

COMPARATIVE CONSTITUTIONALISM
IN CENTRAL EUROPE

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COMPARATIVE CONSTITUTIONALISM IN CENTRAL EUROPE

*Analysis on Certain Central and
Eastern European Countries*

Edited by
Lóránt CSINK and László TRÓCSÁNYI



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Constitutional Values and Constitutional Identity in National Constitutions

Norbert TRIBL

ABSTRACT

National constitutions are the basis of our constitutional systems. The question is, however, whether each European constitutional system is the same or whether, on the contrary, they are all unique. The answer is twofold. Of course we might have the same values, the same principles, but we have unique characteristics and we have our own values as well. Each constitutional system has its own specific characteristics, based on the history of the constitutional community and the constitutional system itself.

Reactions to certain events in history have shaped the constitutional community and the identity of the constitutional state. On this basis, it is possible to identify specific features that are specific to a given constitutional system, i.e. elements of its identity. At the same time, the constitutional system carries certain social and constitutional values which also define the system itself. We call these constitutional values, which could be different state by state, nation by nation and which created the idea of unity in diversity in Europe.

KEYWORDS

identity, European values, national values, constitutional values, constitutional identity, national identity, national constitution.

1. Identity in general

The rules set out in a constitution, in the legal sense,¹ are the most fundamental legal norms that constitute the fundamental order of a state-organised society,² i.e. that establish the lasting fundamental order by regulating the organisation, exercise and control of state power³ according to defined principles and requirements.⁴ In the legal sense, the constitution as a fundamental law thus expresses the essence of the democratic order of the state, defines its institutional forms, the requirements of the rule of law, fundamental rights and their guarantees as

1 Bulmer, 2014, p. 2.

2 Petrétei, 2011, p. 48.

3 Zeller, 2005, p. 42.

4 Cf. Petrétei, 2011, pp. 99–155; Dorsen et al., 2003, pp. 10–12.

well as the purposes, means, organisation and limits of public power.⁵ However, according to the value-centred conception of it, the constitution is more than a set of fundamental norms: it is a catalogue of principles and values⁶ on which the state is established.

In this value-based approach, the constitution is both a means of popular expression and a reflection of the cultural heritage of the people,⁷ which, however, raises the problem:⁸ is it permissible for the constitution to contain the values laid down by the legislator (*prescriptive constitution*), or must it be value-neutral (*procedural constitution*)?⁹

It is worth noting that the hermetic separation between value-neutral and ‘value-oriented’ constitutions is more a theoretical category rather than a scale between two endpoints on which each constitution can be placed according to its value-oriented nature (in the case of Hungary, the former constitution can be seen as value-neutral, while the Fundamental Law has an explicit value-oriented character.) The purpose of this paper is not to take a position on the need for value neutrality in a constitution; rather, it does aim to examine the value content of the constitutions of some Central European States. At the same time, it is worth noting that the values already enshrined in the constitution are closely linked to the question of constitutional identity as the values enshrined in the constitution can shape the society that gives it life and vice versa. The constitution can only enshrine values that the constitutional community is able to embrace.

We must ask two basic questions about the values in the constitution: what do we consider to be values, and whose values are they?¹⁰ However, these questions – or rather their answers – change fundamentally if they are not viewed from within the constitutional system (the mutual, mutually shaping relationship between the constitution and the society that gives it life, and the value-shaping influence (function?) of the constitution on society is examined by Habermas in his theory of constitutional patriotism.¹¹

As a Hungarian author, Balázs Majtényi writes, the question ‘indoors’ is whether it is permissible for the constitution to declare defining principles – moral, historical, religious etc. – and considerations defined by the lawmaker and held by certain strata of the community to be constitutionally protected values at the level of the constitution.¹² In this case, one wonders whether there exists a homogeneous community that embraces these values or a ‘constitutional minority’ that does not embrace them.

5 Takács, 2007, pp. 28–29.

6 Cf. Ádám, 2010, pp. 115–127.

7 Takács, 2007, p. 28.

8 For a possible approach to the values enshrined in the constitution, see, e.g., Majtényi, 2017.

9 Bulmer, 2014, pp. 6–7.

10 Majtényi, 2017, pp. 5–11; Petréttei, 2011, pp. 147–157. On the values enshrined in the Fundamental Law of Hungary, see Smuk, 2013, pp. 446–463.

