involvement of three parties – platform – client – worker; focus on solving specific problems or managing specific tasks; work carried out in a form of outsourcing; work broken down into smaller tasks (so-called gigs); and on-demand services.[3]

1 Prassl and Risak, 2016, pp. 618 et seq.; Bednarowicz, 2018, pp. 13 et seq.; Dobrzyńska, 2020, pp. 16 et seq.

2 Bednarowicz, 2019, pp. 604 et seq.; Świątkowski, Andrzej Marian, 2019, pp. 95 et seq.; Unterschütz, 2020, pp. 319 et seq. http://doi.org/10.62733/2025.2.5-15

3 Cf. European Foundation for the Improvement of Living and Working Conditions, 2018, pp. 9–10; Świątkowski, Andrzej Marian, 2019, pp. 95 et seq.; Mirosławski, 2023, pp. 1 et seq.

Researchers often highlight two types of work through digital platforms. The first relates to "on-demand work via apps", which is characterised by the performance of common activities such as transport, cleaning, and care work via platforms and is mostly performed locally. Platform companies set minimum standards for the services offered, but also intervene in the selection and management of the workforce.[4] The second type, "crowdwork", is based on the execution of a series of tasks through digital platforms. These platforms connect an unlimited number of organisations and individuals with workers on a global basis. The micro-tasks performed on crowdwork platforms are in many cases menial and monotonous, but still require human judgement and perceptiveness (e.g. tagging photos, completing surveys), although digital platforms offer their space also for freelancers with specific skills, more technical or creative (e.g. programmers, architects, creative sector professionals).[5]

In the new technological and economic reality, the gig economy is becoming a fact. For millions of people, the technological solution offered by platforms seems to be an alternative option. In theory, the flexibility of on-demand work on platforms can be a significant opportunity for people who cannot work full-time; people with disabilities; or people who combine employment with other responsibilities, such as care work. The platforms offer work flexibility: whenever, wherever, and whatever task the platform workers accept.[6] According to the European Commission, digital work platforms may promote innovative services and new business models and create many opportunities for consumers and businesses. For workers, platforms mostly offer additional income, especially for people who face barriers in accessing the labour market; meanwhile, platforms improve access to products and services for consumers.[7]

However, platform work in its flexible form of "providing services" approaches the precariousness and instability of employment by forming a class of precariat. The phenomenon of precariousness of employment, following Guy Standing's research, can be identified as deficits in job security, among which we can mention employment security; job security through the guarantee of safe and hygienic working conditions; income security in the form of stable and adequate wages; or security of representation related to the right of coalition and collective labour relations.[8] Work through digital platforms often bears the characteristics of precariousness in the form of uncertainty about the frequency of opportunities for "gig jobs", and the amount of wages received for these jobs. Non-transparent conditions for the performance of services using algorithmic management lead to asymmetry

4 De Stefano, 2015, p. 1.
5 Prassl and Risak, 2016, pp. 624-627; Bakalarz, 2019, pp. 11–12.
6 Risak, 2017, p. 4.
7 European Commission, COM (2021), 762 final.
8 Cf. Standing, 2011, pp. 49–50.

of information on the part of employees and make it difficult to claim their rights in disputes with platforms. Digital platforms, owing to their structure, make it difficult for workers to effectively realise their right to labour representation.[9]

The number of people working through digital platforms in 2022 was estimated at 28.3 million, for whom work is more frequent than sporadic, and by 2025, the number was projected to reach 43 million people. However, 5.51 million of them, according to the analysis, are at risk of misclassification of employment status.[10] The majority of digital platforms, nine to 10 times, classified these people as self-employed.[11] In Poland, the number of workers who use digital platforms often more than once per month is estimated to be 11%, which is the average level in the EU; however, the percentage of these people is gradually growing every year.[12]

Some Member States have recognised the importance of the issue of platform work and have started to adopt regulations to protect platform workers. Further, national courts – for example in Spain, Belgium, and France – have ruled against digital platforms; with on-demand work platforms losing the majority of such cases.[13] Here, it is worth pointing out two decisions of the Court of Justice of the European Union (CJEU). In judgment C-434/15,[14] the CJEU held that the intermediary service provided by Uber should be considered an integral part of a complex service, the main element of which is the transportation service. The intermediary service provided by the Uber company consists of selecting vehicle owners who are not professional drivers, to whom the company provides an application, without which, first, these drivers would not provide transportation services, and second, people wishing to travel a city route would not have access to the services of these drivers. Furthermore, Uber exerts a decisive influence on the conditions under which these drivers provide services. Uber determines – with the use of the app – at least the maximum price of a given transport.

Moreover, Uber collects this price from the customer and then transfers part of it to the owner of the vehicle who is not a professional driver; Uber exercises a certain amount of control over the quality of the vehicles and their drivers, as well as over their behaviour, and such control can, if appropriate, result in the suspension of the driver in question from providing transport services. Uber's activity cannot be reduced to mere intermediation in the search for a customer by a person expressing

9 Cf. Lehdonvirta, 2016, pp. 53 et seq.; Potocka-Sionek, 2022, pp. 112–113.
10 European Commission, Directorate General for Employment, Social Affairs and Inclusion and PPMI., 2021.
11 European Commission. Directorate General for Employment, Social Affairs and Inclusion. and CEPS., 2021.
12 Pańków, Owczarek and Koziarek, 2018; ILO, 2021, p. 49.
13 See more C. Hießl, 2022.
14 Judgment of 20 December 2017 of Court of Justice (C-434/15, Asociación Profesional Elite Taxi v Uber Systems Spain SL).

a desire for an *ad hoc* transport service. Instead, it provides a transport service through drivers who are in constant cooperation with it, under its management. Uber's directorial and control powers are expressed in such features identified by the CJEU as: selecting drivers and their vehicles; deciding on the route of the ride through the application; controlling the standards of the service provided; and sanctioning undesirable behaviour through exclusion from the platform altogether.[15]

In judgment C-413/13,[16] the CJEU ruled, as in previous judgments, that the concept of an employee within the meaning of Union law must be defined on the basis of objective criteria that characterise the employment relationship, taking into account the rights and obligations of the person in question. From this perspective, qualification as a self-employed service provider under national law does not preclude a person from qualifying as an employee within the meaning of Union law if his independence is purely fictitious and thus serves to conceal a genuine employment relationship. It follows that the status of an employee under Union law cannot be affected by the fact that a person has been hired as a self-employed service provider under national law, provided that such a person acts under the direction of his employer as regards, in particular, his freedom to choose the hours and place of work and the tasks performed in the course of his work, provided that he does not bear the commercial risk of that employer, and provided that he is integrated into the enterprise of the said employer during the course of the employment relationship, forming an economic unit with that enterprise.[17] The judgment emphasises the stronger link of organisational integration of the worker than the traditional elements of subordination taken into account by national courts. As is further explained, EU legislation in relation to platform workers on digital platforms highlights the importance of CJEU case law in matters of identifying a worker's subjectivity.

## 3.
## EU Directive on Improving Working Conditions in Platform Work

Platform work and their working conditions have been identified by the EU as a new problematic issue and challenge.[18] Legislative action was taken when the European

15 Cf. Bakalarz, 2019, p. 11; Bagińska, Majkowska-Szulc, 2018, pp. 30–36.
16 Judgment of 4 December 2014 of Court of Justice C-413/13 FNV Kunsten Informatie en Media v Staat der Nederlanden.
17 Judgment of CJEU C-413/13, C. Hießl, 2022, pp. 72–73.
18 See more European Foundation for the Improvement of Living and Working Conditions, 2017, 2018; European Commission. Joint Research Centre, 2018; European Commission. Directorate General for Employment, Social Affairs and Inclusion, 2021.

Commission presented a proposal for a directive on improving working conditions in platform work in December 2021.[19] The Directive is one of the group of measures introduced in the European Pillar of Social Rights Action Plan, which, *inter alia*, aims to establish a standard for platform work, to protect European workers from being misclassified as bogus self-employed workers, and to provide workers with social protection and mitigate health and safety risks.[20] In 2024, the Directive on improving working conditions in platform work was adopted[21] and Member States are now required to adopt the laws, regulations, and administrative provisions necessary to comply with this Directive by 2 December 2026.

The main emphasis of the Directive focusses on improving working conditions and the protection of personal data in platform work by introducing measures to facilitate the determination of the correct employment status of persons performing platform work; promoting transparency, fairness, human oversight, safety, and accountability in algorithmic management in platform work; and improving transparency with regard to platform work, including in cross-border situations (art. 1 (1) of the platform work directive).

The directive set up a definition of digital labour platforms, which includes any natural or legal person providing a service that meets all of the following requirements:

I it is provided, at least in part, at a distance by electronic means, such as by means of a website or a mobile application;
II it is provided at the request of a recipient of the service;
III it involves, as a necessary and essential component, the organisation of work performed by individuals in return for payment, irrespective of whether that work is performed online or in a certain location
IV it involves the use of automated monitoring systems or automated decision-making systems

The definition of digital labour platforms, virtually kept without changes from the proposal for the directive (except point iv)), seems too strict and unprovable for new forms of digital platforms. Developing a cumulative definition would exclude some of the existing platforms,[22] but more crucially, it may permit circumventing the definition by digital labour platforms when new platforms appear in the future.[23]

19 European Commission, COM (2021), 762 final.
20 The Council, The European Economic and Social Committee and The Committee of the Regions, COM(2021) 102 final.
21 Directive (EU) 2024/2831.
22 For example platforms within companies that are addressed to employees, see: M. Schlachter, 2022, p. 386.
23 De Stefano, 2022, p. 4.

The European Trade Union Confederation noted that the references to "organisation of work" and "as a necessary and essential component" are too narrow and do not capture the manner in which work is performed. Further, the reference to a service "at a distance" adds weakness to the definition and could allow digital labour platforms to circumvent the definition.[24] Bearing in mind the differences between even on-demand work, which, in many cases, can be subsumed to traditional criteria of control by employers, "crowdwork" platforms could escape from known features into more "independent" control of working performance.[25]

The Directive presents two definitions of persons who work through digital labour platforms. The first are "persons performing platform work", that is, any individual performing platform work, irrespective of the nature of the contractual relationship or the designation of that relationship by the parties involved. The definition covers a broader range of independent contractors and self-employed persons.

