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Constitutional identity: The constitutional dimension

of EU integration and disintegration

Position paper by

Aina Amat i Blai & Bernat Aritz Monge Nunes
(Autonomous University of Barcelona, Spain)

Aina Amat I Blai

ainaamat@gmail.com

Bernat Aritz Monge Nunes

bernat776@gmail.com

INTRODUCTION

The European Union - mired in crisis and malaise for almost a decade now - has experimented during this period of time unprecedented economic and political challenges to its stability which are resulting into threats to its own integrity. Notably, through rising political parties in many Member States in favour of departing from the European Union and/or the Eurozone and the decision by British citizens to terminate the United Kingdom's membership into the European Union on July 2016.

As a natural consequence, the philosophy of the European Union's history has been dramatically shaken off its foundations, with the widespread mantra of ever-greater integration shattering into pieces.

The intricacies of the colossal challenges have clearly manifested themselves in the economic and political settings. Nonetheless and oddly enough, in the discussion of the measures to advance and what paths to take a very interesting aspect to consider for systemic changes has been scarcely treated as a whole: the Constitutional dimension of integration and disintegration.

Quite a lot has been written about taking steps back in the project of the EU as it has developed until present on the one hand and on accelerating the centralization of political and economic decision-making into the European Union on the other as solutions for the long uneasiness. Even as far-reaching as turning the European Union into a Superstate by the most staunch integrationists: a federal United States of Europe.

All the same, what could be labelled the last frontier of conflict between the forces of

integration and the forces of renationalisation – the Constitutional dimension of EU

integration – has not been assessed in an integral way in spite of its importance.

In order to justify the relevance of the Constitutional dimension of EU Integration we analyse in this paper its most relevant concept: the concept of Constitutional identity; how it can be defined and what does it imply.

Different interpretations have been developed about the meaning of constitutional identity since its first appearance in the Treaty of Maastricht from a jurisprudential and doctrinal legal standpoint. Nonetheless, as every concept in social sciences with far-reaching implications, one discipline (in this case Law) cannot adequately analyse the full interrelations and implications which such a concept has in the social world. Hence, we will step further beyond in order to grasp and discuss the full implications of the Constitutional identity on politics, economics and sociology.

ADVENT OF THE CONCEPT

The concept entered for first time with the Treaty of Maastrich (1992), both as "national identity" and as "European identity". The first identity notion referred to the Union acting on the international scene as a collective actor, this article was considered a new step in the integration process. The inclusion of new policy areas in the Treaty of Maastricht which are considered the heart of the national sovereignty (such as justice or home affairs) needed a counterbalance to prevent the eventual risk that Europe became some kind of superpower[1].

With Maastricht, the reference to the "national identity" was linked to the democratic system of government. However, in this Treaty the provision never acquired real legal meaning, it just served symbolic and political functions.

The Treaty of Amsterdam (1997) revised the provision concerning the national identity. It was detached from any reference to democratic principles and linked to the European values and to national identities which had clearly a function of counterbalancing the commonality due to the process of integration[2].

In the Constitutional Treaty, the provision was moved to an article entitled "The Relations between the Union and its Member States. In this case, the principle of national identity was directly related to the equality of the Member States, which reminds the principle of sovereign equality under the International Law. The new article mentioned that the Union respects the "essential State functions" mentioning the respect for the territorial integrity, the maintenance of law and order and the safeguard of national security[3].

1 Claes, M. 2013,National Identity: trump card or up for negociation? in A Saiz Arnaiz & C Alcoberro Llivina (eds), *National constitutional identity and European integration.* Law and Cosmopolitan Values, no. 4, Intersentia, Cambridge, pp. 115 and following.

2 Ibid. p. 118.

3 Claes, M. 2013 Op. cit note nº1 p. 119.

With the Constitutional Treaty, it seemed that this provision became a kind of agreement between the Member States and the European Union to guarantee the respect of the fundamental and constitutional political structures of every State[4]. After the failure of the Constitutional Treaty, the Treaty of Lisbon (2009) established a concept of "national identity" which was essentially the same.

