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Constitutional Identity

The author interprets the legal concept of constitutional identity and its differences in comparison with the sociological concept of the constitutional identity as national identity constructed by the constitution. The author determines the nature of the constitutional identity of the Republic of Croatia and suggests the acceptance of constitutional review regarding material constitutionality of the constitutional amendments as a necessary condition for the protection of state sovereignty and for the active participation in the constitutional pluralism of the European Union.

1. Introduction: modernism in constitutional identity discourse

The research of constitutional identity and material review of the constitutionality regarding constitutional amendments belongs to modernism[1] in the constitutional law science. According to a well-known American anecdote, people exiting the Philadelphia Convention were once asked: "What are you working on there?" The answer was: "*A machine that will go by itself*." Thus, it needs no control. Why did they think that? The Constitution was understood as a mechanism, in terms of Newton's mechanics, whose wheels were regulated in such a manner that they could not violate Constitution even if they wanted to. The Constitution was considered inviolable and there was no need for its control. Today, we think that the mechanisms themselves are not sufficient and that some control is necessary. The science of constitutional engineering is an extremely imperfect science.

The discussion about the constitutional identity reflects the end of an era in the history of political systems, launched at the end of the Great French Revolution. It was a period when democracy was understood traditionally, as a system founded on national sovereignty, in which there existed a huge distrust of the revolutionaries towards the judges belonging to *Ancien Régime* Parliaments (who opposed the sovereign-king by invoking the values of natural law, demanding the right to control and annul his laws). Today, we use the same term - *democracy* referring to the fundamental rights protection, but the meaning of the term is different and we go back to the same situation, with the exception that the value system is not religious anymore, but it is founded on fundamental rights. The guardian of those universal principles is – indispensably - a judge. In the end, in some way, we close proverbial parentheses on democracy, which had an extremely short life in the history of our political systems, only to produce a new, improved, or at least different system (if desired, we can also call

[1] D. Maus, B. Francois, M. Troper, *Écrire une Constitution*, RFDC, No. 79, July 2009, P.U.F, p. 562.

it "democracy" just as we call a table "chair", as the chair of the French constitutional law association *Bertrand Mathieu* states, in a caricaturist's manner)[2].

This topic evokes iconoclastic movement and the incineration of the pictures of various saints: how can a constitutional court, which is empowered to guarantee compliance with the constitution, control the norms or the change of the norms it is obliged to comply with? After the World War II, there has been a growth in the number of constitutions which contain prohibition of changing some of the constitutional norms.[3] Legally, the problem of unconstitutionality of constitutional amendments exists since the passing of the first constitutions. However, today the reaction to it is different than in the 19th and 20th centuries.

2. Judicial *Coup d'État*

In the debate about the constitutional identity and the possibility of constitutional amendments' material review, a question has been opened whether there is something **behind (Latin – retro)[4] or above** constitution. What is the relationship between the constitutional order and the ethic order of values? Aharon Barak notes that: "The role of a judge is to give effect to democracy through deliberating according to the democratic values and fundamental principles. In my view, the fundamental principles (or values) fulfil the normative universe of democracy. They justify the legal norms. They are the reason for their change. They are *l'esprit* (voluntas) which unifies the substance

[2] Bertrand Mathieu, debate: Table Ronde 24 – 25 April, 2010, AIDS, Jerusalem, http://www.iacl-aids.org/, accessed on 01 July 2010.

[3] For example, Article 79 paragraph 3 of the German Basic Law of 1949, Article 288 of the Portuguese Constitution of 1976, (14 unalterable areas included into the chapter named "material boundaries of the Constitution"), Brazilian Constitution, Greek Constitution ("The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of articles 2 paragraph 1, 4 paragraphs 1, 4, and 7, 5 paragraphs 1 and 3, 13 paragraph 1, and 26"), Turkish Constitution ("The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed" (Article 4).). The Romanian Constitution ("The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, territorial integrity, independence of the judiciary, political pluralism and official language shall not be subject to revision" (article 148 (1)) and article 148 (2) "Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or the safeguards thereof"). We stress that the Constitution of Norway (1814, article 112) forbids the change of the constitution which is in conflict with the constitutional principles and spirits of the constitution, which represent the oldest "eternity clause" (10 principles originally referred to, among other things, division of powers, national sovereignty, independent judiciary). Article 139 of the Italian Constitution (republican form of government), article 9 (2) of the Czech Constitution "Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible".

[4] *Latin* retro: behind, back, backwards, again.

(verba). Each norm made in democracy, has been made with those values in the background."[5]

The writers of the constitutions and the courts often refer to the social value judgements, since constitutions and their application reflect the selective and biased choice of values. Some recent research shows[6] disagreement between the doctrine and the judges regarding the meaning, nature of the values, and the width of compliance with the values in constitutional judicature.

In 1958, German Federal Constitutional Court made a precedent in that view, and through the ruling in the *Lüth BferGe 7, 198,*[7] it determined that the German Basic Law is not a neutral document regarding values.[8] *Alec Stone Sweet* explains that according to the *Lüth* ruling, "value system" expressed by the Basic Law (today, we talk about the principles), and in particular the system of rights, "affects all spheres of law". As a result, "every provision of the private law must be compatible with this system... and every such provision must be interpreted in its spirit."[9] The obligation of all courts is to secure the compatibility of all private law provisions with constitutional rights. If the private law judges fail in it, claims the Federal Constitutional Court, or if they fail to strike a proper balance using the principle of proportionality, they violate "objective constitutional law" and, thus, the rights of individuals. It is about a *judicial revolution*, since this ruling created a new cause for complaint against the civil law judges, which the Federal Constitutional Court would hear and deliberate via constitutional complaint procedure. The writers of the Basic Law have not determined that the fundamental rights could have effect between the private persons and their legal relations, and after *Lüth* ruling, what was then stated, only became constitutionalised.

Although human dignity belongs to inalienable rights in Basic Law (Art. 1), the concept of human dignity being in the centre of objective value order is not stated in the text of the Constitution, and it is a product of constitutional judicature. In 2006, the German Federal Constitutional Court (BVerfGe, vol. 115, page 118, Lufrsicherheitsgesetz – Air Traffic Security Act) explains that human life, as the primary constitutional principle and the highest constitutional value, presents the vital foundation of the human dignity. Every human possesses this dignity as a person, no matter of its characteristics, its physical or spiritual state, its abilities and its social status. It cannot be denied to any person. However, the right to

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[5] Aharon Barak, *Le rôle de la Cour suprème dans une démocratie,* RFDC, No. 66, April 2006, P.U.F., p. 241.