11 Habermas, 1976.

12 Cf. Majtényi, 2017, pp. 6–7.

If we start to look at these issues from an external perspective, at the level of European integration, the question is not whether there are, or can be, values at the level of the constitution, but what they are. What are the social, cultural, political, institutional-historical, etc. attributes that define the constitutional and political system of a state which, as a Member State, no longer exists in a “vacuum” but as part of a community? This perspective raises the question of the European Union as a community of values, and the idea of a European constitutional heritage as a single set of values that binds the Member States together.¹³ However, in addition to a limited common set of values (the set of ‘European values’ in the Treaties¹⁴), each Member State also has its own values: individual attributes, arising from historical specificities, which define the constitutional system of a given Member State and which are not necessarily recognised in other Member States, or perhaps more importantly, are recognised with different content and varying levels of importance.

Take, for example, the protection of human dignity, which undeniably defines the entire European constitutional space both at the level of integration and at the level of member states. Germany, however, has enshrined the protection of human dignity in an eternity clause and declared it to be an immutable, fundamental attribute of the constitutional system. This high level of protection does not necessarily mean that the protection of human dignity in Germany is currently stronger or different from that in other European member states. The value to be defended is the same as anywhere in the European integration scheme, but social sensitivity and historical perspective make it different in different countries.¹⁵ A similar phenomenon can be found in France and laicity,¹⁶ and the list could go on. In fact, it would be difficult to identify and fully compile what exactly each European member state considers to be constitutional values given its constitutional traditions; the same concepts may have different and sometimes changing meanings in member states according to their historical perspectives (within the framework of the present examination, we attempt to do so only based on the constitutions of the Central European states, without claiming completeness.)

The need to protect these attributes, which differ from one member state to another, is the central phenomenon that has led to the reevaluation of the concept of constitutional identity.¹⁷ As the Hungarian author Tímea Drinóczi states, constitutional identity is primarily to be found in the provisions of national constitutions,

13 See Láncoš, 2013, pp. 153–170.

14 E.g. Art. 2 of the TEU, which states, “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”.

15 Cf. Müller, 2016, pp. 73–79.

16 Cf. Levande, 2016, pp. 71–72.

17 Drinóczi, 2018, pp. 4–5.

which at the same time carry the specificity of the constitutional system (order) in a globalising context. The European significance of constitutional identity is thus created by the supranational community of values, in which each constitutional system must designate its own uniqueness, which is made possible by the value-bearing nature of the constitution.

All further issues to be discussed around constitutional identity, including its legal relevance, revolve around these two factors. The phenomenon of the valorisation of constitutional identity was inevitably triggered by the supranational environment, which entailed the development of integration into a community of values. This also means that the role of national constitutions seems to be supplemented by the protection of the institutions and values of the constitutional (and political) order, which is to be protected within the integration process and is specific to the member state concerned, and which is shaped in the course of organic constitutional development.

2. Constitutional identity¹⁸

In 1995, Michel Rosenfeld formulated the concept of constitutional identity as follows: “To create a constitutional identity that will endure over time, it is essential to weave together the past of its creators, our own present and the future of generations yet unborn”.¹⁹

If the treatment of the concept of constitutional identity is to be permanent, both sides – national and European – should show due consideration and mutual respect. The Constitutional Court should adhere to the guidelines promulgated by the Court of Justice of the European Union, and the Court of Justice of the European Union should provide guidelines, but not put a brake on national courts.²⁰

These thoughts come from the President of the Czech Constitutional Court, Pavel Rychetsky, in 2017, 3 years before the German Federal Constitutional Court’s PSPP decision (Public Sector Purchase Programme of the European Central Bank), in which the German Court declared the decision inapplicable to itself on the grounds of a violation of German constitutional identity and the ultra vires nature of the Court of Justice of the European Union’s (CJEU) decision.²¹