The new article 4.2 of the TEU established the constitutionality of every Member State. It maintains the principle of respect for the essential functions of the State and their principal characteristics, including their territorial integrity.

In practice, it has been argued that this provision could be read as an expression of constitutional pluralism and a way of integrating the jurisprudence of numerous domestic constitutional courts on the relationship between EU law and national constitutional law.

However, some authors consider that article 4.2 should not be read as allowing the national courts to unilaterally refuse to apply EU law arguing they are protecting their national identity[5].

I. Constitutional identity or National identity?

Article 4.2 TEU does not mention the concept of "Constitutional Identity", it uses the notion of "National Identity". Nonetheless, Constitutional Courts and even the ECJ has often used the concept of "Constitutional identity", even when it refers to National Identity.

According to some authors[6], although the Treaties have only spoken of national identity, the

4 Villalón, P.C., 2013. La identidad constitucional de los estados miembros: dos relatos europeos. *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, 17(17), pp.501–514.

5 Claes, M. 2013 Op. cit note nº1 p. 122.

6 See, Van der Schyff, G., 2012. The constitutional relationship between the European Union and its Member States : the role of national identity in article 4 (2) TEU. *European Law Review*, 37(5), pp.563– 583.

cases *Sayn-Wittgenstein* and *Runevi-Vardyn*[7] permit to understand national identity as constitutional identity. In the case *Sayn-Wittgenstein*, for example, the ECJ recognised that the Austrian law on nobility formed part of the country's "constitutional law" which pursues a "fundamental constitutional objective". But does the national identity in article 4.2 TEU have be limited to constitutional identity?

Some Advocates General have referred to this notion, for instance, A.G. Maduro in his Opinion in *Michaniki* uses the term "Constitutional identity" included in States National Identity. In a different manner, A.G. Kokott in her Opinion in USTECA linked the "Constitutional identity" to the protection of cultural diversity [8]. However, even if the protection of cultural identity is important for the ECJ, the Court has used the concept of Constitutional Identity more broadly. Although there is a debate between the limits of National identity and Constitutional Identity, in this paper the terms will be used as a synonym, taking into account that the ECJ has assimilated both concepts in the more recent case-law.

II. "Constitutional identity" as a jurisprudential construction

The concept of constitutional identity has served both the Constitutional Courts and the Court of Justice of the European Union (CJEU). However the construction of this concept has been built differently depending on its national origin or European origin.

1. Constitutional Courts and the defence of sovereignty

The idea of constitutional identity has been seen for an important number of Constitutional Courts of the Member States. In the Frontini's case[9], the Italian Constitutional Court was the first arguing that European Integration could not be constructed against the substance of the

7 See notes 18 and 20 for the whole reference. 8 Van der Schyff, G., 2012 p.566.

9 Corte Constitutzionali, 18 december 1973, Frontini vs. Ministry of Finance (183/1973).

constitutional order, even if it did not mentioned the term of "constitutional identity". The

Frontini's case established the theory of the "Controlimitti" which emphasized that it is inadmissible for the European's institutions to violate the fundamental principles of the Constitutional order or the inalienable human rights. In *Granital*[10] the Italian Constitutional Court admits that exceptionally it is available to control the European Union's acts when they violate these fundamental principles [11].

In the same sense, the Federal Court of Justice of Germany mentioned in *Solange I*[12] that article 24 of the Basic Law for the Federal Republic of Germany related on the transfer of sovereign powers does not allow modifications of the fundamental structure of the Constitution without a process of Constitutional revision.

These examples show the important role of some Constitutional Courts defending the fundamental constitutional structures since the beginning of the European Union, even if the concept of "national identity" only integrated the Treaties in 1992. In general, States are protective of the competences constituting the heart of their sovereignty and Constitutional Courts have been considered their guardian, acting, in some occasions, as a counterpower of the CJEU.

After the consolidation of the notion in the Treaties, the first explicit reference to "constitutional identity" was established by the French Constitutional Council in a case in 2006[13]. Two years later, in 2008, the Constitutional Court of Czech Republic in a decision before the entry to force of the Treaty of Lisbon[14], considered that constitutional identity could

10 Corte Constitutzionali,8 juin 1984, Granital (170/1984).

11 Bon, P., 2014. La identidad nacional o constitucional, una nueva noción jurídica. *Revista española de derecho constitucional*, 34(100), pp.170 and 171.