[6] *Constitutional topography: values and constitutions,* Ed. By András Sajó, Renáta Uitz, Eleven international publishing, 2010, The Hague, The Netherlands, Preface.

[7] BverfGe 7, 198 (1958) in Donald Kommers/Russell Miller, *The Jurisprudence of the German Constitutional Court,* 3rd Ed, 2007.

[8] Chosen rulings of the German Federal Constitutional Court, Konrad Adenauer Stiftung, 2009, Skopje, p. 242: The ruling of the First Senate from 15 January 1958 – 1 BvR 400/51.

[9] Alec Stone Sweet, *The Juridical Coup d'État and the Problem of Authority,* German Law Review, Vol. 08, No. 10, 2007, p. 920.

its observance can be violated.[10] Deliberating upon the constitutional complaint against the legal norm contained in the Air Traffic Security Act empowering the army to use the imminent combat force in order to take down the aircrafts used as weapons to commit criminal acts against human lives, the Federal Constitutional Court has concluded that the provisions of the mentioned law are not in concordance with the Article 1, page 1 of the Basic Law, since the taking down of the aircraft can violate the rights of the victims, crew and passengers of the aircraft, and therefore deprive them of the respect which belongs to them through the mere force of human dignity.

When killing of people becomes the means to save the others, human beings become objectified and simultaneously deprived of their rights if their lives are handled unilaterally, for the state's sake (the passengers and the crew as victims are becoming deprived of the values belonging to every person, when making a decision of their own). The state can make the choice of the means to perform the obligation of protecting human lives only among those whose usage is in compliance with the Constitution, or in compliance with the prohibition to kill, resulting for the State from the Article 1, page 1 of the Basic Law. German Constitutional Court states that the fact that the procedure should serve to protect and sustain lives of other human beings changes nothing.[11]

European Court of Human Rights, in *Pretty v. United Kingdom*, faced with the same textual imperfection, states that: "the pure essence of the Convention is the respect for human dignity and freedom."[12]

2.2 Is there anything behind or above Constitution?

All that has been mentioned before, points to the need to locate the constitutional values, their relationship with the text of a constitution, and their functions in forming the judges' opinions when deliberating. Considering the problem from the perspective of a constitutional text, *Otto Pfersmann* notes that the positive answer to the question whether there is something behind or above constitution would mean that even the constitution itself is limited by observing some more fundamental values or norms, or that certain contextual elements are stronger than the constitution on its own.[13] He explains that such a concept is regularly appearing in constitutional debates when some political subjects in a political arena want to impose constitutional changes which others are not willing to accept (and vice

[10] Chosen rulings of the German Federal Constitutional Court, Konrad Adenauer Stiftung, 2009, Skopje, p. 176: The ruling of the First Senate from 15 February 2006 – 1 BvR 357/05.

[11] Material contents of German Eternity Clause (Art. 79, pg. 3 of the Basic Law, Deutsch Bundesverfassung).

[12] Pretty v. United Kingdom, EctHR Application No. 2346/02 from 29 April 2006, (65). More in: Biljana Kostadinov, *L'euthanasie au Canada et en Europe*, Conseil international d'études canadiennes, Le vieillissement des sociétés: La dynamique de l'évolution déemographique au Canada, 2010.

[13] Otto Pfersmann, *The Only Constitution and Its Many Enemies, Constitutional Topography: Values and Constitutions,* E. by András Sajó, Renáta Uitz, Eleven international publishing, 2010, The Hague, The Netherlands, p. 45.

versa), and serves to promote or halt constitutional changes. Positive answer to this question is given by the supporters of the mentioned concept, or *retro-constitutional approach.*

Otto Pfersmann starts from the premises of legal positivism (which he considers hard to surpass) and approaches the problem by determining constitution in legal terms: if the constitution is the thing that ultimately sets the first normative element of a legal system, then obviously something that belongs to the same legal system and sets the basic elements of that system cannot be somewhere else. According to the positivist theory, *concepts of retro-constitutionality* are ideological attempts to change the rights outside legal procedures provided for that particular purpose, while theoretical justifications of such attempts lie on confusing assumptions (which are intended to confuse). Formula of something being behind or above constitution – *retro-constitution*, can indicate that some particular preceding historic date is superior over the constitution or that the current situation demands constant actualization of a once passed constitutional text (in both situations, *constitutional context* is invoked).

Due to the volume of this paper, I shall only expose a brief analysis of the *judicial revolution. Alec Stone Sweet* determines it in this way: "By the phrase *juridical coup d'état,* I mean *a fundamental transformation in the normative foundations of a legal system through the constitutional lawmaking of a court."*[14]

The court can say that the constitution encompasses something that is not, in fact, in the constitution, or that there is something somewhere else, which by the opinion of the court, can have a decisive legal influence on constitution (more aggressive approach would be in invoking hyper-constitutional entities). The real problem lies in the influence of the use of such an argument on the legal system in its entirety. In 1971, the French Constitutional Council began incorporating a charter of rights into the Constitution of the Fifth Republic, being fully aware that the founders had explicitly rejected the inclusion of such a charter. The move destroyed the remnants of what was left of a once sacred Republican orthodoxy: legislative sovereignty. The drafters of the Constitution of the Fifth Republic (1958) wanted to make clear in the Preamble that the Fifth Republic is within a certain political continuity of values. Thus, the "rights" mentioned in the Preamble are not considered *rights* in the sense of constitutional norms which can be invoked to attack the legislature. In its famous decision 44 DC of 16 July 1971 (on Liberty of Association), French Constitutional Council produced a *new constitution,* invoking the Preamble, which until then was considered a mere political declaration[15]: "*This decision changed entirely the substance of formal constitutional law, including in it the articles of the Preamble as legally binding provisions – and hence also all the*

[14] Alec Stone Sweet, *The Juridical Coup d'État and the Problem of Authority,* German Law Review, Vol. 08, No. 10, 2007, p. 915.