A few decades ago, constitutional identity was an obscure concept that interested only a few scholars of European constitutional law, and it was almost non-existent

18 Drinóczi, 2020.

19 Rosenfeld, 1995, p. 1049.

20 Rychetsky, 2017, pp. 95–98.

21 See case C-493/17.

in the practice of the constitutional courts of European integration, even though the legal framework was already taking shape in those decades. However, the concept has now become a much researched – and contested – area and dimension of European constitutional law, not as a ‘scientific fad’ but rather as a consequence of the historically young but unique nature of European integration and its identity crisis.²² The content and applicability of constitutional identity in European integration are linked to the direction of integration and its future.

In the second half of the twentieth century, the concept of constitutional identity was conceived in a context radically different from that of today. Its definition is nuanced by the fact that the Anglo-Saxon – and especially the American – interpretation of the term is also applied in a context that is significantly different from the European one. As regards the European interpretation, the concept of constitutional identity has in recent years become intertwined with the constitutional relationship between the European Union and its member states, which has made the concept itself as controversial as the system of relationships to which it is applied.²³

Nevertheless, it must be taken as a fact²⁴ that in recent years constitutional identity has become a concept of practical importance in the practice of national constitutional courts within the European Union, and its significance is constantly growing, thus placing it at the centre of the academic discourse on constitutional law and European law.²⁵ This is because, within the system of European multilevel constitutionalism, a long-standing central debate of integration is the clash between the EU legal order and the constitutional rules²⁶ of the member states.²⁷ Although the Court of Justice of the European Union (hereinafter referred to as the CJEU) in *Costa v. E.N.E.L.* ruled²⁸ in general that member states cannot invoke the rules of national constitutions against integration, since the CJEU’s landmark decision, it has been evident that the rules established by the CJEU’s decision cannot stand without limits. Member states do not accept the absolute dominance of EU law over national constitutions, even more so since the Lisbon Treaty itself has since enshrined the protection of the fundamental constitutional specificities of the member states in Art. 4(2) TEU, which states that the European Union shall respect the national identities of the member states. The German Federal Constitutional Court (GFCC) has a particularly significant practice in the field of identity, which began to emerge with the well-known *Solange* decisions and the *PSP* decision of 5 May 2020 can be considered a further milestone.

22 Sigmund, 2006, p. 66.

23 Cf. Manurung, 2015, pp. 15–16.

24 Cf. Chronowski, 2015, pp. 20–27.

25 Belov, 2017, p. 74.

26 Belov, 2017, p. 76.

27 Trócsányi, 2014, p. 474.

28 C-6/64 – *Flaminio Costa kontra E.N.E.L.*

At present, the prevailing view is that the European concept of constitutional identity must be interpreted by the constitutional courts of the member states (supreme courts with the power to interpret the constitution) as the authentic – *erga omnes* – interpreters of the constitution of the member states, and this practice must be based on national constitutions and the constitutional values enshrined in them.²⁹

In this chapter, we focus on the constitutional identity and constitutional values of the countries examined.³⁰ However, with regard to constitutional identity in relation to national constitutions and constitutional values, we should first note the following:

- (i) The source of constitutional identity is the homogeneous human group – the demos – as an autonomous entity capable of forming a nation, and a state that, after the period of the natural constitution,³¹ establishes its own constitutional order for the purpose of structural self-organisation.
- (ii) This conception of the nation as a homogeneous community, approached from the point of view of identity formation, can be called a constitutional community with its own values.
- (iii) Sovereignty is the fundamental characteristic of the entity created by the constitutional community (the state), which is ultimately the mapping and concentration of the right of self-determination, and the right of choice, which is the source and precondition of the creation of the state structure and social order, i.e. the constitutional system.
- (iv) The formation of a constitutional structure is a necessary consequence of the socialisation of the constitutional community, which, however, presupposes that the structure formed must correspond to the characteristics of the society that gives rise to it: the members of the constitutional community must be able to identify with the structure created and thus be able to accept it, that is, the collective identity of the community must be reflected in the structure it creates.
- (v) On the one hand, the constitution is the source of the state and social order in which the constitutional community exists, and on the other hand, it embodies it: the constitution (inseparably united with the source of its existence) also becomes the source and embodiment of state sovereignty.
- (vi) The constitutional system created by a constitutional community calls into being the values, institutions and social organisational principles specific to that constitutional community, which make it unique, characterise and define not only the constitutional community but also the constitutional system itself.