12 BVerfG, 29 May 1974, Solange I (BVerfGE 37).

13 Conseil Constitutionnel, 27 July 2006 (2006-540 DC).

14 Ústavní Soud, 26 November 20008 Pl.Ús 19/08: Treaty of Lisbon I.

limit the process of European integration. The Czech court went further when it considered that it could function as *ultima ratio* or, in other words, it could control exceptionally the limits of a European act which affected the Czech Republic if it were *ultra vires*.

In a similar manner, the Federal Court of Justice of Germany argues, in the *Lisbon* case[15] that the primacy of the European law can only be accepted as long as the European institutions respect the limits of the delegated competences. This Constitutional Court defends the national sovereignty in some key areas such as fundamental rights, social and financial policy, criminal law or defence.

Expressing different nuances all the Constitutional Courts have considered that the primacy of the European law is relative and they have used the Constitutional identity to endorse their claim of sovereignty.

2. The new dimension of Constitutional Identity: the ECJ

Another dimension of the term of Constitutional identity has been constructed by the European Court of Justice. This acceptance has been used more recently in comparison to the Constitutional Courts and in few occasions, treated as an exception to the principle of primacy of the European Law. Furthermore, Constitutional identity has not been regarded as an autonomous ground for derogation but has enabled the States to justify some obstacles to fundamental freedoms. In other words, the ECJ uses the national identity -based on constitutional traditions or cultural values- to interpret other notions, such as public policy or public order[16].

15 BVerfG, 30 June 2009 *Lisbon* (2 BvE 2/08).

16 Guastaferro, B., 2012. Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause.

In the Omega Case[17], the Court considered that a measure prohibiting the commercial exploitation of games simulating acts of homicide could be justified as long as "the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely "human dignity"[18] which, in Germany, has a particular status of an independent fundamental right.

The restriction needs to be proportional, and it is not indispensable that the restrictive measure imposed by one State corresponds to a concept shared by all Member States, according to the judgement of the ECJ. Therefore, there is a necessary margin of discretion enshrined in the concept of National identity as a particular notion of every State Member.

While Omega Case established the bases of National Identity, the *Sayn-Wittgenstein* Case[19] mentioned for the first time the article 4.2 TEU after the entry to force of the Treaty of Lisbon. In this case, the national measure refused to recognize the surname of an adopted adult, determined in another Member State for the reason that it contained a title of nobility which was not permitted by the Austrian law. This measure constituted a restriction to the freedom to move and reside in another Member State, a right which flows from Article 21 TFEU[20].

The Austrian Government invoked public policy as a ground for justification. According to them, the controversial provision protects the constitutional identity of the Republic of Austria because the Law on the Abolition of Nobility constitutes a fundamental rule in favour of the formal equality of treatment of all citizens.

The Court considers that the provision is proportionate taking into account that every

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17 C-36/02. Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbu¨rgermeisterin der Bundesstadt Bonn [2004] ECR I-09609, Judgment of the Court (First Chamber) of 14 October 2004.

18 Íbid par. 32.

19 Case C-208/09, IlonkaSayn-Wittgenstein v Landeshauptmann von Wien, Judgement of the Court (Second Chamber) of 22 December 2010.

20 This article concerns the European citizenship.

Member State has a margin of appreciation which permits to establish different levels of protection in order to preserve a legitimate interest.