The second, 'platform worker', describes any person performing platform work who has an employment contract or employment relationship as defined by the law, or collective agreements or practice in force in the Member States with consideration to the case law of the CJEU. It is worth noting that reference to "consideration to the case-law of the Court of Justice" was made to other EU directives[26] that have a more hybrid concept of the employment contract. The risk of omitting the legal presumption arises when digital labour platforms base their argumentation on strict and traditional national criteria of employment status. Adopting the reference to case law of the CJEU may ease traditional criteria, which, in most cases, does not recognise the complexity of platform work, by providing more open and wide interpretation of the employment relationship.[27] Moreover, in its judgment C-216/15[28] and in the context of other directives (on temporary work agencies), the CJEU pointed to similar doubts. The CJEU affirmed the necessity of using an autonomous definition of an employee, as an overly narrow understanding of the concept of employee found under national law undermines the effectiveness of the directive. Furthermore, such a narrow understanding would permit the Member States or temporary work agencies to exclude at their discretion certain categories of persons from the benefit of the protection intended by that directive, even though the employment relationship between those persons and the temporary work agency is not substantially different to the

24 European Trade Union Confederation, 2022, p. 2.
25 Ratti, 2022, p. 57.
26 That notion can be found in other directives e.g. Directive (EU) 2019/1152, art. 1 para. 2 or Directive (EU) 2019/1158, art. 2.
27 Cf. Schlachter, 2022, p. 387; Bednarowicz, 2019, pp. 613-614; De Stefano, 2022, p. 5.
28 Judgment of 17 November 2016 of Court of Justice (C-216/15, Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH)

employment relationship between employees having the status of workers under national law and their employer.[29]

To achieve a compatible employment status for persons performing work through platforms, Art. 4 of the draft directive primary sets out a framework of specific measures. The draft directive proposed a presumption of employment that would apply if at least two of the five indicators are met. Fulfilling these five criteria would determine whether a given legal relationship should be recognised as an employment relationship between an employee and an employer. However, this proposed rebuttable presumption has been met with considerable criticism from many authors.[30] Furthermore, the elements of legal presumption seem to be created at most to on-demand work that has particular differentials to "crowdwork".[31] The final version of the directive establishes a legal presumption of an employment relationship for platform workers based on two indicators that have not previously been included.[32] The presumption, enshrined in art. 5 of the directive, applies where facts indicating "direction" and "control" are found, as determined by national law, collective agreements, the practices of Member States, and case law of the CJEU. Moreover, the existence of an employment relationship shall be guided primarily by the facts relating to the actual performance of work, regardless of how the working arrangement is classified in the contract. These facts should include the use of automated monitoring systems or automated decision-making systems in the organisation of platform work. However, the legal presumption may be rebutted, in particular, if the digital labour platform seeks to rebut the legal presumption, and argues against the employment relationship.

The introduction of the rebuttable presumption surely can benefit people working on platforms by providing legal certainty through the correct classification of the employment relationship. Uncertainty of classification on digital platforms is the main issue that affects working conditions and deprives workers of labour rights and social security. Presumption can cause reversal of the burden of proof to digital labour platform stakeholders arguing that the relationship between persons performing work on platforms and themselves are contractual and not employment relationships.[33] Moreover, legal presumption may develop enforcement and monitoring of labour law as law stipulates that these persons who fulfil criteria of legal

29 Cf. C-216/15, paras. 35-37.
30 Cf. De Stefano, 2022 p. 4; Gould IV and Biasi, 2022, p. 93; Schlachter, 2022, p. 389.
31 For instance, Ratti, 2022, p. 58.
32 Nevertheless, it is worth noting that some Member States have adopted into their legal systems a presumption in the same or similar shape to that introduced in the proposal for the directive, cf. European Foundation for the Improvement of Living and Working Conditions, 2025, pp. 5–9.
33 Kullmann, 2022, p. 70.

presumption are in employment relationships.[34] Finally, clarifying the employment status of platform workers would in particular support trade unions to represent these workers in collective bargaining. Thus, the negotiation of collective agreements would cover platform workers through the personal scope of these agreements.[35]

## 4.
## Polish Regulation (Or Lack Thereof) of Platform Work

Polish scholars distinguish few bases of performance of work;[36] however, for the purposes of this study, three of them are relevant. The first is the employment relationship between the employee and employer. According to Art. 2 of the Labour Code,[37] an employee is an individual employed on the basis of a contract of employment, appointment, election, nomination, or co-operative contract of employment. Art. 3 of the Labour Code states that an employer is an organisational unit with or without legal personality, as well as an individual, employing one or more employees. The second is civil law agreements, which characterise the "non-employment relationship" between independent parties where one provides a service and one requests the service. The third is self-employment, although there is a lack of unification in both doctrine and legislation, both in terms of nomenclature and in defining the concept itself. It can be said that the self-employed are natural persons who carry out business activities and provide services to multiple entities (independent self-employed) or over a longer period of time even for one entity, in relation to which they remain in economic dependence (dependent self-employed).[38]

Despite the fact that the phenomenon of platform work and related problems are discussed in the labour law doctrine,[39] at the moment, Poland does not have comprehensive regulation that would cover platform work and protect platform workers.[40] The most connected regulation with platform workers was the amendment to the

34 Ibid., p. 71.
35 Ibid.; Ratti, 2022, p. 51;Unterschütz, 2021, pp. 61 et seq.
36 For a more in-depth examination, see: Baran, 2015.
37 Act of 26 June 1974 Labour Code (consol. Journal of Laws of 2025, item 277, as amended).
38 About the self-employment in Poland see more: Barański, 2023; Duraj, 2022; Musiała, 2014; Tomanek, 2017.
39 Only to mention: Bednarowicz, 2018; Dobrzyńska, 2020; Unterschütz, 2021, 2025; Mirosławski, 2023; Mitrus, 2024; Duraj, 2025.
40 At this moment, the Ministry of Family, Labour, and Social Policy has announced that it will endeavour to ensure that the draft law implementing the directive is presented in the fourth quarter of 2025, but there is no clear legislative schedule at the Government Legislation Centre at this time, Jolanta Ojczyk (2025), *Kurierzy na etatach? Oto plany rządu* [Online].

Drive Law Act[41] that changed the status of drivers who can be self-employed and also independent contractors. Platform work must be obligatory registered and drivers operating under this framework are subject to taxation obligations applicable to all. Platforms as intermediatory companies should be registered and may employ only licensed drivers.[42] The amendment, on the one hand, regulated and improve conditions of performing transport services by required platform workers to hold a taxi license and pay taxes as every regular taxi driver. On the other hand, the regulation strengthened the status of workers as self-employed or contractors, which may deepen the issue of correct employment status.

Platform workers, especially those who perform work via apps such as of transportation services or food delivery, are at risk of health and safety issues as well. In Art. 66 (1), the Polish Constitution[43] states that 'everyone shall have the right to safe and hygienic conditions of work'. In the Labour Code, Art. 304 §1 indicates that an employer shall ensure the healthy and safe conditions of work referred to in Article 207 §2 for individuals who perform work on any basis other than an employment relationship, at the employer's establishment or at another location designated by the employer, as well as for self-employed persons who conduct economic activity on their own account at the employer's establishment or at another location designated by the employer. Paragraph 2 states that an employer shall ensure healthy and safe conditions of training organised in the establishment for students who are not his employees. Crucially, §3 stipulates that the obligations referred to in Article 207 §2 shall apply accordingly to any entrepreneurs who are not employers and who organise work performed by individuals on the basis other than an employment relationship or who conduct economic activity as self-employed persons. The indicated provision was aimed to protect working conditions of non-employed workers by obligating entrepreneurs, whenever they are or are not employers, to ensure proper occupational health and safety protection. However, Art. 304 §3 in its content indicates the adequate use of Art. 207 §2. Lack of clear and proper regulation of entrepreneurs' obligation of occupational health and safety rules implicate unsure situations for every party in the employment relationship, but mostly the issue would affect the compliance of law by labour law authorities.[44] Such interpretation problems have already led to ineffective inspection of Uber drivers by labour inspectors who could only investigate the compliance with occupational and safety regulation of

41 Act of 16 May 2019 amending the Road Transport Act and some other Acts (Journal of Laws 2019, item 1180).
42 Rogalewski, 2020, p. 29.
43 Constitution of Republic of Poland (Journal of Laws of 1997, no. 78, item 483).
44 Raczkowski, 2019, pp. 69–70.

company's office employees, which of course was completely without purpose and ineffective.[45]

The situation of trade unions and collective bargaining on digital platforms in Poland also is hampered by the shape of the legislation on trade union functioning in workplaces. First, establishing a trade union organisation is a complex process that requires having organisational status and establishing a board; additionally, a trade union can be established in the employer's company or can create "multicompany" organisations in more same branch companies.[46] Moreover, in 2018, there was an amendment that extended the subjective scope of the right of coalition to persons with civil law agreements and self-employed persons.[47] Before the amendment, these workers could only join existing trade unions. Now, they have obtained the right to form a trade union after working for at least six months for an employer covered by the organisation. This solution is a compromise step between ensuring the right of coalition workers and the condition of a reliable bond of the worker to the employer. The first trade union of platform workers was established in two companies that provide services for the platform Pyszne.pl (food delivery platform).[48]

When discussing the legal presumption of an employment relationship in Poland, a few remarks should be made. Article 22 of the Labour Code stipulates that by establishing an employment relationship, an employee assumes the obligation to perform specific work for the employer and under the employer's direction at a place and time specified by the employer, and the employer assumes an obligation to employ the employee against payment of remuneration. Employment on the terms referred above is taken to be based on an employment relationship, regardless of the name of the contract concluded by and between the parties. Moreover, a contract of employment cannot be replaced with a civil law contract based on the conditions of work. The employment relationship can be characterised as a voluntary relationship between the employee and employer, in which the employee personally performs work and is subordinate to the employer, and the employer is obligated to pay remuneration and organise work at his own risk.[49] Thus, the essential sense of the regulation contained in § 1(1) and § 1(2) of the Labour Code is to shift the burden of examining the nature of the legal relationship under which work is provided from determining and interpreting the content of the contract concluded by the parties to determining the

45 Rogalewski, 2020, p. 29; Mirosławski, 2023, pp. 8–10.

46 In Poland, the core regulations governing the establishment of trade unions, their activities and collective bargaining can be found in Act of 23 May 1991 on trade unions (consol. Journal of Laws of 2025, item 440), and Labour Code.