[15] Here, I stress the fact that the prior French Constitution of 1946 explicitly excluded the Preamble and the Declaration of Human Rights from 1789 as a basis for the constitutional review on behalf of the Constitutional Committee. See: *Droit Constitutionnel,* Georges Burdeau, Francis Hamon, Michel Troper, 25th Ed, L.G.D.J, 1997, p. 383.

objects to which the Preamble refers, notably the fundamental principles recognized by the laws of the Republic, a move which amounts to a retroactive constitutionalization of ordinary legislation enacted before 1946 under a republican government. As the Constitutional Council is not entitled to modify formal constitutional law by any stretch of the imagination, this means no less than a revolution in the legal meaning of the word."[16]

The judges managed to impose their opinion as binding, while the academic community unanimously agreed that the decision was well-grounded. Hereby in France, with a few constitutionally protected rights, a new constitution was formed, having a broad catalogue of rights, which can be found in the *fundamental principles of republican legislation.*[17] It is about the interruption of continuity and acceptance of the new constitution via judicial deliberation. Therefore, it is about the constitutional change.

The concept of legal positivity determines the following:

a) For any legal system, the Constitution is functionally defined as a set of norms which determines the validity of other norms;

b) If something was behind, next to, inherent or wherever, having the function of determining the validity of the norms within a given legal system, then this retro- or hyper-constitution would be the Constitution itself;

c) Legally, there is nothing outside the Constitution, except the supposition that what is appears as the formulation of the constitution is in fact a constitution;

d) Arguments aiming at showing that retro-constitutional entities would be truly legal entities, constitute an attempt to change the Constitution without respecting the legal rules for such a change;

e) Revolutionary success of some of these attempts does not prove that there was anything retro-constitutional; rather it shows that in order to include those entities, one must force extra-legal change.[18]

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[16] Otto Pfersmann, *The Only Constitution and Its Many Enemies, Constitutional Topography: Values and Constitutions,* E. by András Sajó, Renáta Uitz, Eleven international publishing, 2010, The Hague, The Netherlands, p. 60.

[17] In its further decisions, the Constitutional Council has made concrete those fundamental principles (for example, the right to strike, the right to communicate freely, to teach freely, the independence of university professors…) *Droit Constitutionnel,* Georges Burdeau, Francis Hamon, Michel Troper, 25th Ed, L.G.D.J, 1997, p. 700.

[18] Otto Pfersmann, *The Only Constitution and Its Many Enemies, Constitutional Topography: Values and Constitutions,* E. by András Sajó, Renáta Uitz, Eleven international publishing, 2010, The Hague, The Netherlands, p. 68:"It may very well be that under certain given circumstances (in a working liberal democracy), revolutions through judicial retro-constitutionality approaches are morally a good thing..."

The positivist concept asks the supporters of the material revision directed towards the constitutionality of constitutional amendments for a proof in the form of existence of logical link between the prohibition of passing the norms and the production of polymorph constitutional norms (norms of higher constitutional rang, the eternity clause), having the right to review and annul norms which do not comply with those constitutional norms.

Most of the constitutions recognize different procedures of changing the constitution or exempt some elements from any kind of change. The supporters of the idea of hyper-constitutionality or retro-constitutionality may say that thus the highest level of the constitutional law is "above constitution", but it is only a terminological trick. What happens is that more and more legal systems accept hierarchically complex, differentiated structure. However, nothing in those cases anticipates the constitutional review of lower norms in relation to hierarchically higher ones (which is done in India, Austria and Israel, for example).

The mentioned question is not possible to solve merely within the frame of the positivist theory. The real problem is that posed by the interpretation theory (with opened Pandora's Box of the possible answers to the question): who is empowered to decide upon the interpretation of the constitution?[19]

In contemporary doctrine of public law the tendency to lean towards positivism weakens. The ideas that some elements of the general political decision upon which a constitution is framed are accepted and they predominate over the explicit language of the constitution. For example, in Italy, some maintain that the constitutional amendments cannot change the legal system over the boundaries of the great constitutional compromise among the anti-fascist forces.[20] Some others maintain that behind the U.S. Constitution there is a will of the founding fathers which determines the contents and the evolution of the constitution. Similarly, some authors accept the fact that evolution of the political society determines the contents of a constitution, whatever the constitution itself – despite that - might say about the changes.[21]

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[19] Interpretation does not have a problem with regard to the question who should decide. It is dealt with by normative hierarchy, which gives powers to certain bodies. The problem of interpretation is what the precise „formulating of the prescriptive provisions" means. It is the problem of analytically applied philosophy of language and linguistics. It is a semantic problem, a problem of meaning. The answer to this question can be found in certain provisions, while our problem is the interpretation of their meaning.

[20] See: L. Favoreu, O. Pfersmann, (Ed), *La révision de la constitution,* 1993, p. 117.

[21] More extensively on this debate in: R. Berger, *Government by Judiciary* (1977); R.H. Bork, *Neutral Principles and Some First Amendment Problems,* 47 Ind. L.J. 1(1971); J. Rakove (Ed.), *The Debate Over Original Intent 197* (1990); A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997); T. Marshall, *The Constitution: A Living Document*, in J.C. Smith (Ed.), T. Marshall, *Supreme Justice: Speeches and Writings 281* (2003); M. Tushenet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles,* 96 Hard. L. Rev. 781 and 793-804 (1983); R. Dworkin,

2.3 About constitutional identity

Analysing the unconstitutionality of constitutional amendments, we begin from the specificity of the inseparable essence of the Constitution, the thing we call *unalterable constitutional identity.* Again, there is a debate and question whether there is something *behind* or *above* constitution? In defining what that "something" would mean, one can start from political or social reality. *Michel Troper* explains that *Hans Kelsen* wrote in that sense, discussing the "*eternal question of what stands behind the positive law".*[22] The second answer might be raw power, economic forces or moral principles, but that also does not help legal scientists who want to know if that "something" behind the constitution has a legal nature. One can answer that behind some specific constitution there is a specific ideology. For example, behind post-communist constitutions there was the ideology of rule of law. However, although courts can interpret the constitution in light of that ideology, it will not make that ideology legally binding. The practice can change, what binds the legislator is not the ideology, but the Constitution itself. In the above mentioned decision on Liberty of Association in France, the Constitutional Council in 1971 established that freedom to associate must be included into fundamental principles acknowledged by the laws of the Republic and reaffirmed in the Preamble of the Constitution.[23] The French Constitutional Council has re-constitutionalized and given significance of the constitutional provision to the freedom to associate; it clearly sees the mentioned fundamental principles acknowledged by the laws of the Republic as constitutional norms, they are not behind or above the Constitution, they are Constitution itself.