The *Runevic-Vardyn* case[21] also shed light on article 4.2 TEU. The Court considered that Lithuania can refuse to spell the names and surnames of a Lithuanian citizen married in Poland whose name was spelled according to polish orthographic norms. Again, the *Runevic-Vardy* case allows a Member State to restrict the applicants freedom in article 21 TFEU by refusing to spell their names as they wished on the ground of protecting the national identity enshrined, in this case, to the national language. The ECJ argues that article 4.2 provides that the European Union must respect the national identity of the Member States which includes the protection of the State's National Language [22]. *Sayn-Wittgenstein* and *Runevic-Vardyn* cases use article 4.2 TEU as a legal basis but both cases are based on other legal arguments. The Court uses article 4.2 to endorse their main arguments but it does not constitute the *ratio decidendi.*

There is not enough cases based on article 4.2 TEU to draw definitive conclusions. However, it is possible to identify some tendencies, such as the possibility of recognizing different views, which can permit restrictions on fundamental freedoms *ad hoc* for every Member State. The indeterminate juridical nature of the concept, which can include at the same time the preservation of an official language or the protection of the human dignity permits a large margin of application of the notion of Constitutional identity. Moreover, Constitutional Courts have also used this concept to maintain their sovereignty in fundamental policies. As the duty in article 4.2 TEU has been formulated broadly, this concept affects all the actions taken by the European Union, including adopting directives or regulations.

21 Case C-391/09 Malgozata Runevic-Vardyn and Lukasz Pawel Wardyn v. Vilniaus miesto savivaldybės administracija and others, Judgement of the Court (Second Chamber) of 12 May 2011. 22 Ibid par. 86.

CONSTITUTIONAL IDENTITY:

AN OBSTACLE FOR EUROPEAN INTEGRATION OR AN ESSENTIAL PIECE FOR SOVEREIGNTY?

Constitutional identity as an interdisciplinary concept

To summarise, the constitutional identity encompasses the essential principles and institutional characteristics and competences of the concerned State reflected in the constitution or the constituting texts. What makes the aforementioned State exist and what ensures its idiosyncrasy.

Every concerned State defines its own constitutional identity through its constitutive texts and/or its constitutional judiciary and, as we have seen, the aspects comprehended can vary widely.

Having duly stated all this, a step further in our reflective endeavour would lead us to realize that legal doctrine and jurisprudence on the matter is essential but insufficient to fully treat and understand the Constitutional Identity of a Member State; even more so when there is not enough cases based on article 4.2 TEU to draw definitive conclusions. It is a concept characteristic of legal science but not exclusively so.

Just as other concepts with far-reaching interrelations and implications of the social sciences one discipline cannot properly explain it without entering into the realm of another. And the Constitutional identity of a Member State (or of any other State in a derived theoretical framework) qualifies exactly as such deep and wide a concept because the constitutive texts not only concern what makes the State exist as a legal entity and confers to it its idiosyncrasy when compared with others. It fundamentally serves to establish and guarantee the stability of its legal order but also its political, social and financial stability.

The absolute core (be it explicit or driven to implicitly) is conformed by the attributions referred to the absolutely essential elements of the State: the principle of territoriality, the monopoly over the means of violence and the monopoly over the means of taxation (to which the monetary monopoly is narrowly linked according to chartalist monetary theory initiated by Georg Friedrich Knapp with his *State Theory of Money* and to Modern Monetary Theory or

MMT). These monopolies which presuppose one another were already developed by eminent classical political economists and sociologists like Maximilian Weber and more contemporary figures like Norbert Elias.

Departing from this core of what the Constitutional Identity of the State consists of from a political economy and sociological perspective, more advanced features can and do form part as well of the constitutional identity of the State, such as for example the features of the classical liberal State like the rule of law, democratic principles and the freedom of religion; which the Federal Court of Justice of Germany recognised through its jurisprudence (more concretely in the *Solange* cases). Other features such as the organisation of the Welfare State could as an example also be considered as part of the constitutional identity, even if until the present day they have not been the prominent subject on which constitutional identity has formally played a role.

From a political economy and sociological perspective the contours of Constitutional identity become more clearly defined than from a classical standpoint of Law alone, which enumerates and develops elements without an appropriate factual systematic approach (which is much more useful to develop an integral framework of analysis in the future).

The "Constitutional Space" of the EU

In the EU the essential element which sets the Constitutional identity of a Member State apart from a more generic sense of Constitutional identity is that, the judicial space of the EU (but not only judicial, we could call it a "Constitutional Space") at the highest level is composed by an ensemble of constitutions, and quasi-constitutional texts and courts (like the TEU, the TFEU, the CJEU, but also of Member States which do not have a single constitutional text) in which no text has *de jure* preeminence over the others.