47 Baran, 2018, pp. 2 and seq.

48 Nowy Obywatel (2022), *Powstał związek zawodowy w Pyszne.pl* [Online].

49 See: Judgment of the Supreme Court of 6.10.2004 r., I PK 488/03, OSNP 2005, no. 10, item 145; Judgment of the Supreme Court of 23.10.2006 r., I PK 113/06, Pr.Pracy 2007, no. 1, item 35.

actual conditions of its performance. If, in the legal relationship linking the parties, the characteristics of the employment relationship set out in Article 22 §1 of the Labour Code prevail, then we are dealing with employment on the basis of an employment relationship, regardless of the name of the contract concluded by the parties. Conversely, if the characteristics of an employment relationship do not predominate in the content of the legal relationship, then it cannot be assumed that such a legal relationship is between the parties.[50]

Polish labour law does not provide for any legal presumption of employment relationship;[51] although, it is not permissible to replace the employment contract with the civil law agreement while maintaining the conditions of an employment relationship. Some researchers argue that the legislator introduced a "soft legal presumption" to the Labour Code to prevent replacement of the employment relationship to a civil law relationship.[52] However, the majority view of doctrine and jurisprudence point out that Article 22 does not creates neither a legal presumption nor a legal fiction of an employment contract.[53] The choice of the type of legal basis of employment is decided by the will of parties (Article 353(1) of the Civil Code in conjunction with Article 300 of the Labour Code), and work may also be performed under civil law agreements.[54] The Supreme Court, in its judgments, has accepted that the essence of contractually subordinated work is the possibility to concretise the employee's duties on a daily basis and, in particular, to determine the activities within the agreed type of work and the way in which they are to be performed (Article 100 §1). The employee has no autonomy in determining the day-to-day tasks. Employee subordination cannot be equated with permanent supervision by a superior over the manner or proper pace of the activities performed, as it is sufficient to indicate the task and set a deadline for its performance, followed by control of the quality and timeliness of the work performed.[55]

50 Judgment of the Supreme Court of 10.05.2018 r., I PK 60/17, LEX no. 2486218.

51 Currently, the Labour Code does not provide for any legal presumptions or legal fictions. The closest in terms of this is the regulation of Article 18(3b) of the Labour Code, according to which an employer's differentiation of the situation of an employee for one or more of the reasons set out in the Labour Code, with the effects specified in the provision, is considered to be a violation of the principle of equal treatment in employment. Cf. Tomanek, 2017, p. 1444; Sitko, 2025, pp. 12–13.

52 Orłowski, 2007, pp. 134–135; Dral, 2009, p. 395; Unterschütz, 2013, p. 133.

53 Among others: Gersdorf and Raczkowski, 2024; Jaśkowski, 2024; Tomaszewska, 2025; Judgment of the Supreme Court of 11.09.2013 r., II PK 372/12, OSNP 2014, no. 6, issue 80; Judgment of the Supreme Court of 23.09.1998 r., II UKN 229/98, OSNP 1999, no. 19, issue 627.

54 Tomaszewska, 2025; Judgment of the Supreme Court of 26.03.2008 r., I UK 282/07, LEX no. 411051.

55 Jaśkowski, 2024; Judgment of the Supreme Court of 10.05.2018 r., I PK 60/17, LEX no. 2486218.

The implementation of the legal presumption proposed by the European Commission would profoundly change the labour market in Poland.[56] To prevent uncertainty and dichotomy of traditional work and platform work, the legislator should adopt a general presumption on the employment relationship. Introducing a rebuttable legal presumption of an employment relationship only for digital platforms would create an unequal situation in the market and make it even more difficult to identify companies as digital platforms. In mid-2025, there were circa 3.1 million self-employed people in Poland; however, most of them do not employ employees or contractors.[57] Such a solution will consequently lead to profound changes in the identification and distinction of civil law contracts from the employment relationship.

The current regulation of the employment relationship and protective regulations can address the problem, if handled consistently. The basic criterion distinguishing civil law relations from the employment relationship is the subordination of the employee. The Supreme Court, in its judgment II PK 372/12,[58] stated that not the contract's title or the will of the parties, but work in a certain dependence specific to the employment relationship should be decisive, since even in a civil law contract, there may be the features of management and subordination, although not the exact same. Employee subordination is a relationship of dependence between the employee and the employer, involving carrying out orders issued by the employer. It manifests itself in the employer's own supervision of the management of the work process by assigning specific tasks that the employee is obliged to complete. On-demand work platforms are not just intermediaries in the relationship between independent service contractors and customers, but directly involved service providers. Companies provide tools in the form of platforms or apps that allow specific services to be performed and direct how the work is performed through rules and regulations issued, instructions, and algorithmic management having control over the performance of the work.[59] Thus, in the case of many people working through platforms, the condition of labour subordination would apply and we could speak of an employment relationship.

It is worth noting that the labour law provides for administrative penalties for employment on the basis of civil law contracts in conditions where there should be an employment contract, enforced by the labour inspectors (art. 281 of Labour Code). Moreover, Article 63(1) of the Code of Civil Procedure stipulates that labour inspectors may bring actions on behalf of citizens in cases to establish the existence of an employment relationship, and may enter, with the consent of the claimant, into proceedings in such cases at any stage of the process. However, despite regulations in the Labour

56 Mitrus, 2024, pp. 147 et seq.; Duraj, 2025, pp. 6 et seq.
57 Statistics Poland, 2025.
58 Judgement of the Supreme Court of 11.09.2013 r., II PK 372/12, OSNP 2014, no. 6, issue 80.
59 Skowron, 2020, pp. 163–164.

Code on the employment relationship or the competence of inspection responsible for compliance with labour law, counteracting the replacement of employment contracts with civil law contracts continues to take place. This is particularly influenced by the liberal approach to atypical forms of employment by both the judicature and state authorities. It is also influenced by the very will of employees who are not interested in employee employment, declaring, above all, their unwillingness to pay additional social security contributions, as well as pointing to the greater flexibility of civil law contract than is the case under the employment relationship.[60]

Interesting observations on the presumption of an employment relationship in Polish doctrine are presented by A. Sobczyk. He assumes that labour rights as social human rights are subject to special protection provided by the State. From the social nature of labour rights, a transformation of the man–society employment relationship is taking place instead of the typical private law man–other man relationship. Current regulations are supposed to favour the protection of the employment relationship, and even establish an unexpressed presumption of an employment relationship. The main difficulty to overcome is the overly contractual and private relations-oriented interpretation of labour courts. Despite previous arguments, A. Sobczyk recognises the need for an explicitly expressed presumption of an employment relationship to realise the protection of employees and the workers' rights.[61]

## 5.
## Conclusions

The rise in popularity of digital platforms and the performance of work through them coincided with the economic crisis of 2007–2008 and the subsequent COVID-19 pandemic. Platform work allows people with either low skills or specialised skills to perform a series of short tasks (gigs) allowing them to combine work with other activities such as housework, but also the possibility to earn additional income to their regular salary. Platform work, globally as well as in Poland, is usually carried out on the basis of civil law contracts, which allow for higher flexibility and lower contributions for the employers and the workers, but is also characterised by lower protection standards and a lack of security of labour rights for platform workers. This is particularly noticeable with on-demand work via apps, which has been repeatedly recognised by courts in various European countries – specifically, that the services provided by platform workers via digital platforms demonstrated the characteristics of an employment relationship and contested the contracts concluded by digital

60 Państwowa Inspekcja Pracy, 2025, pp. 95–97.
61 Sobczyk, 2018, pp. 199–208.

platforms with workers. However, crowdwork and its more nuanced structure than on-demand work, which often resembles traditional employment relationships and employee subordination, makes it difficult to clearly classify the type of work performed and intensify supervision and management as a typical employment relationship.

The Directive on improving working conditions in platform work may be a step in the right direction, as it has the potential to harmonise the legislation of the Member States at the European level. This would solve the issue of classifying digital platforms as employers and strengthen the protection of workers and their efforts to determine the correct basis of employment. It would also cover the issues of algorithmic management and the information rights of workers and their representatives, which were not addressed in the article.

Some of the solutions in the Directive raise some concerns. The definition of digital labour platforms mentioned in the article, by closing the definition and limiting the characteristics of the platforms to three, may already at this point lead to the exclusion of existing digital labour platforms from its scope – for instance, in the context of algorithmic management and access to information.[62] An enumerative catalogue of listed definitions of digital labour platforms may in consequence not recognise platforms created in new forms or already existing ones, which under the influence of the prepared directive, will change in such a way that they will not be included in its scope. Such a definition makes it difficult to properly identify digital labour platforms and consequently hinders the application of the directive.[63] In my opinion, opening up the catalogue contained in the definition will allow for better implementation of the directive by the Member States (especially bearing in mind the superficial implementation of directives, often based on copying the text of the directive into the national legal order); above all, it will make it more difficult for digital labour platforms to avoid classification under the definition indicated.

Currently, Poland appears to be making slow progress in establishing clear and proper regulations to improve the situation of platform workers. Furthermore, it is challenging to identify court judgments related to platform work and employment status. Generally, there are social partners, the vast majority of them being trade unions that stand up for worker rights and promote discussion in public spaces. It is also worth noting that in Poland, a presumption of an employment relationship has never been introduced in the Labour Code with only regulations aimed at preventing the circumvention of employment contracts by civil law relationships.