Didier Maus explains that the date 16 July 1971 has a symbolic value, since it was the first time in the history of France that the Constitution truly became the highest legal acting norm. However, due to the European evolution, it was not destined to stay that way for a long time.[24]

Freedom's Law: The Moral Reading of the American Constitution (1996); M. Rosenfeld, *Just Interpretations: Law Between Ethics and Politics* (1998).

[22] Michel Troper, *Behind the Constitution? The Principle of Constitutional Identity in France,* in: *Constitutional topography: values and constitutions,* Ed. By András Sajó, Renáta Uitz, Eleven international publishing, 2010, The Hague, The Netherlands, p. 189: *„For Kelsen: Whoever seeks the answer will find, I fear, neither an absolute metaphysical truth nor the absolute justice of natural law. Who lifts the veil and does not shut his eyes will find staring at him the Gorgon head of power."* Michel Troper cites this from: D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar 154* (1999).

[23] The first chapter of the Preamble in the Constitution of the Republic of France (1958): "*The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946."* Citation from: *Vladavina prava,* Zagreb (1997), year 1, No. 4-5-6, p. 123.

[24] D. Maus, B. Francois, M. Troper, *Écrire une Constitution*, RFDC, No. 79, July 2009, P.U.F, p. 569.

The example of judicial revolution or juridical coup d'état, together with the above mentioned French decision on Liberty of Association or German *Lüth* ruling is most definitely *Costa ECJ 6/64, ECR (1964),* 585, in which the European Court of Justice established the doctrine of supremacy of EU law, which in combination with the doctrine of direct effect from *Van Gend en Loos ECJ 6/64, ECR (1964),* 585, served to "constitutionalize" the Treaty of Rome. Member States have neither prescribed the superiority of the Treaty, nor the direct effect of the Treaty or the directives of European Union. In *Griswold v. Connecticut 381 U.S. 479 (1965),* the U.S. Supreme Court established that the U.S. Constitution contains the right to privacy (at least for the decisions regarding reproductive health), despite the fact that such provision does not exist in it. Considering the constitutionalization of the general principles of EU law, *Siniša Rodin* states that European Court of Justice in C-555/07 *Kücükdeveci* of 19 January 2010 has legal judging similar to U.S. Supreme Court in *Griswold v. Connecticut*, where equality – in former, and liberty – in latter, represent the pre-constitutional liberal values, which do not constitute, but only declare the positive law (constitution, treaty, or directive): "In essence, the understanding of ECJ considerably resembles the understanding of the U.S. Supreme Court, regarding the doctrine of *substantive due process* through which the U.S. Supreme Court expanded its competence. The Supreme Court, on the basis of this doctrine, applies constitutional rights onto situations which are in the regulatory competence of the states. Also, the Supreme Court shields from regulatory state intervention certain rights it finds "fundamental" to such an extent that they can be invoked even without direct constitutional basis."[25] He concludes that in both cases the law of the state, or Member State, must step back as unconstitutional, that is, contrary to the EU law, with the consequence of expanding judicial competence of the U.S. Supreme Court and European Court of Justice onto the areas traditionally considered belonging to the jurisdiction of Member States.

2.4 National identity in reference to Constitution

According to *Michel Troper*: "The term "constitutional identity" does not exist in the Constitution of France, nor does the term "identity"; we can find it neither in the old French constitutions, nor in the foreign constitutions; in doctrine and jurisprudence it has not been used until recently."[26] However, the idea of constitutional identity is not a novelty and it could have multiple theoretical and

[25] Siniša Rodin, *Konstitutionalizacija općih načela prava u novijoj praksi Europskog suda,* Informator, No. 5847 of 20 March 2010, p. 2. The U.S. Supreme Court proclaimed unconstitutional the Law of the state of Connecticut which incriminates giving medical advice to married couples regarding contraception in the way that *specific guarantees of the Bill of Rights have partial shades, which make the source of those guarantees helping them to give life and substance. It is about the right to privacy which is older than the Bill of Rights – older than our political parties, older than our school system...*

[26] Michel Troper, *Identité constitutionnelle,* in: Cinquantiéme anniversaire de la Constitution francaise, sous la direction de Bertrand Mathieu, Dalloz, 2008, p. 123.

practical implications. In reality, it can assume different meanings. First of all, it can represent a special form of national identity. National identity, a community of conscious and unconscious elements which constitute affiliation towards a certain collectivity is psychological and sociological phenomenon. We can understand national identity in reference to constitution when constitution contributes to creation or strengthening of an identity. It is about a revolutionary American or French concept.

The U.S. Constitution must constitute more perfect community, since its Preamble starts with the following words: "*We the People of the United States, in Order to form a more perfect Union...do ordain and establish this Constitution for the United States of America."*

French Declaration of Human and Civil Rights from 1789 determines in its Article 16: "*Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution."*

Therefore, it is the society as well, and not only the public government, which needs to be built. The constitutional identity of France is, unlike the national identity, created by constitution as sociological and psychological concept, purely legal concept. This concept is founded on constitutional principles – fundamental elements of the system itself. Here, it is about the structural principles, which are constitutive because they are the ones to determine not nation or its culture, but the constitution itself. In the famous *Kesavananda Bharati v. State of Kerala, 1973 SC 1461 (1973), 1624* ruling of the Indian Supreme Court, a constitutional amendment was annulled since there existed boundaries for the change of constitution, the boundaries set by "its fundamental structure", its "identity", which must stay unalterable.[27]

2.5 Constitutional identity of France and Italy

Constitutional Council, in its battle to limit superiority of the European law, in its Decision 2006-540 of 27 July 2006, formed the concept of French constitutional identity. Protection of the state sovereignty was the main so-called "hidden stake in the game" on the occasion of the constitutional change of 2008. It was more significant than the new citizens' rights and the protection of the fundamental constitutional rights. According to *Marthe Fatin-Rouge Stéfanini*, the drafters of the constitution had to choose between two scenarios: "Either France will adopt *a posterior* review and be able to defend its fundamental constitutional rights from European influence or it will let itself be defeated with the risk of losing its famous *constitutional identity."*[28] The Constitution of the V. French Republic (1958), as well as the previous constitutions, does not contain provisions about constitutional identity and, also, it cannot be found in the constitutions

[27] See: Gary Jocobsohn, *Constitutional Identity,* The Review of Politics, 68 (2006), p. 361-397.