This arrangement creates the need for a «Constitutional dialogue» between constitutional or quasi-constitutional courts like the CJEU, which since 1992 has only manifested itself in a significant manner with the entry into force of the Treaty of Lisbon and with certain mechanisms and programmes devised in the heat of the economic crises and the ensuing European malaise.

This Constitutional dialogue during the first 20 years of the EU has developed with fluidity as

the general rule. Nevertheless, In a process of EU disintegration and towards a nationalisation on different spheres it is likely that the political and economic problems will have a significant reflection on constitutional identity matters, with a political dimension but also a judicial dimension.

Up until the present day the most remarkable moment of tension in this dialogue has been the cases relative to the Outright Monetary Transactions programme envisaged by the ECB and on which the Constitutional Court of Germany showed what some authors have considered a very defiant position.

Conflict can already be devised in the near future if the Republic of Poland passes reforms of the Constitution which would present incompatibilities regarding the rule of law as understood by the CJEU, more precisely about the independence of the judiciary.

Ultimately, the constitutional identity conundrum inevitably falls back to the crux of the legal construction of the EU: it is a legal, institutional and political UFO. Far from a conventional International Organisation and also far from a cogent federal State structure and, as a consequence, with the need for the construction of a space which recognises the identities of every State which can ultimately be sustainable only through political willingness and constitutional dialogue.

Changes in the Constitutional identity stemming from the asymmetry of Integration

Moreover, it is necessary to acknowledge that the interrelation between Constitutional texts and the European Treaties and their derived EU law is not one which always de facto unfolds on a levelled ground.

Most notably, asymmetries between the national and European decision-making centres with structures which fundamentally alter the conventional monopoly over the means of taxation and the monetary monopoly of the State like the Economic and Monetary Union can de facto alter the Constitutional identity of a State.

Most notably, the Kingdom of Spain facing financial stability problems and factually limited degrees of monetary and budgetary discretion undertook a Constitutional reform in the year 2011 of article 135 of the Spanish Constitution which essentially established the principle of

budgetary stability fixed to the margins established by the European Union. A balanced budget amendment as a fundamental governing principle for all actions of the State and also the obligation of debt servicing as the absolute priority in the State's expenses.

An extremely significant constitutional change which further delimited aspects susceptible of forming part of the Constitutional identity of a State such as budgetary decisions and the Welfare State.

CLOSING REMARKS

A disintegration process could feasibly weaken the constitutional dialogue which has been

taken for granted during the previous years, along with other previously sacred cows of the European Union. We should not be excessively surprised and be prepared if in the near future we were to observe constitutional conflict instead as a reversal of the trend. Noteworthy signs have already appeared, revealing that this Constitutional coexistence is not an always easy one, and it is certainly not the natural state of an inevitable *in crescendo* integration.

The door is open to Constitutional struggles if circumstances are forced to such a point where the economic and political rivalries within the EU reach this highest playing field and which can decisively drag up the paradox and the weaknesses in the foundations of the EU as it is. Measures of systemic change from both integrationists and eurosceptics should be designed with a clear vision of the Constitutional identity of their Member State and acknowledging the necessary complexities of juggling them in a common space from a sober position.

The reshuffle of certain aspects towards the nation State -being a much older and cogent construction than the comparatively very new European Union- in order to establish more suitable solutions for the citizens of said State to whom it ultimately has to answer before is an understandable and legitimate political position. Hence, integrationists with foresight ought to acknowledge not only the legal but also the political, economic and sociological basis upon the Constitutional identities of the States are framed. That more than an obstacle the respect for the Constitutional identity of the States could be thought of as one of the most fundamental elements which allows the EU to exist. Little consideration for the concept and/or an excessively reductionist approach by which the CJEU ought to be the sole interpreter of what qualifies as Constitutional identity would be counterproductive in the long term. Likewise, trying to force the creation of a European Superstate without previously generating a genuine European *demos* would not be a reasonable and stable solution for the ailments of Europe.