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NATIONAL IDENTITY AS A PATH TOWARDS THE COMPATIBILITY OF THE OPPOSITE STANDPOINTS

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Abstract. Both the unconditional primacy of the EU law (even over all the national constitutional norms), and the supremacy of any national constitutional rule over EU law, couldn't be considered as a solution to the accommodation of the constructive interaction between two autonomous legal systems. The pluralistic models come up with a solid explanation on how legal systems interact. However, they fail to provide a solution when it comes to the potential collision of the EU and national constitutional norms. In the last decade, discourse on the notion of national identity has been developing. This concept could be a viable approach in resolving situations (as researched in this article[2]) bordering on conflict in the pluralistic models.
Keywords: national identity, primacy, judicial dialogue.

INTRODUCTION

The dispute over the primacy of EU law, over any national law, is a long-standing issue that has sparked debate. The primacy of EU law was introduced as the core principle of EU law by the ECJ in C-6/64 *Costa* (Judgment of the Court of 15 July 1964), which sought to prevent the deprivation of the character of EU law by the national law "however framed". The primacy of EU law over national legislation was reinforced in the C-11/70 *Internationale Handelsgesellschaft* (Judgment of the Court of 17 December 1970). The ECJ stated that EU law cannot be affected by the national constitution, nor the principles of a national constitutional structure. Despite the existence of the primacy of EU law in early decisions, the ECJ maintains its' position: the "rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law" (Judgment of the Court (Grand Chamber) of 8 September 2010). This position that the ECJ maintains meets the general idea of the EU, as described by L.F.M. Besselink, as the supranational construct that prevails over the Member States. Besselink's opinion was given in response to the existence of sovereignty as a cause of conflict (Besselink, 2010, p. 39). We can therefore conclude, that according to the ECJ, EU law has unconditional primacy over any national law, including the national constitutions. Otherwise, the Member States could introduce amendments to their national constitutions to circumvent the requirements of EU law, which would substantially affect the unity of EU law. Or could give way to a situation, in which the non-compliance with EU law based on the existing constitutional provisions would be justifiable.

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It is now generally accepted in the Member States that EU law takes precedence over national law. Although this principle is acceptable only in relation to ordinary law. This relationship is controversial and inconsistent in regard to constitutional law (Grabenwarter, 2009, p. 84-85). The primacy of EU law over the constitutions of the Member States remains a subject of debate (Perez, 2013, p. 146-147). The reasons for such a debate seem to be evident: EU law limits the absolute expression of these powers – national sovereignty (Chalmers et al., 2014, p. 202). According to the jurisprudence of the ECJ, albeit within the limited fields, the Member States "have limited their sovereign rights" (Judgment of the Court of 5 February 1963). Hence, if the primacy of EU law is unconditionally accepted by the Member States in these limited fields, the Member States limit their sovereign rights to an extent determined not by the national constitution, but by external legal system, namely the EU's. In that case, the scope of constitutional norms becomes interdependent on the EU law – the more EU competence "creeps", the more such national constitution shrinks. If such a model were to be unconditionally accepted, this would mean no more than the federal statehood, and could be described as the prostration of national law (Mayer, 2009, p. 423). But the EU is not a federation, the EU remains the Union of States (Bofill, 2013, p. 242; Opinion of AG Cruz Villalon in Case C-612/13). If it is so, couldn't it be argued that the primacy of the EU law over national constitutional norms could be limited under certain conditions, and in case the results are favourable, under which conditions?