[28] Valérie Bernaud, Marther Fatin-Rouge Stéfanini, *La réforme du contrôle de constitutionnalité une nouvelle fois en question?* Réflexion autour des articles 61-1 et 62 de la Constitution proposé par le comité Balladur, Revue francaise de Droit constitutionel, no hors-série, 2008, p. 190.

of other countries. French science and judicature have started to distinguish it only recently. In the Decision No. 2006-540 DC of 27 July 2006, the Constitutional Council explicitly invokes constitutional identity of France, assessing – at the demand of 60 members of the National Assembly – the compliance of the national law for implementation of a European Union directive with the Constitution, prior to its promulgation (Article 61-2 of the Constitution).[29]

Constitutional Council has decided that the implementation of European Union directives[30] cannot go against the rules or principles which are the constituent part of French constitutional identity, unless the drafters of the Constitution agreed to it.[31] Constitutional Council quotes that due to the constitutional deadline of one month in which it has to deliver its judgement (Article 61-3 of the Constitution) it cannot direct the preliminary ruling regarding the interpretation of the directive towards the European Court of Justice (on the grounds of Article 234 TEC, that is, Article 267 TFEU).[32]

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[29] Decision No. 2006-540 DC of 27 July 2006 (Loi relative au droit d'auteur et aux droits voisins dans la société de l'information). Directive 2001/29/CE du Parlement européen et du Conseil du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information : http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2006/2006-540-dc/decision-n-2006-540-dc-du-27-juillet-2006.1011.html, (accessed on 01 July 2009). Constitutional Council confirmed its view (from the Decision No. 2006-535 DC of 30 March 2006). If the legal norms for implementation of the European Union directive are clearly not in compliance with the directive itself, the Constitutional Council must proclaim them unconstitutional on the grounds of Article 88-1 of the Constitution („Republic (France) is the member of European communities and European union, made by the states who have, on the grounds of the Treaties they accepted, freely chosen to perform certain authorities together.“)

[30] Directives are one of the fundamental sources of the European Union secondary law. They are binding for the Member States to whom they are addressed regarding the result which needs to be accomplished, but they leave upon the States the choice of forms and methods of realization of those goals. Ćapeta, Rodin, *Osnove prava Europske unije,* Gradivo za cjeloživotno obrazovanje pravnika, First PDF edition, Zagreb, 2009, p. 11.

[31] The mentioned part of the Decision No. 2006-540 DC in French: ‘’19. Considérant, en premier lieu, que la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti.’’

[32] On the grounds of the Article 234 TEC, European Court of Justice has jurisdiction to decide upon the interpretation of the Treaty, validity and interpretation of the Acts made by the EC institution and Acts made by the European Central Bank, as well as the interpretation of the regulations which are passed by the bodies founded via some Acts of the Council, if those regulations say so. When such questions of interpretation or validity appear before the court of a Member State, that court *can* ask from the European Court of Justice to rule on that question as a preliminary ruling. National court can ask from the European Court of justice to decide on such preliminary ruling if it considers this decision necessary to make a judgement in the case being solved. However, if it is about the national court against whose ruling there are no legal means, such court must ask European Court of Justice to make such as decision. More in: Roding S, and Ćapeta T. (Eds.),

As the Chair of the Constitutional Council, *Pierre Mazeaud* explained a year before reaching the above mentioned Decision that European law, no matter how far its priority and directness may go, cannot challenge that which is explicitly written in our constitutional laws, and which is ours. Here, I speak about everything that is a constituent part of our constitutional identity, in double meaning of the term "*inherent"*: decisive and distinctive. In other words: essential for the Republic.[33] The contents of constitutional identity of the French constitutional law can be found in some constant features of all French republican constitutions.[34] It is all about the principles that make up the French contribution to the general theory of state and law. They are listed in one of the most important works in the field of 20th century French public law by a classic of the constitutional thought, *Carré de Malberg*.[35] The principle is not completely identical to the national identity from the Lisbon Treaty[36] which determines that the Union respects the equality of Member States before Treaties, as well as their national identity, which is a constituent part of their fundamental political and constitutional structures, including regional and local autonomy. European legal order maintains that the constitutional principles which are not bound exclusively to a specific national identity (for example, the division of powers or human rights) are sufficiently protected by the European law. French fundamental constitutional rights and freedoms are not always identical to the corresponding European rights, they do not have the same substance and they do not come from the same constitutional tradition, thus the protection of the national constitutional rights presented a priority on the occasion of the Constitutional change of 2008.

The thing that was on Constitutional Council's mind while determining that the implementation of European Union directives cannot go against the rules or principles which are the constituent part of French constitutional identity – unless the drafters of the Constitution agreed to it, were the provisions specific for the French Constitution which did not have equivalents in European law.[37]

Učinci direktiva Europske unije u nacionalnom pravu, Pravosudna akademija, Zagreb, 2008, p. 10.

[33] Voeux du président du Conseil constitutionnel, M. Pierre Mazeaud, au président de la République, 3 January 2005, http://www.conseilconstitutionnel.fr/conseilconstitutionnel/root/bank_mm/pdf/pdf_cahiers/cccc18.pdf, page 15 (accessed on 01 July 2009).

[34] For example, national sovereignty, representative government, and the division of powers are the foundations of a great number of constitutional and legal norms, although they have not been explicitly listed in Constitutional laws of 1875, Michel Troper, *Identité constitutionnelle,* in: Cinquantiéme anniversaire de la Constitution Francaise, sous la direction de Bertrand Mathieu, Dalloz, 2008, p. 130.

[35] R. Carré de Malberg, *Contribution à la théorie générale de l'État; spécialement d'après les données fournies par le droit constitutionnel francais,*Paris, Sirey, 1920, new edition: Dalloz, 2003.

[36] Article 4, paragraph 2 of consolidated version of the TFEU, modified and supplemented by the Lisbon Treaty, in: *Reforma Europske unije, Lisabonski ugovor,* Eds. Rodin, Ćapeta, Goldner-Lang, NN, Zagreb, 2009, p. 364.