Polish regulations in their shape present an active attitude in preventing violations of the law through hiring based on civil law contracts. Both the provisions of

62 Cf. Schlachter, 2022.
63 Duraj, 2025, pp. 11–12.

the Constitution, which indicates that work is under the protection of the Republic of Poland, as well as the quoted provisions of the Labour Code and the procedural regulations are intended to support the protection of employees in their pursuit of lawful employment status. However, the tendency to interpret the provisions on setting up an employment relationship liberally, coupled with the labour inspectorate's often lack of concrete powers, leads to the problem deepening continuously and atypical forms of employment increasing. The introduction of the presumption of an employment relationship into the Polish legal system, in the form currently presented in the platform work directive, without adequate preparation and provision of legal tools to the authorities and courts, may lead to further complication of the processes for establishing the employment relationship. The desire to raise the standard of protection must also go along with the predictability of the law and the possibility of challenging the presumption of an employment relationship by both the employer and employee. The presumption of an employment relationship should be an instrument that facilitates the process of applying the law for public authorities, but also transparent for those who would like to use it. A well-implemented presumption would facilitate the path to establishing the correct basis of employment, and would probably curb the growth of bogus self-employment and the large-scale occurrence of civil law contracts instead of employment contracts. For the moment, however, the Polish legislator should first and foremost improve the application of the current provisions on the powers of labour inspectors to establish the employment relationship and strengthen the criteria distinguishing an employment relationship from civil law relationships.

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Marija VLAJKOVIĆ

# Constitutional Identity in the European Integration Process: The Case of the Republic of Serbia

**ABSTRACT:** *Constitutional identity is a complex and multifaceted concept. It encompasses the core values that underpin a constitutional order and defines the unique character and specificity of a particular legal system in relation to others. When it comes to delineating the sovereign constitutional orders of Member States from the supranational legal system of the European Union, this notion has been extensively examined by renowned scholars and addressed by both national constitutional courts and the Court of Justice of the EU.*

*In this context, we analyse the transformative power of European integration on the post-communist Western Balkan states going through the EU accession process and, more specifically, on the Republic of Serbia. Europeanisation of the legal and constitutional system became a common trait of the European integration process, especially in the Western Balkan countries.*

*As a candidate country on the path towards European Union membership, Serbia is engaged in the process of not only shaping its political reality but also undergoing a democratic transition of its political and legal system. The discourse on the constitutional transformation of the Republic of Serbia intensified following the adoption of the 2006 Constitution, which reaffirmed Serbia's territorial integrity amid a looming*

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This paper stems from research conducted for my doctoral thesis, specifically for the chapter entitled "Constitutional Identity and the Identity Challenges of the Republic of Serbia in the Context of European Integration." A more extensive and detailed discussion of this and related topics can be found in my PhD thesis, titled "The Adaptation of the Foundations of the Legal System of the Republic of Serbia to European Union Law – A Contribution to the Study of the Relationship between EU Law and Constitutional Law," completed within the International Joint Mentorship Program (Cotutelle) between the University of Lorraine and the University of Belgrade Faculty of Law and defended on the 13th of December 2024 at the University of Lorraine. This paper also results from research conducted within the Horizon Twinning project "Advancing cooperation on The Foundations of Law – ALF" (project no. 101079177). The project is financed by the European Union.

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*political crisis and firmly established its commitment to European principles and values. The European integration process and the harmonisation of Serbia's legal order have exerted a strong influence on the remodeling of its constitutional identity. However, this should not negate the "noyau dur" or the core constitutional foundations, which have been affirmed in numerous constitutional texts throughout Serbia's constitutional history and constitutional reality.*

*Thus, this study will explore the relationship between Serbia's constitutional differentia specifica and new constitutional challenges determined by the dynamics of the European integration process.*

**KEYWORDS:** *European Integration, Europeanisation, Western Balkans, Republic of Serbia, Values, Constitutional Identity.*

## 1.
## Introductory Remarks

The European integration process has proven to be a key driving force for political, legal, and constitutional transformation, firstly in the Central and Eastern European countries at the beginning of the XXI century and then in the Western Balkans. Europeanisation, defined as the adoption of European norms, rules, and values by non-EU countries, especially in the context of the Western Balkans, has been both an instrument of change and a goal.[1] This complex and long process, driven by external influences from the European Union (EU), involves constitutional changes and adaptation of political reality. Thus, having in mind the dynamic nature of the constitutional identity that intertwines with the continuity of its constitutional core, we focus on the European integration process as a strong factor that reshapes the identity of the Western Balkan countries, and in this case, the Republic of Serbia.

Furthermore, the process of Europeanisation of the Republic of Serbia necessitates a top-down approach, requiring states to align their legal and political systems with EU norms. This transformation transcends mere legal and technical adjustments, demanding profound political and constitutional reforms. A prime example is the mandate for constitutional amendments to safeguard the rule of law, ensure judicial independence, and meet EU fundamentals, as defined in the recent EU enlargement methodology.[2] This is particularly apparent during Serbia's accession process, which involves substantial constitutional revisions to satisfy EU benchmarks

1 Anastasakis, 2005, pp. 77–88.

2 A more credible, dynamic, predictable and political EU accession process – Commission lays out its proposals [Online].

concerning the rule of law, democracy, protection of human and minority rights, and will continue in the near future. The implementation of these reforms will be crucial in determining Serbia's progress toward accession to the European Union.

Moreover, the European integration process of Serbia has been significantly shaped by the guidance and recommendations of key European institutions, namely the Venice Commission and the European Commission. These bodies have played a crucial role in steering Serbia's constitutional reform process, ensuring alignment with the EU's accession criteria. The Venice Commission, serving as an advisory body to the Council of Europe, has consistently emphasised the need for substantive reforms that move beyond superficial changes, particularly in areas related to judicial independence and the rule of law. Simultaneously, the European Commission, through its annual progress reports, has closely monitored Serbia's constitutional adaptation, establishing a direct link between advancements in constitutional reforms and progress in EU accession negotiations. Chapters 23 and 24 of the EU acquis,[3] focusing on the Judiciary and Fundamental Rights, and Justice, Freedom, and Security respectively, have been central to these reforms. The European Union has consistently insisted on concrete legal and institutional changes that reflect its core constitutional values. However, the success of these reforms depends on their effective implementation, not just on their proclamation in the relevant documents.

Consequently, we cannot deny the transformative impact of the accession process on Serbia's constitutional framework and, therefore, its implications on its constitutional reality. The European integration process, which has been ongoing in Serbia for more than two decades, requires Serbia to make identity compromises, particularly in terms of embracing the common European values depicted as Fundamentals. However, one of the most difficult challenges is the protection of the Republic of Serbia's territorial integrity, as proclaimed by the Constitution. Serbia represents a unique case of a candidate country where a question that has represented a constitutional core and a constitutional identity trait for centuries became a subject of a negotiating chapter with the EU and a subject of political deals and negotiations.

Therefore, this paper aims to closely analyse the profound impact that the European integration process has exerted on the constitutional identity of the Republic of Serbia. We will examine how the ongoing EU accession efforts have significantly reshaped Serbia's constitutional framework, compelling the country to undertake substantial revisions and adaptations to align its constitutional structures and values with the norms and principles upheld by the European Union. Furthermore, we emphasise the issue of territorial integrity protection, i.e. the pivotal role of the

3 Chapter 23 (Judiciary and fundamental rights) and Chapter 24 (Justice, freedom and security) of the EU negotiating framework.

Kosovo*[4] question in defining and reshaping the constitutional identity of the Republic of Serbia. This challenge is particularly acute given that the status of Kosovo and Metohija is proclaimed as a core fundamental identity trait for Serbia, which now must be reconciled with the demands of the European integration process. This question represents a heavy, but painful burden in Serbia's path towards EU integration, necessitating careful negotiation and compromise.

## 2.
## Europeanisation of the Western Balkans Through the Process of EU Integration

The EU's enlargement strategy has undoubtedly emerged as the strongest foreign policy asset and one of its most successful endeavours in recent European history. Political decision-making and the ideals of unifying the continent have taken precedence over technicalities, specific mechanisms, and carefully formulated standards. As previously noted, the Eastern enlargements introduced novel elements into the legal and political processes of European integration, as well as the requirements, not lacking in complexity, imposed on candidate countries. Both the candidate states and the EU institutions have aligned themselves with a more demanding and comprehensive approach that prioritised political criteria, particularly the obligation to develop and safeguard values such as the rule of law, democracy, and fundamental rights. The Copenhagen Criteria, introduced in 1993,[5] represented conditionality criteria and since then were widely considered to be means of, firstly, democratic transformation and promotion of legal and economic changes, and secondly, the instrument of Europeanisation. Special emphasis was, as mentioned, on the first criterion that defines the following: *'Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.'*[6] *This required significant changes in the constitutional and overall legal system of each candidate country. This was monitored by the European Commission in its Copenhagen-related documents, such as Country Reports, Progress Reports, Non-Papers, and others. Those documents gained specific leverage in the EU integration process as they served as "lignes directrices"* for the domestic legal, political, and economic development.

4 This designation is without prejudice to positions on status and is in line with UN Security Council resolution 1244 and the International Court of Justice Opinion on the Kosovo declaration of independence.
5 Accession criteria (Copenhagen criteria) [Online].
6 Ibid.