A STARTING POINT FOR DISCUSSION

In his book "Legal Monism", P. Gragl examines the relationship between EU law and national law extensively from the perspective of the positivism paradigm, arguing that the four main models of the relationship between the EU and the national system can be categorised as: pluralistic, dualistic and monistic (Cragl, 2018, p. 214). The latter having two sub-types, either based on the primacy of the law of the Member States or based on the primacy of EU law. P. Gragl thus reaches a conclusion: the interaction between national law and EU law is a monistic model of a legal system based on the primacy of EU law (Cragl, 2018, p. 230, 236). However, such primacy of EU law over national constitutions would have features of the federal structure. The EU is more than a confederation because of the intensity of the commitments made by the union. However, this intensity does not reach federal statehood (Kirchhof, 2009, p. 743). The EU is based on the transfer (limit) of some of the competences of the Member States to the EU under the principle of conferral[3]. Provided the primacy of the EU law is being accepted unconditionally (Opinion of AG Cruz Villalon in Case C-507/08), the Member States, being and remaining the "Masters of Treaties", would not have any legal measures to counter EU acts, with the sole exception being the possibility of challenging the measures before the ECJ.

On the other hand, the interaction between national law, and EU law – based on a monistic model with the supremacy of national law, would result in denying the basic characteristics of EU law, developed over the years by the ECJ. It is now generally accepted that EU law takes precedence over national law. Although this principle is acceptable in relation to ordinary law, this relationship

3 TEU Articles 4(1), 5(1) and 5(2).

is controversial and inconsistent in relation to constitutional law (Grabenwarter, 2009, p. 85-85). The overview of the EU Member States would require a much more extensive analysis, meanwhile it is sufficient to mention a Lithuanian case, where the Constitutional Court first established the relationship between EU law and the Lithuanian Constitution:

"Thus, the Constitution <...> in regard of European Union law, establishes *expressis verbis* the collision rule, which consolidates the priority of application of European Union legal acts in the cases where the provisions of the European Union arising out of the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal force is), save the Constitution itself" (Ruling of Lithuanian Constitutional Court in Case No. 17/02-24/02-06/03-22/04).

The monistic legal system: *i)* is based on one *grundnorm*, that presupposes a hierarchical structure of legal norms with the EU primary law or national constitution in the apex; *ii)* has clearly established rules on the conflict of norms, consequently, the primacy of EU law, or the supremacy of a national constitution is unconditional in any case; and lastly *iii)* there is but one court with an example of a case such as the latter instance. Is this maintained in case EU law and national law interact? I would argue that - no. Firstly, from a practical point of view, and based on the above-mentioned argument about the Union of States. And secondly, from a theoretical approach, on multiple *grundnorm*. If we accept that both national and EU legal systems are independent and autonomous, they, according to the theory of H. Kelsen, are based on different *grundnorm*. In case of the collision of EU law and national constitutions, we would have a collision of different *grundnorm*. F. Myers made a statement that, in the sense of legal theory, there is no legal solution for a conflict of different *grundnorm* (Mayer, 2009, p. 425). It might appear that no theoretical model exists to solve the possible conflict between national and EU law, but it would seem that this is not the case.

The answer to the challenges that arise in a monistic theoretical model, is a shift from a monistic to a more sustainable pluralistic one. This model could go under many names: constitutional pluralism, multilevel constitutionalism, composite constitutionalism, polycentrism, etc. The key goal of this pluralistic theoretical model is to prevent the absolute authority of EU law, while leaving the question of *Kompetenz-Kompetenz* unaddressed (Halmai, p. 1). The pluralistic model accommodates multiple *grundnorm*, therefore reinforcing the interaction of EU and national law, not in a hierarchical, but heterarchical structure. Hence, establishing the idea that there is no ultimate arbiter. Legal pluralism does not require any specific mechanism that is established for conflict resolution. Each legal system sets its own rules for resolving conflicts, and legal systems compete for the right to resolution in the event of a conflict of norms (Cragl, 2018, p. 9). Moreover, constitutional pluralism is incompatible with federalism (Claes, De Visser, 2012, p. 85), and therefore it fits the concept of the Union of the States. But one might ask the question- how can the pluralist model accommodate for the interaction between the different *grundnorm*. My answer lies within the pattern of positivism: to use another theoretical concept – the *rule of recognition* by H. Hart. As established under the *rule of recognition*, one *grundnorm* should be recognised by another *grundnorm* to the extent that is acceptable for both *grundnorm*. A conflict between the *grundnorm* is impossible, and therefore, there could

be only full or partial acceptance, or alternatively non-acceptance, of the external *grundnorm* and the impact it brings. This is not a purely theoretical construction. On the flipside, it is a theoretical foundation which explains the functionality of the mechanism established in TEU Art.4(2), referred to as a national identity clause.