[37] Original text of the Decision No. 2006-540 DC: „*Considérant, en premier lieu, que la transposition d'une directive ne saurait aller à l'encontre d'une*

First of all, it is about the *laïcité principle.* In 2006, while shaping the constitutional identity, French Constitutional Council had a clear political goal: to protect the core of national sovereignty. The assumption was that *any constitution that submits to some external legal rule cannot submit entirely and must preserve some core principles.* Such an assumption – constitutional identity – is metaphorically "behind the constitution" since it has legal power, although it is not prescribed, but only assumed.[38]

We must stress the fact that the topic of constitutional identity in the perspective of European law is, undoubtedly, an extremely hot topic and the high regard for the constitutional identity has already been made concrete in the series of rulings delivered by the European Court of Justice.[39] The first direct reference to constitutional identity by the European Court of Justice appears on 7 September 2006 in C-53/04 *Marrosu* ruling, where the independent attorney Poiares Maduro states that it is without a doubt if we should acknowledge to the national authorities, and especially to *constitutional courts,* the responsibility to determine the nature of national particularities which can justify such difference in treatment. They are, actually, best positioned to determine the constitutional identity of Member States of the European Union, which it has a duty to respect.[40]

In 1988 (Decision 1146, 1988), the Italian Constitutional Court first touched the heart of competence for the change of a constitution. It explicitly determined that the constitutional laws and laws enabling the change of constitution could be declared unconstitutional due to the material unconstitutionality: "Italian Constitution contains some of the highest principles, which cannot be challenged nor changed in their essential substance, by laws enabling the change of constitution or other constitutional laws... Unalterable are not only constitutional principles explicitly determined as an absolute boundary for the power of changing the constitution – republican form of government (Article 138 of the Italian Constitution of 1947) – but also other principles which, although not explicitly listed in the areas which cannot be brought to revision, belong to the essence of the highest values upon which the Italian Constitution is founded."[41]

2.6 Constitutional identity in Austria and the Czech Republic

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règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti."

[38] Michel Troper, *Behind the Constitution? The Principle of Constitutional Identity in France,* in: *Constitutional topography: values and constitutions,* Ed. By András Sajó, Renáta Uitz, Eleven international publishing, 2010, The Hague, The Netherlands, p. 203.

[39] M.-C. Ponthoreau, *Identité constitutionnelle et clause européene d'identité nationale. L'Europe a l'épreuve des identitets constitutionnelles nationals,* Diritto Publico Comparato Ed Europeo, 2007, p. 1576-1588.

[40] CJCE, 7 September 2006, Marrosu, C-53/04, Rec. P.I-7213, conclusion of the attorney Poiares Maduro, paragraph.40.

[41] Massimo Luciani, Le côntrole du constitutionnalité des lois constitutionnelles en Italie, *Les Cahiers du Conseil Constitutionnel,* 27, 2009, Dalloz, p. 30.

From a great number of views regarding constitutional identity, as a starting point (doctrine, constitutional and international courts) we shall take *Urlich Preuss's* definition, in which he explains that *from the logical and teleological point of view, the only part of Constitution worth protecting is the integrity of the drafters, the right of the people to choose and pass the Constitution in a free and democratic manner. The assumption for passing the Constitution is that the people are free to exercise their right for self-determination. Whether it is federalism, monarchy or republic, that right to pass the Constitution should be eternal, while the social systems can change through the course of history. This question includes and implies dignity of a human being, since the inseparable part of the idea of passing the Constitution, which at the same time includes inherent logical and teleological implications, is the fact that people wish to live in the conditions of the freedom to self-determine.*[42]

The first decision, made by some European constitutional courts regarding annulment of a constitutional provision (formally constitutional) due to its material unconstitutionality, was passed by the Constitutional Court of Austria in 2001, VfGH, 11 October 2001, G 12/00 et al.[43]

For better understanding of this ruling, it is necessary to point out that Austrian constitutional law has a fragmented structure, and its constitutional norms can be found in the Constitution of Austria (1945), constitutional laws, old monarchical constitutional provisions, international agreements, and constitutional provisions contained in ordinary laws (which was the case here). At the same time, constitutional law is structured on two levels. The first level requires two thirds majority of the votes cast in Austrian parliament in order to change ordinary constitutional norms, while in order to change the core of fundamental principles ("complete revision") constituent state referendum is needed. The problem with constitutional norms is in the laws which are used by the government and parliamentary majority with the purpose of daily politics, since due to the simplicity in their process of passing (it is sufficient for the parliament to proclaim a certain provision constitutional, and to achieve necessary majority of the votes cast), they serve to create exceptions within the constitutional system.[44]

Austrian Constitutional Court delivered the ruling that Article 1, paragraph 126a of the Federal Public Procurement Law of 1997 is considered unconstitutional and hence is annulled, and therefore its

[42] Ulrich Preuss opposes the idea that within the Constitution itself there is a hierarchy. If there is the constituent government, then Constitution is the embodiment of that constituent government and internal hierarchy cannot exist. Discussion held at: Table ronde AIDC, Jerusalem, 2010.

[43] Official Collection of Judgements of the Austrian Constitutional Court (VfSlg) 16327/2001. *International Constitutional Law, 2008, 2/2008:* Harald Eberhard & Konrad Lachmayer*, Constitutional Reform 2008 in Austria Analysis and Perspectives,* http://www.internationalconstitutionallaw.net/index.php?id=146,754,0,0,1,0,0, access on 01 July 2010.

[44] Constitutional changes of 2008 made circa 1000 of such provisions lose their value, but the problem was not completely solved, nor has their passing been banned.

null and void provisions shall not be applied anymore. According to the view of the Constitutional Court, provisions of the paragraph 126a[45] were designed to free all state Acts, which were referring to the control of the procedures of public procurement of the influence exerted by federal constitutional law. In other words, they were designed in a manner not to apply the federal constitution on any such provision. All provisions of the state law regarding the establishment and scope of the institutions which control the procedures of the public procurement and which would be effective on 01 January 2001, should not be considered unconstitutional. Consequently, the federal Constitution is supposed to lose its limiting function for the state legislature.

Constitutional Court of Austria states that the mentioned constitutional norm from the Federal Public Procurement Law is contrary to the fundamental constitutional principle of democracy and legal state. That provision excludes a whole part of the public procurement law from the Federal Constitutional Court control and, therefore, it is conflicting with the principle of legal state. Court calls attention to the fact that in this way the Austrian people might lose their legitimate role in the process of complete change of the Constitution, according to Article 44, paragraph 3 of the Austrian Constitution[46] (obligatory constituent state referendum) regarding change of the core of fundamental principles of the Constitution (democracy, federalism, legal state, division of powers, fundamental rights, form of government) and therefore, it annuls this constitutional provision.

On 10 September 2009, the Czech Constitutional Court delivered the *Decision of annulment of the Constitutional Act 195/2009 on shortening the Fifth term of office of the Chamber of Deputies* due to material unconstitutionality, contradicting with fundamental principle of a democratic state and rule of law from the Article 9, paragraph 2 of the Czech Constitution (1992).[47] In this

[45] The mentioned provision of this Law states the following: ''Constitutional provision: Provisions effective on 01 January 2001 and referring to the organization and scope of the bodies which have the goal of assisting legal judgement linked to the procedures of public procurement, are not unconstitutional.''