29 E.g. Rychetsky, 2017; Levade, 2016; Decision 22/2016. (XII. 5.) AB of the Hungarian Constitutional Court, etc.

30 Czech Republic, Slovakia, Croatia, Hungary, Poland, Slovenia, Romania, Serbia.

31 Cf. Deli, 2018.

- (vii) These values, institutions and principles are determined by the identity of the constitutional community (national identity) and by the confrontational relationship between all the factors that make up the constitutional order (constitutional community, constitutional power and constitution).
- (viii) It is only through this confrontational relationship that some elements of constitutional identity can be understood, which is also determined by the evolutionary process that the constitutional order undergoes from its existence.

The concept of constitutional identity could perhaps be best understood by comparing the theories of two leading authors in this field: Michel Rosenfeld and Gery J. Jacobsohn. Rosenfeld lays a solid theoretical foundation based on Hegelian philosophy, while Jacobsohn's system allows us to trace the practical realisation of constitutional identity and, through this, to understand its nature.³²

Finally, the concept of constitutional identity within the European Union can be understood as the self-definition of the constitutional systems of the member states: a system of fundamental constitutional values, principles and institutions with historical origins that define the constitutional arrangements and whose respect is an obligation of the Union under Art. 4 TEU. Constitutional identity is also a quality that goes hand in hand with the constitutional system (order) and embodies its uniqueness, which is manifested in national constitutions as a result of the confrontational relationship between the constitutional community, the constitutional power and the constitution itself.

3. Constitutional identity and constitutional values in the states of the CEE region

Art. 9 of the constitution of the Czech Republic contains an eternity clause on the constitutional system defined by the rule of law.³³ The Czech Constitutional Court, in its Lisbon decision (PL. ÚS 19/08), outlined its position that the transfer of powers to an international organisation cannot violate the essence of the republic on Art. 9 of the constitution. In the Lisbon judgement, the panel did not make any reference to constitutional identity³⁴ or constitutional values, but it did in the 'Slovak pension case' (decision ÚS 5/12). In this decision, the Czech Constitutional Court referred back to its earlier Lisbon ruling, essentially drawing a parallel (or more

32 See Tribl, 2020; Polzin, 2016, pp. 411–438; Polzin, 2017.

33 Art. 9 (1) This Constitution may be supplemented or amended only by constitutional acts. (2) Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible. (3) Legal norms may not be interpreted so as to authorise anyone to do away with or jeopardise the democratic foundations of the state.

34 But mentioned constitutional values; see Par. 120 of the judgement.

precisely, a common intersection³⁵) between constitutional identity and Art. 9 of the constitution.³⁶

Based on the Croatian constitution, the Croatian Constitutional Court in case U-VIIR-164/2014 upheld the indivisible, unitary, democratic state system, popular sovereignty, freedom and equality of rights, equality of nationalities and genders, respect for peace, social justice, respect for fundamental rights, the sanctity of property rights, the preservation of a sustainable environment and the principles of the rule of law and pluralism as constitutional values and quasi-eternity clauses. The Constitutional Court has addressed the issue of constitutional identity in several decisions,³⁷ in which the fundamental constitutional principles and values, the structural organisation of the Croatian state, the idea of a social state, the protection of national minorities and the democratic exercise of power can be considered elements of the constitutional identity of Croatia.

In accordance with the practice of the Slovak Constitutional Court (Pl. ÚS 24/2014 and PL. ÚS 7/2017), the provisions of paras 1.1, 12.1 and 93.3 of the Slovak constitution enjoy special protection. On this basis, special protection is given to provisions relating to sovereignty, the democratic exercise of power, the rule of law, the protection of fundamental rights and freedoms and the parts of the state budget that affect the exercise of fundamental rights. Based on the decisions of the Slovak Constitutional Court in Constitutional Identity II ÚS 171/2005, III ÚS 427/2012 and PL ÚS 7/2017, the Slovak constitutional identity includes the person of the president of the republic, who expresses and embodies statehood and sovereignty, the republican form of state, the democratic exercise of power, the rule of law and the protection of fundamental rights and freedoms.

