

Research Article

CONSTITUTIONAL IDENTITY
AS A GUARANTEE OF STATEHOOD:
EUROPEAN EXPERIENCE
AND UKRAINIAN CHALLENGES
(BASED ON THE PRACTICE
OF CONSTITUTIONAL COURTS)

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ABSTRACT

Background: *The article analyses the doctrine of constitutional identity in the context of both European and Ukrainian constitutionalism. It argues that constitutional identity is a relatively new category of constitutional theory, reflecting the fundamental and immutable values enshrined in the Constitution and serving to protect these values from external influences, particularly from supranational legal systems. Special attention is given to how this doctrine has developed in the jurisprudence of European constitutional courts (Germany, Poland, Hungary, Lithuania, Italy, France) and how it is being shaped in Ukraine in response to contemporary challenges, including the Russian Federation's military aggression and the need to safeguard the state language, sovereignty, and national unity.*

Method: *The study employs systemic-structural and comparative-legal methods to analyse the doctrine of constitutional identity, its constituent elements, and the legal positions of constitutional courts in different countries. The logical-legal method made it possible to trace the evolution of approaches to the relationship between constitutional identity, national sovereignty, and integration processes in Europe. The research is based on the analysis of constitutional texts, judicial practice, and scholarly sources.*

Results and Conclusions: *Constitutional identity is understood as a set of fundamental constitutional principles (sovereignty, human rights, rule of law, democratic form of government, state language) that constitute the “core” of the Constitution and cannot be altered, even by constitutional reforms. The practice of European constitutional courts (primarily the German Federal Constitutional Court) laid the foundation for the doctrine of constitutional identity as a tool for limiting the influence of supranational law on the fundamental bases of national constitutional systems. In Ukraine, this doctrine has been shaped through the prism of protecting the state language, national sovereignty, and societal consolidation, as reflected in the decisions of the Constitutional Court of Ukraine of 2018 and 2021, as well as legislative changes adopted between 2014 and 2025.*

1 INTRODUCTION

The concept of constitutional identity has become a key category in contemporary constitutional theory and practice in Ukraine, as demonstrated in prior research.¹ Alongside the doctrines of the rule of law² and the Law-Governed State,³ the doctrine of limited government,⁴ and the doctrine of constituent power,⁵ it occupies an important place both in modern constitutional scholarship and in the official constitutional doctrine of the state. The growing attention to this concept reflects the need to preserve the fundamental principles and values of the constitutional order amid democratic transformation, European integration, and the development of constitutional jurisprudence.

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- 1 Tetiana Slinko and Yevhenii Tkachenko, ‘Guaranteeing Constitutional National Identity by Bodies of Constitutional Review’ (2023) 7 Law of Ukraine 70, doi:10.33498/louu-2023-07-070 [in Ukrainian].
 - 2 Tetyana Slinko and others, ‘The Rule of Law in the Legal Positions of the Constitutional Court of Ukraine’ (2022) 5(1) Access to Justice in Eastern Europe 165, doi:10.33327/AJEE-18- 5.1-n000099.
 - 3 Iurii Barabash and Mokhonchuk Bogdan, ‘The Principle of The Law-Governed State in the Constitutional Doctrine of Ukraine’ in Anatolii O Selivanov (ed), *A New Way to Law* (Logos 2021) 49 [in Ukrainian].
 - 4 Tetiana Slin’ko and others, ‘The Doctrine of Limited Government in the Legal Positions of the Constitutional Court of Ukraine’ (2025) 8(1) Access to Justice in Eastern Europe 41, doi:10.33327/AJEE-18-8.1-a000107.
 - 5 Hryhorii Berchenko, ‘Judicial Interpretation as Informal Constitutional Changes: Questions of Legitimacy in the Aspect of the Doctrine of Constituent Power’ (2024) 7(2) Access to Justice in Eastern Europe 39, doi:10.33327/AJEE-18-7.2-a000203.