The aforementioned processes and fulfilment of conditions set in the Criteria are all part of Europeanisation, a core phase of the European integration process. Europeanisation encompasses the process of changes in national and political practices during European integration. The transformative power of the EU integration, and therefore of the Europeanisation, is perceived through a "twinning exercise", described by Papadimitrou and Phinnemore as encompassing instruments for adoption of the EU acquis but also for the introduction and enforcement of the "EU-isation" to be part of national legal and political systems.[7] The European Union thus becomes an active and sometimes decisive participant in legal harmonisation and modern constitutional engineering. However, mitigating the risks of implementing Europeanisation without deeper, substantive transformation is the *rationale* behind the complexity of the Western Balkans' saga of approaching and joining the EU. The European integration of the Western Balkans is therefore the outcome of a complex Europeanisation process closely tied to, and conditioned by, democratisation and democratic consolidation. The European perspective has played a significant role in the transformation processes of these states and remains a strong motivator for numerous reforms or changes in their legal systems. The process for this region is also unique, as these countries were (and still are) a part of the Stabilisation and Association process, which represented the pre-EU integration phase. As Theodor Tudoroiu describes in his analysis of identity changes prompted by EU enlargement, "democratic identity change was closely associated with regional stability", guaranteed by the Stabilisation process.[8] This included political stabilisation and democratic transition on the one hand and forming or adapting their constitutional orders to comply with the liberal democratic constitutional traditions on the other. In that regard, Keil and Nikolić rightly notice: *'..introducing European standards in national constitutions becomes therefore a contest of ideas, a conflict between revitalised traditions of national identity and pre-constitutional identities and the adoption of values that praise the European project as an inspirational goal'*.[9]

Even though the EU's approach during the "Big Bang" enlargement was marked by an idealistic belief that this geopolitically driven expansion would comprehensively transform the former socialist states into democracies, other Western Balkan countries were no exception to the same expectations. The Union also operated under the assumption that this process would foster a unified understanding and application of shared values, thereby promoting the acceptance of the EU's overarching identity built on common European values and shared constitutional traditions. The process of European integration, and thus the candidacy procedure for membership, can

7 Papadimitrou and Phinnemore, 2004, pp. 619–639.
8 Tudoroiu, 2004, p. 59.
9 Keil and Nikolic, 2014, p. 96.

only begin if the state establishes a democratic political order based on the system of values that underpin the EU. For the Western Balkan states, this has been achieved through conditionality instruments and new criteria aimed at advancing towards candidacy and eventual full membership. As Jano argues, 'reinforcement by reward' appeared to be the best model for Europeanisation and the development of values in the Western Balkans.[10] However, this also involved additional interrelated processes, as the challenges to establishing democratisation often stemmed from the "ongoing challenges of statehood, sovereignty, and independence in the newly formed states,"[11] which raised questions of regional stability and compliance with additional political criteria. Thus, regional cooperation and cooperation with the Hague Tribunal, in the case of the Western Balkans, and especially the ex-Yugoslav states, supplemented the Copenhagen Criteria and extended the political and legal framework within which Europeanisation of these states is conducted. The EU's accession negotiations with Croatia, the last country that entered the EU in 2013, established a novel approach, revealing that the process entailed not just formal alignment with the EU acquis, but rather necessitated comprehensive substantive harmonisation based on values and principles that are enshrined in the requirements of negotiating Chapters 23 and 24. Similarly, the negotiations with the Western Balkan countries introduced new conditions, arising from insights gained and mistakes made during prior enlargement rounds and adjustments made to account for the unique legal and political backgrounds of the transforming nations, fitting them into an EU complex constitutional and legal framework. The European Union took steps to prevent the recurrence of mistakes from previous rounds of enlargement, which had caused lasting "damage" to the concept of European integration and, consequently, to the development of unity regarding the shared values at the heart of the European (constitutional) identity. Therefore, the integration and adaptation of the legal systems of candidate countries, with Croatia being the first, had to be grounded from the very beginning in the advancement of the rule of law and other European values. This implies that the negotiation chapters (Chapters 23 and 24) must be the first to be opened and the last to be closed, and they should not be subject to political pressure. The aim of this change was to provide member states with sufficient time to implement reforms that should be substantive and fundamental, rather than a mere "window dressing". A new mechanism has been introduced that enables the suspension of negotiations if there are serious and persistent breaches of the principles of democracy, human rights,

10 Jano, 2004, p. 59.
11 Polović, 2013, p. 18.

and the rule of law, i.e. the fundamental values.[12] Thus, the introduction of these two components demonstrated that the focus of the European negotiation process was on creating a commonality of European constitutional bases – the values, with the aim of integration and adaptation into a new political and legal system, and consequently, its identity. This was further strengthened in the Revised Methodology in 2020,[13] accepted by the Republic of Serbia, as well as Montenegro, Albania, and Bosnia and Herzegovina. The revised enlargement methodology applied to Western Balkan candidate countries should be viewed as a domestic legislative process with both qualitative and quantitative outcomes of legal harmonisation. It explicitly prioritises the primacy of fundamental principles over overall progress in dictating the opening or closing of negotiation chapters during the future talks. Furthermore, it undoubtedly exerts significant influence on constitutional adaptations, including changes that have been introduced and must still be introduced to meet the conditions outlined in the revised methodology, with particular emphasis on Cluster 1-Fundamentals.[14]

The Revised Methodology for the Western Balkans is expected to contribute to the stability of the states' adherence to the common values proclaimed by the EU, presenting the constitutional basis of the EU identity. The focus points in this process should be the political will of the involved countries and the EU institutions, as well as a substantially deeper level of engagement that involves changing the legal and constitutional culture, which significantly influences the reshaping of national constitutional identity.

## 3.
## European Integration of the Republic of Serbia: Adaptation to EU Values

The Europeanisation of Serbia's legal system is not limited solely to the adoption of legal norms but involves the embedding of EU values into the country's political

12 This mechanism reflects the evolving priorities of the EU in the negotiation process. Regarding the fundamental principles that define the constitutional identities shared by all member states, including those in the process of accession, the Commission can, on its own initiative or at the request of one-third of the member states, recommend the suspension of negotiations and propose conditions for their resumption. The Council then adopts such a decision by a qualified majority, after informing the European Parliament, and provides the candidate state with an opportunity to respond. Pejović, 2023, p. 197.

13 Revised enlargement methodology: Questions and Answers [Online].

14 Cluster 1 is titled Fundamentals and encompasses Chapters 23 and 24.

and legal culture.[15] The reforms required under Chapters 23 and 24 are part of a broader effort to transform Serbia into a country that not only adopts EU laws but also internalises the values that underpin the European Union. The said chapters are central to Serbia's EU accession negotiations, focusing on the judiciary, fundamental rights, justice, freedom, and security. These chapters require candidate countries to undertake substantial legal and institutional reforms to align with the EU's legal order and core values. For Serbia, these chapters represent not only a legal obligation but also a roadmap for transforming its judicial system to meet European standards of independence and accountability (3.1.). The constitutional amendments, widely recognised as necessary for advancing the accession process, were introduced and adopted in 2022. The necessity of constitutional amendments in the process of EU accession has not only guided the direction of constitutional changes but has also internationalised the amendment process,[16] or, more accurately, Europeanised it, considering the European institutions involved from the beginning until the end of the process. These constitutional changes represent crucial steps toward harmonising Serbia's legal and constitutional framework with the values and principles upheld by the European Union, thereby shaping the dynamics of Serbia's evolving constitutional identity (3.2.).

### *3.1. Aligning the Serbian Legal System with the Foundations of European Identity – Chapters 23 and 24 and EU Values*

The return to Europe and European values of the Republic of Serbia after the dissolution of Yugoslavia primarily entailed the establishment of democracy in its fullest sense, the rule of law, which required complex reforms in every sphere of state functioning. As an independent state, the Republic of Serbia did not follow the distinct path of Europeanisation experienced by other post-socialist states, which were obligated to meet the political criteria on the European enlargement agenda.

15 This deeper, legal and value-based dimension of Europeanisation does not unfold in a political vacuum. Its long-term effectiveness is also influenced by the level of public support for EU membership, which has fluctuated significantly in the previous decades. Since 2002, public support for Serbia's accession to the EU has generally remained around 40 and 60 per cent. The highest recorded level was in December 2003, when 72 per cent of respondents expressed support. In 2014, following the opening of accession negotiations with the EU, 59 per cent of citizens were in favour of EU membership, believing it would bring a better future and greater prosperity. More than a decade later, in 2025, however, support had declined to around 39 per cent. What remains positive, nonetheless, is that for many years a consistently high share of respondents, over 60 per cent, have maintained the view that the reforms required for Serbia's EU accession should be carried out regardless. Proširenje EU – Percepcija u Srbiji i državama članicama EU [Online].

16 Simović, 2018, pp. 15–29.

The process that preceded Serbia's application for EU membership was largely shaped by internal crises, regional instability, and new challenges and tensions, which appeared to complete the fragmentation of the region. Furthermore, like other former Yugoslav states, the Republic of Serbia had to navigate the legacy of prolonged conflicts and internal political upheavals in order to fully implement the stabilisation process. These unique factors became integral components of Serbia's negotiation process and were established as mandatory prerequisites for further progress, thereby constituting a substantive precedent compared to previous membership negotiations. The adoption of the 2006 "Mitrovdan" Constitution was primarily driven by Serbia's transition to statehood, which necessitated a redefinition of its constitutional and legal framework as an independent nation, a topic that will be explored in the subsequent section dealing with the identity of the Serbian constitution.

Before the analytical review of legislation and the substantive phase of negotiations, the central legal point of harmonisation with the EU acquis was the Stabilisation and Association Agreement (SAA), signed in 2008 and entered into force in 2013,[17] which regulates the rights and obligations of a state that has begun the process of EU accession. By concluding this agreement, the Republic of Serbia was confirmed as a potential candidate for EU membership, thereby altering both the form and scope of its obligations to the EU. The SAA, in its preamble, starts from the assumption that there are values shared by both contracting parties. Article 1 of the SAA establishes the legal and formal association as follows: "An association is established between the Community and its Member States, on the one hand, and the Republic of Serbia, on the other", with one of the main objectives of this association, being "to support Serbia's efforts to strengthen democracy and the rule of law."[18] Article 2, in the first part of the Agreement concerning general principles, states that the essential elements of this agreement are "respect for democratic principles and human rights". Moreover, Title VII, named Justice, Freedom, and Security, under which Article 80 is titled Strengthening Institutions and the Rule of Law, specifies:

> *'In their cooperation on justice, freedom and security, the Parties shall attach particular importance to the consolidation of the rule of law, and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation shall notably aim at strengthening the independence of the judiciary and improving its efficiency, improving the functioning of*

17 Stabilisation and Association Agreement between the European Communities and the Republic of Serbia, OJ L 278, 18.10.2013, pp. 16–473.

18 Article 1, SAA.

> *the police and other law enforcement bodies, providing adequate training and fighting corruption and organised crime."*[19]

Furthermore, the granting of candidate status to Serbia by the European Union in 2012 marked a significant milestone in the country's negotiation process towards accession to the EU, followed by the official opening of the negotiation process in 2014.[20] Given the new approach to negotiations, established with Croatia, which places the values enshrined in Article 2 of the Treaty of the EU, at the centre of the process, the Republic of Serbia needed to achieve a high level of compliance with the criteria in Chapters 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom, and Security). These criteria are being judged by EU member states to ensure alignment with existing EU standards. These chapters have been part of the European Commission's annual reports on Serbia's progress since 2006 and are exceptionally complex because the criteria set in them require substantial qualitative improvements to Serbia's entire constitutional and legal framework. Those chapters were opened during the Third Intergovernmental Conference held on July 18, 2016.[21] At this meeting between representatives of the Serbian Government and EU institutions, the official version of the EU's Common Position was presented.[22] The Republic of Serbia regularly submitted reports on the implementation of the action plans for the aforementioned chapters in 2016, 2017, and 2018, outlining both ongoing activities and their status. Since 2017, the EU has introduced an additional document compiled and published twice a year, called "Non-paper on the state of play regarding chapters 23 and 24,"[23] which monitors Serbia's progress in implementing the action plans for these chapters. This assessment is based on the reports submitted by Serbia as well as the committee and subcommittee meetings attended by representatives of both parties.