[46] Austrian Constitution, Article 44 (1): Constitutional laws or constitutional provisions contained in simple laws can be passed by the National Council only in the presence of at least half the members and by a two thirds majority of the votes cast; they shall be explicitly specified as such („constitutional law", „constitutional provision").
2) Constitutional laws or constitutional provisions contained in simple laws restricting the competence of the *Länder* in legislation or execution require furthermore the approval of the Federal Council which must be imparted in the presence of at least half the members and by a two thirds majority of the votes cast.
(3) Any total revision of the Federal Constitution shall upon conclusion of the procedure pursuant to Art. 42 above but before its authentication by the Federal President be submitted to a referendum by the entire nation, whereas any partial revision requires this only if one third of the members of the National Council or the Federal Council so demands.

[47] http://angl.concourt.cz/angl_verze/doc/p-27-09.php, Constitutional Act No. 195/2009 Coll, on shortening the Fifth term of Office of the Chamber of

decision, it explicitly invokes the practice of German and Austrian constitutional courts (in the above described case) regarding material review of the constitutionality in constitutional amendments and laws.

Constitutional identity of Croatia

Here, we stress the opinion of Prof. Constance Grewe that nothing prevents us from finding the boundaries in the texts, even if they are not explicitly deemed inviolable, and nothing prevents constitutional judges to change their jurisprudence and to declare themselves entitled for protecting constitutional identity, even in the case of constitutional changes. Even if some legal system does not go as far as to determine the inviolable core of its Constitution, it will try to protect it because it represents its identity. In that sense, it is significant that the Lisbon Treaty acknowledges the explicit respect for that identity on behalf of the European Union.[48]

We think that the constitutional identity of the Republic of Croatia, the Croatian Constitution's own structural principles, is not behind or above but *within the Constitution of the Republic of Croatia.* It is about the obligation to respect human dignity (right to life, prohibition of torture, cruel or degrading treatment or punishment), the essence of the content of the rule of law's principles (legal determination of criminal offences and penalties) and the principles of free democratic order (freedom of thought, conscience and religion).

Constitutional identity of Croatia is inherently determined in the constitutional text, as a logical consequence of the provision about the absolute boundary regarding the limits of the application of the Croatian Constitution (Article 17, paragraph 3 of the Croatian Constitution):

"*Not even in the case of an immediate threat to the existence of the State may restrictions be imposed on the application of the provisions of this Constitution concerning the right to life, prohibition*

Deputies is annulled as of 10 September 2009. In reasoning of the Decision, the Constitutional Court invokes the practice of the Federal Constitutional Court of Germany, and the above explained Decision of the Austrian Constitutional Court. The Court asks a question about what the constitutional law is: Under the Constitution, what definitional, conceptual elements define the category of constitutional acts? Is an act automatically a constitutional act if it is labelled as such by the Parliament of the Czech Republic and is adopted by a procedure under Article 39 par. 4 of the Constitution? Or must it also meet other conditions: the condition of competence (authorization) under Article 9 par. 1 of the Constitution or another express constitutional authorization (Article 2 par. 2, Article 10a par. 2, Article 11, Article 100 par. 3) and the substantive condition provided in Article 9 par. 2 of the Constitution?

The Constitutional Court answered: ''The Constitutional Court's position is that the validity of a constitutional act comes from meeting all three of these conditions: the procedural condition, the competence (authorization) condition, and the **substantive condition (consistency with the non-changeable principles of a democratic state governed by the rule of law).''**

[48] Constance Grewe, lecture on 22eme Cours Internationale de Justice Constitutionnelle Hiérarchie entre druits fondamentaux, Aix-en-Provence, 8 and 9 September 2010, organisé par l'ILF-GERJC, Université Paul-Cézanne Aix-Marseille III.

of torture, cruel or degrading treatment or punishment, on the legal definitions of criminal offences and punishments, or on freedom of thought, conscience and religion."

Compliance with the prohibition to limit the application of law, even in the cases of imminent danger for the survival of the state from Article 17, paragraph 3 of the Croatian Constitution, logically and teleologically necessarily involves the inviolable constitutional ban to annul those rights, and therefore the constitutional identity of the Republic of Croatia. Human dignity cannot be relativized in such a way that, according to the principle of proportionality, in judicial proceedings it would be compared to state interests of keeping other people alive or that it would be quashed by legislation. Prohibition to limit the application and, thus, the annulment of the obligation to respect human dignity, the essence of the content of the rule of law's principles, and the free democratic order is unalterable as a norm in our Constitution. It is a concretization of highest constitutional values of the Constitution of the Republic of Croatia (Article 3) which represent the foundations for interpretation of our Constitution: freedom, rule of law, and democratic multiparty system.

Constitutional acceptance of the obligation to respect human dignity as fundamental constitutional principle and the highest value of the Croatian Constitution, together with the inviolability of the foundations of the rule of law's principles and free democratic order (from the Article 17, paragraph 3) represent the reason why our Constitution belongs to the community of constitutions of free states of Europe and the world. In the Republic of Croatia, Article 17 paragraph 3 of the Croatian Constitution is the foundation for interpretation of the Constitution, as well as for deciding upon the material constitutionality of constitutional amendments. Croatian Constitutional Court can exercise the review of the material constitutionality of constitutional amendments invoking Article 17 paragraph 3 of the Croatian Constitution and interpreting its jurisdictions according to the Croatian Constitution and the Constitutional law about the Croatian Constitutional Court, in the same manner exercised by the Federal Constitutional Court of Germany in the above mentioned example.

When will our Constitutional Court make a step toward the review of the material constitutionality of the constitutional amendments and at whose request (at the initiative of constitutional judges themselves, or at the request of the Croatian Parliament?) remains contemporary Croatian enigma.[49]

[49] See opposing opinion: Jasna Omejec, *Promjene Ustava Republike Hrvatske*, 2009, Informator, 5818, p. 3. Asked whether the Croatian Constitutional Court should have jurisdiction over the review of the material constitutionality of the constitutional provisions with the legal force of the Constitution, i.e. constitutional amendments and constitutional laws, Jasna Omejec claims the following: „..our answer would be negative, since the review of the material constitutionality of any constitutional norm is not inherent with the constitutional tradition in our country, nor the substantial review of the constitutionality of constitutional norms enters the body of „universally accepted rules" of the European legal order". The President of the Croatian Constitutional Court interprets that the Constitution of the Republic of Croatia does not know the explicit „eternity clause", which

We point out that European constitutional courts (for example, Italian, German, Austrian and Czech) review the material constitutionality of constitutional amendments, although such competence is not explicitly determined in the constitutions of the mentioned countries.