BRIDGING THE GAP

As explained above, there exists a major challenge for the primacy of EU law *vis-à-vis* the supremacy of the national constitution. The absolutist model may not work because of the distinct features of a monistic and hierarchical system. Positions of absolutism are not attractive in terms of primacy or supremacy, because they reject the values of another legal system. So, the question should be formulated differently: when does EU law take precedence over national law (Chalmers et al., 2014, p. 219)? Such an approach maintains the primacy, albeit not absolute, of EU law. On the other hand, it safeguards certain national constitutional provisions from the external overriding and unforeseen impact made by EU law.

It is important to recognise that the model being discussed is very complicated. It does not have a hierarchy, nevertheless, it has multiple *grundnorm,* and has multiple arbiters, instead of a single one. In these conditions, a coherent interaction between two autonomous and independent legal systems should be established. What makes it even more complicated, is that there is no uniform regulation for the division of competences. Therefore, the ECJ and the national Constitutional Courts operate according to different regulations of their respective jurisdictions (Jakab, 2016, p. 113). We may ask ourselves: "Is it possible to find a solution, despite the relationship between EU law and constitutional law of the Member States?". This is one of the most conflicting issues in the European legal field (Bogdandy, 2011, p. 1417). It seems feasible, although it remains a very difficult task. It would require many preconditions, one of the most important is accepting the pluralistic model, while also facing all the downsides it possesses. We might also ask: "How would this model function in order to solve all the challenges that have been previously discussed?" The functionality of such a model is possible under current TEU Art.4(2), as it establishes the notion of national identity:

> "The Union shall respect the <…> Member States <…> national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government <…>."

Firstly, TEU Art.4(2) recognises the pluralistic model. As emphasised by A. von Bogdandy and A. Schill, the pluralistic concept of the relationship between EU law and national constitutional law is earning recognition with the advent of the wording of TEU Art.4(2). As it stands, the traditional hierarchical ideas of early jurisprudence that the ECJ and the Constitutional Courts stood by, are becoming increasingly obsolete (Bogdandy, 2011, p. 1452). As noted earlier, acceptance of the pluralistic model leads to a general disregard of the hierarchical model and the concept of a sole ultimate arbiter.

Secondly, a departure from the unconditional primacy of EU law safeguards the fundamental constitutional structures from the unwanted and unpredictable effects it can have. The removal of fundamental constitutional structures (usually referred to as a constitutional core) leads to a change in the primacy that current EU law possesses over the national constitutional norms. The national identity clause can be seen as a lawful derogation of the core constitutional elements from the absolute primacy of EU law (Dobbs, 2014, p. 301). This means, that two core principles of the primacy of EU law and the supremacy of constitutions are allowed to co-exist simultaneously, both in non-absolute forms, while both continuing to make concessions against each other.

Thirdly, due to the fact that the national identity clause does not carry any hierarchical or mandatory provisions, it is based on the mutual acceptance of it by both systems. It is also a tool that could make way for a judicial dialogue between two equal counterparts, neither being superior. National identity cannot be developed in any normative way under the current Treaties. Therefore, the cooperative judicial communication between the Constitutional Courts and the ECJ (according to the procedure of preliminary reference under TFEU Art.267) is the only institutional instrument that is currently available. In order to ensure the feasibility of such a level of cooperation, all parties, both the Constitutional Courts and the ECJ, should look towards the path of mutual concession to ensure the further development of the European project. The national identity procedure could be implemented by both supreme courts in a constructive dialogue to form a constitutional nucleus that would not be affected by the priority of EU law and would be acceptable to both courts (Tatham, 2013, p. 292-293).