Two decisive elements in the practice of constitutional identity in Hungary are the Seventh Amendment of the Fundamental Law, adopted by the National Assembly on 20 June 2018, which enshrines the protection of constitutional identity in the National Avowal and Art. R), and the Constitutional Court's decision No. 22/2016 (XII. 5.) AB. It is worth noting that Hungary was the first member state of the European integration to enshrine the protection of constitutional identity at the constitutional level. The Hungarian Constitutional Court considered the wide range of constitutional values

35 The Constitutional Court derives the constitutional identity of the Czech Republic from its common past with the Slovak Republic. Cf. Decision No 5/12 ÚS, Chapter VII.: "...the Constitutional Court in its statement expressed the expectation that, at least in order to preserve the appearance of objectivity, the ECJ would familiarise itself with the arguments that respected the case law of the Constitutional Court and the constitutional identity of the Czech Republic, which it draws from the common constitutional tradition with the Slovak Republic, that is from the over seventy years of the common state and its peaceful dissolution, i.e. from a completely idiosyncratic and historically created situation that has no parallel in Europe".

The text of the decision is available in English: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%205-12.pdf.

36 For a detailed analysis of Czech practice, see Drinóczy, 2016, pp. 10–11; Pítrová, 2013.

37 Decision U-IP-3820/2009, Decision U-IP-3826/2009, Decision U-I-3597/2010, Decision U-VIIR-5292/2013, Decision U-VIIR-1159/2015, Decision U-II-6111/2013.

enshrined in the Fundamental Law as the source of constitutional identity. In the above-mentioned decision, the Constitutional Court stated the following:

The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us. These are, among others, the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon.³⁸

Poland's practice on constitutional identity and constitutional values is based on the Polish Constitutional Tribunal's judgement K32/09 of 24 November 2010 (the so-called Lisbon decision).³⁹ The Polish Lisbon decision basically was founded on Polish constitutional values and principles, the sovereignty of the state and constitutional identity. The focus of the Polish Constitutional Tribunal's decision was on the transferability of powers to the European Union and the primacy of European Union law. With regard to constitutional identity and constitutional values, the tribunal stated,

The Constitutional Tribunal shares the view expressed in the doctrine that the competences, under the prohibition of conferral, manifest about a constitutional identity, and thus they reflect the values the Constitution is based on. (...) Therefore, constitutional identity is a concept which determines the scope of excluding – from the competence to confer competences – the matters which constitute the conferral of which would not be possible pursuant to Article 90 of the Constitution. Regardless of the difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences.⁴⁰

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

39 The Decision is available in English at: https://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf.

40 K32/09 of 24 November 2010.

In its decision, the Constitutional Tribunal examines and compares European values and Polish constitutional values, citing the preamble of the Polish constitution as one of the sources of constitutional values.⁴¹

According to the Polish Constitutional Tribunal, the “conferral of competences” is one of the means of implementing constitutional values and fulfilling the duties assigned to the state, and the conferral of competences makes sense only when it leads to better implementation of constitutional values and better fulfilment of constitutional duties. The Tribunal also noted that Poland has a constitutional obligation to refrain from conferring competences on an international organisation if such conferral does not serve better implementation of constitutional values and better fulfilment of constitutional duties. Finally, the decision of the Polish Constitutional Tribunal states that Art. 90 of the constitution should serve the effective implementation of constitutional values and the effective fulfilment of constitutional duties, but the application of that article is subject to evaluation from the point of view of those values and duties.⁴²

The Constitutional Court of Slovenia does not apply the concept of constitutional identity in its practice; however, it is worth mentioning the preamble of the Constitution of Slovenia, according to which

proceeding from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, and from fundamental human rights and freedoms, and the fundamental and permanent right of the Slovene nation to self-determination; and from the historical fact that in a

41 According to the preamble of the Constitution, “Having regard for the existence and future of our Homeland, Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate, We, the Polish Nation – all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, Equal in rights and obligations towards the common good – Poland, Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values, Recalling the best traditions of the First and the Second Republic, Obligated to bequeath to future generations all that is valuable from our over one thousand years’ heritage, Bound in community with our compatriots dispersed throughout the world, Aware of the need for cooperation with all countries for the good of the Human Family, Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland, Desiring to guarantee the rights of the citizens for all time, and to ensure diligence and efficiency in the work of public bodies, Recognising our responsibility before God or our own consciences, Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities. We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland”.