In the 2017 Non-paper, the European Union acknowledged that Serbia has adopted the action plans and corresponding strategies but notes that the implementation of measures remains in its initial stages for most areas. Furthermore, the document emphasises that significant efforts are required across all necessary reforms, particularly in judicial reform, which necessitates constitutional amendments.[24]

19 Article 80, SAA.
20 Serbia and EU. History [Online].
21 Ibid.
22 European Union Common Position, Accession negotiations with Serbia Chapter 23: Judiciary and fundamental rights Brussels, 5 July 2016 (OR. en) 10074/16 ELARG 78.
23 EU Documents [Online].
24 Non-paper on the state of play regarding chapters 23 and 24 for Serbia, May 2017.

### *3.2. Constitutional Amendments: Aligning With European Standards as Part of Reshaping the Constitutional Identity*

The complexity of adopting constitutional changes in a country undergoing Europeanisation, i.e., the European integration process, is evident through the indispensable involvement and oversight of the Venice Commission and EU institutions. Opinions and recommendations of the Venice Commission are regularly incorporated by the European Commission when assessing progress regarding constitutional reforms and the judiciary. The constitutionalising of judicial independence is the cornerstone of any legal system based on values such as the rule of law. The constitutional provisions of the Serbian 2006 Constitution[25] did not provide adequate normative or substantive guarantees of judicial independence, particularly in relation to the separation of powers. This was noted by the Venice Commission in its 2007 opinion[26] shortly after the Constitution was adopted. The constitutional shortcomings identified became a key part of the requirements introduced by the European Union in Chapter 23, relating primarily to the independence and proper functioning of the judiciary, in line with the rule of law as a European meta-value embedded in all European constitutions.

In particular, the method for selecting judges and the composition of the High Judicial Council and the High Prosecutorial Council were criticised. The European Commission, in its annual report, adopted the Venice Commission's opinion, specifically raising concerns about the reappointment of judges and the constitutional law governing it. Another of the main criticisms, not only of the European actors involved but also constitutional experts,[27] focused on the definition of the separation of powers, particularly the wording of Article 4 of the 2006 Constitution, which was at least ambiguous and contradictory. Article 4(2) stated that "the system of government is based on the separation of powers into legislative, executive, and judicial branches," but in Article 4(3) it asserted that "the relationship between the three branches of government is based on balance and mutual control." Finally, Article 4(4) provided that "the judiciary is independent," rendering the inclusion of Article 4(3) unnecessary.[28] Vladan Petrov concluded that Serbia's constitutional definition of the separation of powers "is not in line with the European constitutional identity, which permits cooperation between political authorities but not interference between

25 Constitution of the Republic of Serbia, "Official Journal of the Republic of Serbia", Nos. 98/2006 and 115/2021).

26 European Commission For Democracy Through Law (Venice Commission) Opinion On The Constitution Of Serbia, Opinion No. 405/2006, CDL-AD(2007)004, Strasbourg, 19 March 2007.

27 Marković, 2006, p. 5.

28 Article 4, Constitution of the Republic of Serbia.

the political and judicial branches."[29] The 2006 Constitution faced criticism for its approach to judicial appointments, which failed to ensure the necessary depoliticisation required for judicial independence and the rule of law. Unlike the previous 1990 Constitution, the new charter introduced a three-year probationary period before judges could receive permanent appointments. This "probationary mandate" outlined in Article 146 deviated from European standards and was at odds with the principle of judicial permanence, a key aspect of judicial independence. The High Judicial Council, which was granted constitutional status, was intended to ensure judicial independence. However, the Council's composition and selection process undermined this goal. The Council included *ex officio* members, such as the Minister of Justice and a National Assembly committee chair, suggesting it was vulnerable to political influence. Additionally, the inclusion of a "prominent lawyer" member, who could be a law professor or attorney, was a controversial aspect of the Council's structure. Candidates for appointments to the Constitutional Court were nominated by the High Judicial Council and the State Prosecutorial Council, and the Supreme Court of Cassation makes the final selection. The 2006 Constitution made significant changes to the prosecutorial system. It abandoned the principle of prosecutorial permanence and introduced a new legal framework for the selection, tenure, and dismissal of public prosecutors and deputy public prosecutors. Public prosecutors were appointed by the National Assembly based on a proposal from the Government, as stipulated in Article 159, which reflected direct political influence over the judiciary. Furthermore, the appointment of the Republic's Public Prosecutor, who has jurisdiction over Serbia, required the opinion of the relevant National Assembly committee. The dismissal of prosecutors was also highly politicised, as it was contrary to the principle of prosecutorial independence, which required that prosecutors be subject only to the Constitution and the law. The National Assembly, following a proposal by the Government, decides to dismiss a public prosecutor. The prosecutor could appeal to the Constitutional Court, but once the appeal is filed, no further constitutional complaints may be submitted.[30]

Although the first step towards constitutional reform was taken in preparations for the opening of Chapter 23, as part of the Action Plan of the Republic of Serbia[31] and the National Judicial Reform Strategy in 2013,[32] the first draft amendments were not produced until five years later. The Ministry of Justice drafted amendments in 2018, which were reviewed by the legal community and the Venice Commission. Legal and professional associations, such as the Judges' Association of Serbia, and other

29 Petrov, 2017, pp. 17–18.
30 Due to the length of this contribution, this part of the Section represents solely a brief overview of the most important constitutional changes that needed to be introduced.
31 Republic of Serbia Negotiation Group for Chapter 23 Action Plan for Chapter 23 [Online].
32 National Judicial Reform Strategy 2013–2018. [Online].

professional judicial bodies, argued that the proposed changes undermined existing constitutional provisions. This led to further revisions of the draft amendments to ensure progress in the revised Action Plan and the new Judicial Reform Strategy 2020–2025.[33] During this subsequent period, the dialogue began with professional associations, legal experts, and civil society representatives. The involvement of European entities, such as the Venice Commission and the European Commission, from the initial stages of the constitutional amendment process in Serbia highlights the externalisation of an inherently domestic undertaking. Nevertheless, both legal experts and government representatives perceived the constitutional reform procedure as a crucial step in Serbia's European integration efforts and as an indication of progress in harmonising the country's constitutional framework with European standards.

The proposal to amend the Constitution of the Republic of Serbia was submitted to the National Assembly in December 2020 and, six months later, the Assembly adopted the proposal. The Committee for Constitutional and Legislative Affairs of the National Assembly initiated the constitutional amendment process on April 16, 2021, and after public hearings, the National Assembly adopted the final proposal to amend the Constitution on June 7, 2021.[34] The drafts of the constitutional amendments, containing 29 amendments related to the judiciary and the public prosecution system, were submitted to the Venice Commission for its opinion. The Venice Commission welcomed the amendments as qualitatively better than previous proposals.[35] The changes included the introduction of the principle of the non-transferability of judges, the functional immunity of judges and prosecutors, the abolition of the probationary period, the elimination of the rule that the High Judicial Council would be dissolved if it did not render a decision within 30 days, and the removal of the National Assembly's authority to elect court presidents, the Republic's prosecutor, and prosecutors, as well as to decide on their dismissal and elect judges and deputy prosecutors. However, the Venice Commission highlighted the need for further improvements regarding the judiciary's independence, noting that "certain points of the proposed amendments may still raise concerns."[36] The recommendations focused on the anti-blocking mechanism for the election of eminent lawyers to the High Judicial Council and the High Prosecutorial Council, the eligibility criteria to reduce the risk of politicisation, and the composition of the High Prosecutorial

33 Judicial Development Strategy for the period of 2020–2025.
34 11th Public Hearing on Changes to Constitution in Field of Judiciary [Online].
35 European Commission for Democracy Through Law (Venice Commission) Serbia, Opinion On The Draft Constitutional Amendments on the Judiciary and the Draft Constitutional Law For The Implementation Of The Constitutional Amendments, Opinion No. 1027 / 2021 Opinion No. 1047/2021, CDL-AD(2021)032, Strasbourg, 18 October 2021.
36 Parliament promulgates constitutional amendments on justice [Online].

Council. The Commission also emphasised that the amendments were adopted in a political environment characterised by practical one-party rule, with the ruling party holding a two-thirds majority and urged an inclusive approach in the further development of the amendments. The drafts of the constitutional amendments were revised, followed by a new cycle of public hearings. On January 16, 2022, citizens voted in a referendum to adopt the constitutional amendments. The National Assembly declared the Act on Amending the 2006 Constitution on February 9, 2022.[37]

The Venice Commission's opinion held crucial political significance for the continuation of the constitutional reform process in Serbia, despite some criticism from legal experts, who likened its role to that of an "absolute constitutional censor approving the constitutional provisions."[38] Nevertheless, it is undeniable that the Venice Commission played a pivotal part in providing guidance to ensure the amended Constitution was aligned with the constitutional traditions and standards of European states. Similarly, the European Union has consistently relied on the Venice Commission's assessment to evaluate Serbia's progress regarding the rule of law, as reflected in Chapter 23. In its 2022 and 2023 Progress Report, the EU commended Serbia for maintaining continuous consultations with the Venice Commission throughout the drafting of the amendments and noted that most of the Commission's recommendations were incorporated. However, following the adoption of the amendments before the accompanying laws were enacted, the EU acknowledged that while "some progress in the implementation of the EU acquis and European standards" had been made within Chapter 23, it was limited due to the lack of necessary implementing legislation.[39] On February 9, 2023, the National Assembly of the Republic of Serbia adopted the judicial laws, which had been reviewed twice by the Venice Commission in 2022. Thus, creating a legal environment where the judiciary is free from political influence has proven more challenging in practice than initially proclaimed in the amendments. In 2023, the Ministry of Justice of the Republic of Serbia announced