Fourthly, the aforementioned clause could also be used "as a shield or as a sword", an expression noted by P. Faraguna, who underlines the two main directions in the use of constitutional identity. It can be used both as a shield – to overturn or even block EU legal reforms, or as a sword – to create legal conflict in an integrated EU constitutional system (Faraguna, 2017, p. 1621). Indeed, the national identity clause could be used outside of the scope of TFEU Art.267 in a judicial dialogue. National identity creates a possibility to use it in TFEU Art.263 as well, in order to challenge the validity of EU acts (using this concept as a sword) (Konstadinides, p. 2). While also using TFEU Art.258 to defend against the procedure of the infringement of EU law (utilising this concept as a shield) (Guastaferro, 2012, p. 297). However, there is another point that needs to be mentioned. If the TFEU Art.267 presupposes that the judicial dialogue between courts, then in the other two possibilities mentioned beforehand, it is going to be the Government that represents the Member State before the ECJ. In later cases, the national Constitutional Courts could be disregarded (incidentally or intentionally) in the determination of national identity.

Finally, the notion of national identity should be used very cautiously. The TEU Art.4(2) establishes a notion for resolving conflict between EU law and national provisions of constitutional law, which includes constitutional norms that form the constitutional core of hierarchical supremacy over EU law. But the national identity clause could also be used pretentiously, and therefore to avoid the impact of EU law. As is noted by F. Fabrini and A. Sajo, national identity, as a legal category, is too mysterious for the rule of law, and too vague for European integration, while also being too politically risky

because of populist movements that could take place (Fabbrini, Sajo, 2018, p. 15). Maybe because of this particular reason the national identity clause, which is *à la mode* today, is very cautiously developed by the ECJ. The ECJ seems to be hesitant when it comes to relying upon national identity, and only refer to this notion in isolated cases only.

In the 2010 *Sayn-Wittgenstein* (Judgment of the Court (Second Chamber) of 22 December 2010), the ECJ, for the very first time, mentioned national identity. Furthermore, in the 2011 "Lithuanian" *Vardyn* (Judgment of the Court (Second Chamber) of 12 May 2011), the ECJ, in a way that had never been done before, explicitly based its decision on TEU Art.4(2), and the respect of national identity. However, the ECJ is very cautious when it comes to widening the application of national identity, because the national Constitutional Courts are discovering a new method to oppose the unconditional primacy of EU law. The Constitutional Courts ground their decisions on national identity with the goal of limiting the ever-expanding EU law. Constitutional Courts have developed quite different concepts of constitutional identity in order to control the expansion of EU competences, and in order to overcome the absolute primacy of EU law over national constitutional law (Gamba, Lentzis, 2017, p. 1684).

TEU Art.4(2) counterbalances the expanding powers of the EU and the principle of the primacy of EU law (Konstadinides, p. 2). Understanding TEU Art.4(2) is central to maintaining the key EU constitutional principles, namely the primacy of EU law and the uniform application of EU law. This provision is often portrayed as a "European counter-limit", which mainly consists of binding obligations to respect national constitutional identities (Faraguna, 2016, p. 500). Moreover, it might require certain concessions from the ECJ.

CONCLUSION

TEU Art.4(2) is a construct of purely pluralistic nature and requires concessions from both national and EU legal systems, led by their highest judicial authorities – the ECJ and national Constitutional Courts. The functioning of the national identity clause assumes that none of the judicial authorities have a final say, and neither has power over the other. The solution could be found solely through the constructive and open judicial dialogue. In this judicial dialogue, both parties have their say, both parties listen, and the cycle is allowed to repeat. Both parties have their arsenals of legal measures, such as the *ultra vires* review and the constitutional identity review for one party, and the EU law infringement procedure for the other, used to counteract the unsatisfactory developments. However, it is still to be fully developed in the future. It might appear that such an interaction between autonomous legal systems is chaotic, however, this is a pure manifestation of the pluralistic model, whose full-fledged operation is yet to come.

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