42 K32/09 of 24 November 2010.

centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood.

However, in 2011, the Constitutional Court of the Republic of Slovenia, instead of other values or self-determination, placed human dignity at the centre of the constitutional order in its decision on the ‘Tito street’ case.⁴³ In its decision, the Slovenian Constitutional Court stated that the Republic of Slovenia is defined by the principle of democracy as a constitutional democracy in which the human being and dignity lie at the heart of its existence and functioning and that human dignity is at the centre of the country’s constitutional order. The source of the statements of the Constitutional Court was Art. 1 of the constitution, which specifies that Slovenia is a democratic republic.⁴⁴

In this context, we also should mention Art. 3 of the Slovenian Constitution, which states,

Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.

In the commentary on the constitution of Slovenia, Kaučič states that Slovenia can transfer part of its state sovereignty (on international organisations), with the values laid down in the foundations of the constitutional order (respect for human rights and fundamental freedoms, democracy and the principles of the rule of law) being set as a condition for this. With this claim, he implicitly acknowledges that respect for human rights and fundamental freedoms, democracy and the principles of the rule of law are core constitutional values.⁴⁵

When we look at constitutional values and constitutional identity in Romania, we must first look at Art. 1 of the constitution, which states that (1) Romania is a sovereign, independent, unitary and indivisible national state; (2) the form of government of the Romanian state is a republic; (3) Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989 and shall be guaranteed; (4) The state shall be organised based on the principle of the separation and balance of powers – legislative, executive and judicial – within the framework of constitutional democracy.

43 U-I-109/10 from 26 September 2011.

44 See more: Kleindienst, 2017, pp. 117–137.

45 See Kaučič, 2011, pp. 78 and 84–88.

However, it should be noted that Art. 1 of the constitution is not the only article to be examined in relation to the constitutional values and constitutional nationalism in Romania. Art. 4 of the constitution declares that the state is “founded upon the unity of the Romanian people”. According to Art. 6, “The State recognises and guarantees for members of the national minorities the right to preserve, develop, and express their ethnic, cultural, linguistic, and religious identity”.⁴⁶

The Romanian Constitutional Court’s case law could be considered determining regarded to the concept of constitutional identity. One of the most important decisions of the court is Decision No 683/2012, in which the Constitutional Court applied the concept of constitutional identity and formed a constitutional limit in the exact cases of the application of EU law (decisions No 64/2015 and DNo 887/2015 of the Romanian Constitutional Court could be considered related cases.) One of the latest decisions of the court – No 390/2021⁴⁷ – should also be mentioned. In this decision, the Constitutional Court of Romania, based on constitutional identity, stated that it is empowered to ensure the supremacy of the Fundamental Law on the territory of Romania.⁴⁸

Based on Art. 1 of the Serbian Constitution, the 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”. These values can be considered the source of Serbia’s constitutional identity. However, the whole picture of the Serbian constitutional identity is more complicated. As Aleksandra Varga-Kocsicska writes,

efforts to create a new image for Serbia after the fall of the Milošević regime in 2000 are fundamentally linked to the negotiations on Serbian “Europeanness” and the traditional national values promoted since the 1980s. The symbolic practices through which the post-2000 Serbian national identity was negotiated and maintained are of a conciliatory nature.⁴⁹

4. Conclusion

Constitutional values and constitutional identity, as we saw earlier, are linked at several points. One could say that constitutional values create the basis through which constitutional identity can be formed; however, defining constitutional values

46 In the framework of constitutional values in Romania, Arts. 4, 13 and 32 of the Constitution could be noted. See more: Suteu, 2017, pp. 413–435.