37 It is important to emphasise that voter turnout was exceptionally low, at 29.6% of the electorate, and the amendments themselves were passed with a slim majority of 57.4%. [Online],

38 Orlović, 23. 12. 2021.

39 Commission Staff Working Document Serbia 2022 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Communication on EU Enlargement policy Brussels, 12.10.2022 SWD(2022) 338 final, p. 19. See also: Serbia 2023 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement policy.

that 20 more secondary regulations were needed for the full implementation of the judicial laws.[40]

It is crucial that Serbia properly implement the constitutional changes and that the country's institutions be ready to apply the provisions in line with European constitutional norms and the rule of law. Serbia is not alone in facing such challenges, many Eastern European states have gone through judicial reforms during EU integration, and some have encountered issues with the separation of powers after joining the EU. The task is very demanding for candidate states, as the EU places the Fundamentals as central in the negotiation process, due to internal constitutional crisis and future goals of deepening the integration process. Stricter oversight is needed during accession to prevent repeating past mistakes. Failures to uphold European values in a candidate state, such as Serbia, could undermine the European constitutional identity, which is defined by shared national constitutional values. Thus, *'the European integration process not only necessitates constitutional changes but also dictates their content.'*[41]

## 4.
## Unresolved Identity Issues in Adapting the Foundations of the Serbian Legal System to the European Union Legal Order

In the final part of this paper, we examine the identity-forming elements of Serbia's 2006 Constitution, analysing it not merely as a formal legal document but also as one significantly influenced by the dominant process of Europeanisation that has marked the initial phase of European integration. The aim is to provide a concise overview of the current constitutional provisions that shape Serbia's constitutional identity, which is dynamic and evolving. The analysis of specific constitutional provisions aims to define the essence of the Constitution, explored within the political context and the constitutional reality that reshapes this identity. It is crucial for Serbia to evaluate its constitutional characteristics within the overarching processes of Europeanisation of the legal and constitutional order, as both significantly influence the adaptation of the constitutional legal framework, both formally and substantively (4.1.).

The primary reason for the Constitution's adoption was Serbia's change in state status, necessitating a redefinition of its constitutional legal framework as an independent state. According to Ratko Marković, two additional significant motivations

40 However, the EU Commission noted: "Relevant by-laws will need to be adopted by May 2024. The High Judicial Council (HJC) and High Prosecutorial Council (HPC) were established on 8 May, following the election of the lay members, which gave practical effect to the implementing legislation". Ibid., p. 4.

41 Simović, 2018, p. 24.

led to the adoption of this Constitution. The first one was the desire to "permanently preserve Kosovo and Metohija within the sovereign state as an integral part," a point the constitution-makers emphasised in multiple constitutional provisions. The second reason reflects political and social motivations, namely a departure from the political past associated with the Milošević era[42] (4.2.).

### *4.1. The Europeanisation of the Constitutional Foundations*

Unlike the Constitutional Charter of the State Union of Serbia and Montenegro, which was explicitly committed to European integration,[43] the 2006 Constitution of the Republic of Serbia retains a general commitment to being part of Europe, including the European Union. In the first part of the Constitution, which addresses fundamental constitutional principles, Article 1 defines the state as follows: '*Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values.*'[44] In this definition, it is evident that the Republic of Serbia is founded on universally accepted principles inherent in all constitutional traditions, such as democracy, the rule of law, and human and minority rights. Additionally, the constitution-makers clearly express the state's commitment to "European" principles and values, thereby determining its position within the European constitutional framework.

Constitutional Europeanisation is part of the broader internationalisation process, which "implies the constitutionalising of international treaties, rules, and principles of international public law, which become an integral part of national constitutions and are directly applicable."[45] For Serbia, this is of particular importance due to the extensive catalogue of human and minority rights guaranteed in the Constitution. As a state that needed to make a clear democratic break with its communist and later authoritarian past, Serbia, in shaping its liberal-democratic system, embraced European values and incorporated European standards into its constitutional provisions, particularly regarding democracy and the protection of human and minority rights. The transition to constitutional democracy was "delayed" compared to the states of Eastern Europe. However, with the 2006 Constitution, Serbia "caught up" and, according to many, even entered a phase of over-regulation concerning the number and content of provisions. The normative Europeanisation of

42 Marković, 2006, p. 6.
43 A short-lived constitutional document after the dissolution of Yugoslavia and prior to the Montenegrin referendum for independence in 2006.
44 Article 1 of the Constitution of the Republic of Serbia.
45 Simović, 2018, p. 24.

Serbia's constitutional law is evident in the provisions of Title II of the 2006 Constitution under the heading "Human and Minority Rights and Freedoms", which contains nearly one-third of the total constitutional provisions (Articles 18–83). Moreover, the guarantees of specific rights and freedoms are also enshrined in other parts of the Constitution, starting from the Constitutional Principles, where Article 14 particularly guarantees minority rights.[46] Article 18 of the Constitution guarantees the direct application of human and minority rights. Paragraph 3 of this article is particularly relevant for understanding the Europeanisation of the Constitution, as it states that the provisions on human and minority rights shall be interpreted in a manner that promotes the values of a democratic society, in accordance with the applicable international standards on human and minority rights, as well as the practices of the international institutions responsible for overseeing their implementation. Darko Simović highlighted that the international protection standards set by this paragraph are broader than the "generally accepted rules of international law and ratified international treaties" referenced in Article 16, paragraph 2 of the Serbian Constitution, as they may encompass international agreements that Serbia has not yet ratified.[47]

Moreover, Article 20 of the Serbian Constitution requires Serbian institutions, when protecting human and minority rights, to consider not only the domestic legal framework but also the European Convention on Human Rights, the case law of the European Court of Human Rights, as well as EU law and the jurisprudence of the Court of Justice of the European Union.[48] The Serbian Constitution establishes a comprehensive set of personal, political, socio-economic, and cultural-educational rights in Articles 23–74.[49] Section 3 is dedicated to the rights of national minority members, emphasising their ability to freely express, preserve, foster, develop, and publicly manifest their national, ethnic, cultural, and religious identities. Additionally, the Constitution introduces a new right prohibiting measures that would artificially alter the ethnic composition of areas traditionally inhabited by national minorities. According to Miodrag Jovanović, this indicates that the Serbian Constitution is paradigmatic in building its constitutional identity on the recognition of pre-constitutional collective identities of both the majority and minority populations, by enshrining vital individual and collective rights of minorities.[50] Applying Rosenfeld's typology,[51] the Serbian constitutional model shares similarities with

46 Article 14: "The Republic of Serbia shall protect the rights of national minorities. The State shall guarantee special protection to national minorities for the purpose of exercising full equality and preserving their identity."
47 Simović, 2018, p. 23.
48 Nenadić, 2007, p. 16.
49 Constitution of the Republic of Serbia, Section Two Human and Minority Rights and Freedoms.
50 Jovanović, 2016, p. 27.
51 Rosenfeld, 2010.

the Spanish model, functioning as a framework for a multi-ethnic polity while also incorporating transnational norms. In addition, Serbia's constitutional framework also emphasises other important principles. These include the principle of party pluralism, the prohibition of conflicts of interest, the principle of secularism,[52] and the constitutional principle directly related to the state's territory, which is central to Serbia's identity issues. Specifically, Article 8 of the Constitution upholds the principle of the unity and integrity of the state's territory, which has been carried over from previous constitutions. Furthermore, the 2006 Constitution, mirroring the approach of French constitutions, explicitly declares the territory as "indivisible" to affirm its internal territorial integrity.[53]

### *4.2. The Constitutional Principle of the Protection of the Territorial Integrity of the Republic of Serbia and European Integration*

As indicated above, the constitutional guarantee of territorial integrity is one of the central reasons for adopting the 2006 Constitution.[54] This is most evident in the Constitution's Preamble. As Ratko Marković explains, the Preamble was intended to serve as a "patriotic overture to the Constitution",[55] emphasising that "the Province of Kosovo and Metohija is an integral part of the territory of Serbia, that it has the status of a substantial autonomy within the sovereign state of Serbia and that from such status of the Province of Kosovo and Metohija follow constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations".[56] The Preamble signals the constitution-makers' political aim to prevent the potential declaration of Kosovo's independence, albeit to an excessive degree. Vladan Petrov defines the Preamble as "anti-identity",[57] arguing that "by constitutionalising the term 'substantial autonomy,'

52 Articles 5, 6 and 11 of the Constitution of the Republic of Serbia

53 Article 8 of the Constitution of the Republic of Serbia – Territory and Border: "The territory of the Republic of Serbia is inseparable and indivisible. The border of the Republic of Serbia is inviolable and may be altered in a procedure applied to amend the Constitution."

54 Moreover, public support for EU membership in Serbia is also intertwined with the question of Serbia's territorial integrity and the issue of Kosovo*. The shifts and fluctuations in public support for EU accession are closely linked to the political salience of the Belgrade–Pristina dialogue, with support tending to decline during periods when questions of territorial integrity become central to the accession agenda. According to the latest Annual Survey on Serbia, regarding perceptions towards the European Union, unresolved territorial disputes are perceived as one of the three main obstacles to Serbia's EU accession, with nearly 30% of respondents identifying it as the main barrier. Annual Survey 2025 – Serbia [Online].