What exactly does Article 17 paragraph 3 of the Croatian Constitution mean? The interpretation of a constitution is not an interpretation of the text, but of the meaning of the norms, since they must be interpreted within the context. It is about the protection of human rights and liberties and they can be limited by law in ordinary conditions according to Article 16, and in extraordinary conditions according to Article 17 paragraphs 1 and 2, out of which the drafters of the Constitution protect the inviolable essence of the Constitution – "the material core of the constitution" - by exemption via Article 17 paragraph 3. A constitutional provision is directed towards a certain goal: protection of constitutional identity of the Republic of Croatia.

We hold that the purpose of the "material core of the constitution", to which the "command of immutability" is linked as *legal and political guarantor of the Constitution* is hindering tactical changes to the constitution with the purpose of daily politics on behalf of the current parliamentary majority and it represents the constitutional identity whose protection in constitutional democracy – unlike traditionally understood democracy – is entrusted to the constitutional court itself. Constitutional identity of the Republic of Croatia has been established in the Constitution of the Republic of Croatia and it does not depend on understanding and perception of the Constitution on behalf of Croatian Parliament when it passes constitutional amendments.

We cannot invoke constitutional tradition of Croatia in elimination of such review, since modern constitutional doctrine claims – as we have shown in the introduction to this paper – that the material review of the constitutionality of constitutional amendments is a result of contemporary development of various political systems: democracy understood as a protection of fundamental rights, whose natural protector is constitutional judiciary.

The power of authentic interpretation of a Constitution and a constitutional identity enables the imposing the political view on the development of the Constitution and the overall politics. *Venice Commission*, in its Report of 19 January 2010, calls attention to the fact that the material review of the constitutionality of constitutional amendments can cause problematic effects in the states which do not have a developed democratic system and the rule of law. Therefore, it is not recommended for such democracies (for example, the states which emerged from the dissolution of the Soviet Union; they are regularly advised on these topics by the Venice Commission). We strongly oppose the thesis that Croatia is classified in this group and that it has no conditions, or courage, to step toward facing the logic of a constitutional state and its boundaries: the review of the constitutionality of constitutional amendments and constitutional laws.

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would protect „the material core of the Constitution" from „unconstitutional changes", and thus has no constitutional possibility to establish the constitutional review of the „unconstitutional" constitutional amendments.

That journey was once taken by the pioneer countries, European states emerging from the collapse of totalitarian regimes after the World War II, such as Germany, Austria, and Italy, and is now taken by the Czech Republic, Turkey, and the others.[50]

Conclusion

Accepting its own constitutional competence over the review of material constitutionality of constitutional amendments, on the grounds of Article 17 paragraph 3 of the Constitution of the Republic of Croatia, on behalf of the Constitutional court, Croatia would make a step toward facing the logic of a constitutional state and its boundaries, as well as secure a partner status within the European Union. The idea of mutual respect for the foundations of European law - *existential demand* of superiority and direct effect of the European law and *constitutional identity* of the European Union Member States - has been strengthened via the project of Union constitutionalization. The idea is dual, it contains a double obligation: to respect principles of sincere cooperation on behalf of the States, as well as the national identity of the states on behalf of the Union. The Treaty on the Functioning of the European Union (Article 4 paragraphs 2 and 3) determines:

"2. 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.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."[51]

Constitutional clause on integration, which is the constitutional foundation of a state for involvement in European

[50] 19 January 2010, *REPORT ON CONSTITUTIONAL AMENDMENT, Adopted by the Venice Commission at its 81st Plenary Session,* Venice 11 – 12 December 2009. See: http://www.venice.coe.int/docs/2010/CDL-AD%282010%29001-e.asp#_ftn160 (235. On this basis the Commission considers that substantive judicial review of constitutional amendments is a problematic instrument, which should only be exercised in those countries where it already follows from clear and established doctrine, and even there with care, allowing a margin of appreciation for the constitutional legislator.)

[51] Consolidated version of The Treaty on European Union amended and supplemented by the Lisbon Treaty, OJ 2008/C, 115/01. Citation from: *Reforma Europske unije Lisabonski ugovor,* Eds. Ćapeta, Rodin, Goldner-Lang, NN 2009, p. 364.

Union, does not allow questioning national identity of a certain Member State. Protection of statehood (*Staatlichkeit, statehood)* of all Member States does not impose itself only onto a national legislator during integration and realization of the European constitutional clause, but it is also undoubtedly a foundation for the European Union's functioning. The Constitutional Court of Spain explains on 13 December 2004 that the transfer of certain competences onto the European Union, as well as the integration of European law into Spanish legal order both set inevitable boundaries to the sovereign laws of the state, acceptable only to the extent to which the European law is in consistence with the fundamental principles of a social and democratic legal state, established by the Constitution of Spain. Constitutional transfer (Article 93 of the Constitution of Spain) allows for material boundaries which impose themselves onto the mere transfer. Those material boundaries – which are not explicitly established in constitutional provisions, but which implicitly stem from the Constitution as an essential interpretation of the provisions themselves – are translated into respect for state sovereignty, our fundamental constitutional structures.[52]

European Court in Luxembourg admits that constitutional identity of the states represents, under certain conditions, a legitimate interest which justifies limiting of the obligations stemming from the law of the Union (for example, in *Omega* case it is about the ban on economic activity which endangers public order, due to the attack on human dignity from the Basic Law of Germany).[53]

Protection of the state sovereignty of the Republic of Croatia has been secured through reconciliation of both mentioned requirements and their reasonable balance. It includes active participation of Croatian constitutional judges in European constitutional pluralism exactly via constitutional protection of Croatian constitutional identity, together with understanding of the requirements of superiority and direct effect of the European law.

Prof. Biljana Kostadinov, PhD.

[52] More in: L. Burgorgue–Larsen, A. Levade and F. Picot, *Tzraité établissant une Constitution pour l'Europe,* Bruxelles, Bruylant, 2007, p. 154.
[53] ECJ, Omega, C-36/02, paragraph. 41.