47 The decision is available in English: https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_390_2021_EN.pdf.

48 It should be noted that the Romanian Constitutional Court’s practice based on the case law of the German Federal Constitutional Court. See Case 2 BvE 2/08, Cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16.

49 Varga-Kocsicska, 2020, pp. 196–212.

is perhaps much easier than defining constitutional identity. The reason is simple: constitutional values are explicit in national constitutions. It is from these values that the constitutional identity is usually derived, usually with the intervention of the constitutional courts. Many theoretical and practical debates have arisen on constitutional identity not only in jurisprudence but also in the practice of national constitutional courts and the CJEU.⁵⁰ Debates about constitutional values are less scientific but more social or political. If one considers the constitutional values of a state in isolation, one must usually look for the historical reasons leading to the consideration that the lawmaker had enshrined in the constitution something that we would later consider a constitutional value.

In a general sense, a constitution is a legally regulated order of social coexistence, which must, however, meet the criteria of constitutionality.⁵¹ According to the Hungarian author Gergely Deli, a constitution is understood as a unified and self-perpetuating order that contains the two agreements underpinning human coexistence: the association of people with each other on the one hand and their submission to the state on the other.⁵² Deli – with reference to Carl Schmitt – distinguishes between the era of natural and relative constitutions,⁵³ stating that the latter necessarily rests on the former.

According to this view, the constitutional order in the age of natural constitutions is the order of natural human coexistence given by nature itself, and the coexistence of human beings is the natural consequence of the struggle for survival: the hierarchical order of the community of human beings thus created, based on the endowments, constitutes the natural constitution, which is best able to fulfil its primary function of protecting the community.⁵⁴ A community based on a natural constitution is naturally determined by the qualities of its individuals, i.e. the order of the community is determined by the individuals who constitute it and who submit to it.⁵⁵

In other words, the identity of the individuals constituting the community determines the identity of the community itself (i.e. collective identity formation), so that the protective function of the community can be realised as effectively as possible, i.e. the functioning of the community is as close as possible to the individual to allow them to submit to it as fully as possible.

When the above order based on the protective function is institutionalised, we enter the era of relative constitutions.⁵⁶ In the era of relative constitutions, the state no longer seeks to merely protect the members of the community, but it seeks to distribute the (finite) goods available according to social justice.⁵⁷ It must do so, however,

50 See the cited decisions and sources above as well as Faraguna, 2017, pp. 1618–1640.

51 Takács, 2007, p. 22.

52 Ibid, p. 121.

53 Ibid, pp. 121–149.

54 Ibid, pp. 121–126.

55 Deli, 2018, pp. 125–129, 134–140.

56 Deli, 2018, p. 127.

57 Ibid, pp. 124–125.

in an order that best suits the nature of the persons creating and constituting the state, i.e. the community. This brings us to a kind of yardstick for constitutions: how well does the constitution correspond to the nature of the community that calls it into being? To what extent is the constitutional community able to accept constitutional order? To what extent do the values enshrined in the constitution reflect the values of the constitutional community?

The fundamental purpose of the constitution is thus to guarantee the functioning of the state by creating a sustainable order between the state and its citizens and between the citizens themselves, which in the postmodern constitutional era has been complemented by the unconditional guarantee of human dignity.⁵⁸ This question, however, leads us to the system of requirements of constitutionalism, i.e. the criteria by which the constitution must fulfil its natural purpose, namely to ensure public order.⁵⁹

The supranational nature of European integration creates a special situation in which constitutional systems are unified, and the member states react to this, quasi by the law of the counter-effect, by constantly seeking to define themselves⁶⁰ and to defend their historical specificities and the values enshrined in the constitution that defines their constitutional order. It is at this point that the extent to which the individual cooperating member states are similar or different in terms of their values, which are of course largely determined by a shared historical narrative, becomes important.

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58 Ibid, pp. 147–148.

59 Cf. Holmes, 2012, pp. 189–217.

60 Cf. Rosenfeld, 2010, p. 38.

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