55 Marković, 2006, p. 8.

56 Preamble of the Constitution of the Republic of Serbia.

57 Petrov, 2016, pp. 22–23.

the principle of territorial integrity was further weakened," creating a political platform for negotiations. From our perspective, when examining constitutional identity issues in the Republic of Serbia, an analysis of the Preamble cannot be overlooked, as it is fundamental for understanding the constitutional core, reflected in the constitutional spirit, purpose, and ideological foundations. In the case of Serbia, it also defines the country's territorial boundaries. However, the provisions that have constitutionalised the concept of substantial autonomy for Kosovo and Metohija are even more significant than the symbolic introduction to the Constitution. Specifically, Article 8 stipulates that "the territory of the Republic of Serbia is indivisible and inalienable" and that "the borders of the Republic of Serbia are inviolable; they may only be altered in accordance with the procedure for amending the Constitution." Concurrently, state authority is constrained by the citizens' right to provincial and local autonomy. At the same time, state authority is limited by the citizens' right to provincial and local autonomy. In addition, the rights of the citizens of the Republic of Serbia concerning the autonomous province were emphasised in the general principles of the Constitution, particularly in Article 12, which states that "the right of citizens to provincial autonomy and local self-government shall be subject only to supervision of constitutionality and legality".[58]

Less than two years after the recognition of Kosovo and Metohija's substantial autonomy in the Serbian Constitution, it unilaterally declared independence, a status the Republic of Serbia has never recognised. Despite the fact that this Constitution formally represented a continuity of the previous Constitution of the Republic of Serbia, Miodrag Jovanović argues that the contemporary redefinition of the Serbian constitutional identity "is inevitably linked to the issue of resolving the question of Kosovo".[59] Considering the historical and spiritual significance of Kosovo in preserving the Serbian nation and national identity, the status of Kosovo is inherently complex and should be the subject of an extensive study. Our aim was to provide a basic framework for understanding its significance for Serbia's constitutional identity. The political, symbolic, pre-identity history and the "constitutional cementing of Kosovo and Metohija's status within the independent Serbian state"[60] have become

58 The provisions of the Constitution found in Part VII (Articles 176-193) pertain to the territorial organisation of the Republic. We draw attention to Article 182: Autonomous Provinces Concept, Establishment and Territory of Autonomous Province: "Autonomous provinces shall be autonomous territorial communities established by the Constitution, in which citizens exercise the right to the provincial autonomy. In the Republic of Serbia, there are the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija. The substantial autonomy of the Autonomous province of Kosovo and Metohija shall be regulated by the special law that shall be adopted in compliance with the proceedings envisaged for amending the Constitution."

59 Jovanović, 2016, p. 13.

60 Ibid., p. 15.

dominant arguments in elevating the Kosovo issue to the level of an ultimate identity question.

Furthermore, in 2015, the European Union, through its Common Position, defined the content of Chapter 35 in Serbia's accession negotiations, titled "Other Issues," limiting it to a single topic: the Normalisation of Relations between Serbia and Kosovo*.[61] This meant that the dialogue between Belgrade and Pristina officially became part of the negotiation framework for Serbia. Notably, this chapter does not require alignment with the EU acquis, and it was the only one opened without Serbia submitting a Negotiating Position. This makes Serbia's negotiation process unique but more complex, as the rules applied to Chapters 23 and 24, under the new methodology, also apply to Chapter 35.[62] Consequently, a lack of progress in meeting the standards of this chapter can halt the negotiation process in other chapters. Thus, Serbia is the sole case where the so-called "imbalance clause" applies not only to harmonising its constitutional legal order with the fundamental rights and values of the EU but also to balancing progress in this highly politically driven chapter, which goes beyond the Copenhagen Criteria and the typical adaptation of the legal order in the European integration process. This obligation is also stipulated in the EU's General Position, which opened Serbia's negotiations with the Union in 2014. Chapter 35 does not supersede the dialogue between Belgrade and Pristina,[63] which is conducted under the auspices of the High Representative for Foreign Affairs. Instead, it serves as a link between the dialogue and Serbia's accession negotiations. This represents a distinctive characteristic of this Chapter and overall, of the whole EU integration process compared to previous candidate countries. The general obligation imposed on Serbia by the EU's position states that Serbia must ensure it fulfils its commitments regarding the implementation of the agreements from August 25, 2015, particularly concerning the establishment of the Association/Community of Serbian-majority municipalities in Kosovo, as well as other elements of the April 2013

61 European Union Common Position Chapter 35: Other issues Item 1: Normalisation of relations between Serbia and Kosovo* Brussels, 30 November 2015 (OR. en), AD 12/15.

62 "If "progress in the normalisation of relations with Kosovo, significantly lags behind progress in the negotiations overall, due to Serbia failing to act in good faith, in particular in the implementation of agreements reached between Serbia and Kosovo", the Commission will on its own initiative or on the request of one third of the Member States, in accordance with point 25 of the negotiating framework, propose to withhold its recommendations to open and/or close other negotiating chapters, and adapt the associated preparatory work, as appropriate, until this imbalance is addressed., European Union Common Position Ibid., p. 2

63 An EU facilitaed dialogue, as it was stipulated in the UN General Assembly Resolution 64/298 (2010) that stipulates that: "[The General Assembly] welcomes the readiness of the European Union to facilitate a process of dialogue between the parties; the process of dialogue in itself would be a factor for peace, security and stability in the region, and that dialogue would be to promote cooperation, achieve progress on the path to the European Union and improve the lives of the people".

Brussels agreement.[64] Finally, the most important points concerned the inclusion of this Agreement in Chapter 35, as well as the final provision stating that: *'Kosovo and Serbia acknowledge that any failure to meet their obligations under the Agreement, its Annex, or previous dialogue agreements may have direct negative consequences for their EU accession processes and regarding EU financial assistance.'*[65] *While the political success of signed agreements between Serbia and Kosovo* and the lack of tangible results, both legally and politically, are notable, it would be unrealistic to expect Serbia's overall progress in the European integration process to hinge significantly on the advancement of the Belgrade-Pristina dialogue. This is particularly true given the highly politicised nature of the dialogue, its disconnection from the EU acquis, and the absence of a clear end goal.*

To summarise, this context raises significant questions: To what extent can Serbia's national identity and constitutional character survive the nation's path toward European integration, given the European Union's stance on the Kosovo issue? Is Chapter 35, which focuses on the normalisation of relations between Serbia and Kosovo*, truly the decisive factor for Serbia's EU membership, or is it equally balanced with Chapters 23 and 24, which shape Serbia's legal system in alignment with the values upon which the European Union is founded and which are reflected in the country's constitutional definition? Finally, the fundamental question emerges: What should be done when, in the process of European integration, the constitutional identity of Serbia exists in parallel with that of Kosovo?[66]

## 5.
## Conclusion

The most important external factor in the Europeanisation process is the EU and the promise of prospective membership in the Union. In this sense, we speak of the internationalisation, or Europeanisation of democratisation, whose stimulus comes from the outside and is presented as the desired political outcome of the EU's enlargement policy.[67] The Western Balkans' delayed Europeanisation, coupled with the legacies of conflict and political instability of post-Yugoslav states, means that the process of legal and constitutional transformation will continue to be a long and arduous one. The EU integration process is a predominant process determining the recent

64 Brussels Agreement. First Agreement of Principles Governing the Normalisation of Relations [Online].
65 European Union Common Position Chapter 35.
66 Jovanović, 2016, p. 22.
67 Lutovac, 2020, p. 206.

legal and political evolution of each Western Balkans country, such as the Republic of Serbia.

One of the most significant aspects of Europeanisation in the Western Balkans is the emphasis on constitutional reforms and the rule of law. The EU has made it clear that for any country to join the Union, it must demonstrate a firm commitment to upholding democratic values, particularly in the areas of judicial independence, anti-corruption measures, and fundamental rights. Serbia's European integration process has involved significant constitutional and legal reforms aimed at aligning its legal system with the EU's core values. The European integration process presents a range of constitutional and identity challenges for the Republic of Serbia. As Serbia continues its accession negotiations, it must balance the protection of its national constitutional identity and the demands of the EU's legal and political framework. The process of Europeanisation requires Serbia to adapt its legal system in ways that may challenge the core principles of its constitutional identity.

What distinguishes the 2006 Constitution is its deliberate combination of constitutional continuity and innovations due to political dynamics and European future, but also as a result of political tensions surrounding Serbian territory. While it retains the emphasis on territorial integrity and national identity seen in earlier constitutions, it also introduces elements of modern constitutionalism, such as democratic governance, the rule of law, and commitments to international human rights standards. The identity of the constitution of the Republic of Serbia could be described as a complex and multilayered interplay between historical legacies and pre-constitutional identities, a multi-ethnic polity with predominance of ethno-national identity with emphasis on the Serbian people, and modern democratic principles and European values.

The involvement of the Venice Commission and the European Commission in the constitutional processes of the Republic of Serbia from the very beginning to the implementation phase defines the Europeanisation of the constitutional identity of the Republic of Serbia. The 2006 Constitution and 2022 constitutional amendments reflect these external influences, particularly in their provisions on the rule of law, judicial independence, and the protection of minority rights. The adoption of constitutional amendments and the implementation of judicial reforms under Chapters 23 and 24 reflect Serbia's commitment to meeting the EU's accession criteria. However, the success of these reforms will depend on their effective implementation and the development of a legal and political culture that truly embodies European values. The reforms required under Chapters 23 and 24 are part of a broader effort to transform Serbia into a country that not only adopts EU laws but also internalises the values that underpin the European Union.

Correspondingly, by concretising the fundamental and enduring principles and constitutional characteristics, our aim was to identify the immutable elements of

Serbia's identity within the evolving political context. The issue of territorial integrity, particularly the status of Kosovo and Metohija, represents a distinctive feature of Serbia's Constitution. However, it is by no means the sole specificity of Serbia's constitutional framework. Various factors contribute to the evolution of constitutional identity, but it is crucial to delineate what is fundamental in the spirit, tradition, and values underpinning our constitutional objectives. This is essential in shaping the narrative of identity within the constitutional dynamics driven by the process of European integration. While the political ramifications of this dialogue, alongside the strategic aspirations and commitments of both sides toward a prosperous European future, warrant consideration, the resolution of the Kosovo issue is of paramount importance for Serbia's constitutional legal framework, as evidenced during the adoption of the 2006 Constitution.

Hence, the legal and political challenge posed by the status of Kosovo and Metohija in the context of Serbia's EU accession is, therefore, not just a matter of diplomatic negotiation; it is a confrontation between Serbia's constitutional sovereignty and the demands of supranational integration. Resolving this challenge will require a careful balancing act, where Serbia must either adapt its constitutional identity to accommodate its European ambitions or find a diplomatic solution that preserves its territorial integrity while satisfying the EU's requirements for regional stability and normalisation. The future of Serbia's constitutional identity will depend on its ability to navigate these challenges while maintaining the core principles of its national identity. As Serbia moves closer to EU membership, it will need to find a balance between preserving its constitutional sovereignty and adapting to the supranational legal order of the European Union.

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