In contemporary legal science, the category of constitutional identity occupies a special place among the fundamental concepts of constitutionalism. Unlike classical principles such as the rule of law, democracy, human rights, or the separation of powers, it emerged relatively recently yet has already become a key element of doctrinal and judicial debates. Constitutional identity is commonly understood in constitutional doctrine to reflect the distinctive features of a constitutional order. It relates to the fundamental constitutional principles and so-called “immutable provisions” that either cannot be amended at all or may be revised only through particularly rigid constitutional amendment procedures.⁶

At the same time, the concept of constitutional identity is ambiguous: scholars continue to debate its relationship with the notion of national identity, as well as its scope and limits of application. In constitutional scholarship, constitutional identity is often associated with the idea of the constitutional “core,” namely those fundamental constitutional provisions and principles regarded as unalterable. At the same time, it is also viewed as a mechanism for defining the limits of interaction between the national constitutional order and supranational legal systems, particularly within the framework of European integration.⁷ These approaches have been shaped by the case law of European constitutional courts, which, in response to processes of integration and globalisation, seek to strike a balance between preserving sovereignty and respecting supranational institutions.

Attention in this context is drawn to the decisions of the Federal Constitutional Court of Germany (*Lissabon-Urteil*), the Constitutional Tribunal of Poland (K 32/09), the Constitutional Court of Hungary, as well as the doctrine of *controlimiti* developed by the Constitutional Court of Italy. These decisions formed the foundation for understanding constitutional identity as a universal doctrine intended to protect the “immutable core” of national constitutions from excessive interference by external legal systems.

For Ukraine, the concept of constitutional identity has acquired particular relevance amid the Russian Federation’s aggression and the need to strengthen the constitutional foundations of statehood.⁸ In its decision of 14 July 2021, No. 1-r/2021, the Constitutional Court of Ukraine, for the first time, explicitly defined the state language as an element of constitutional identity, equating threats to the Ukrainian language with threats to national security and to the very existence of the state.⁹ This approach demonstrates a gradual transition from the declarative to the practical dimension of protecting constitutional identity in Ukrainian constitutionalism.

6 Olena Boryslavska, ‘State Language and Constitutional Identity of Ukraine: The Nature of Interconnections’ (2023) 3 Ukrainian Journal of Constitutional Law 3, doi:10.30970/jcl.3.2023.1 [in Ukrainian].

7 Olena Boryslavska, ‘The Concept of Constitutional Identity: Between the Challenges of War and the Requirements of European Integration’ (2025) 3 Ukrainian Journal of Constitutional Law 3, doi:10.30970/jcl.3.2025.1 [in Ukrainian].

8 *ibid* 5.

9 Case no 1-179/2019(4094/19) decision no 1-r/2021 (Constitutional Court of Ukraine, 14 July 2021) [2021] Official Gazette of Ukraine 63/3978.

Therefore, the study of constitutional identity enables tracing the evolution of modern approaches to the relationship between national and supranational law and understanding how states preserve their uniqueness and sovereignty in an increasingly integrated world.

This study is based on a combination of comparative-legal, systemic-structural, and logical-legal methods. The comparative-legal method made it possible to analyse the approaches of constitutional courts of different European states to the doctrine of constitutional identity and to identify common and distinctive features in their jurisprudence. The systemic-structural method was used to examine constitutional identity as a complex phenomenon interconnected with sovereignty, constituent power, national identity, and European integration. The logical-legal method enabled the author to trace the evolution of doctrinal approaches to constitutional identity and to assess its role in protecting the constitutional foundations of statehood in contemporary conditions.

2 THEORETICAL ASPECTS OF UNDERSTANDING CONSTITUTIONAL NATIONAL IDENTITY

Although constitutional identity is a comparatively recent concept in constitutional doctrine, it has already acquired an important place in modern constitutional theory when contrasted with classical categories such as human rights, democracy, and the separation of powers. At the same time, it has already become established in legal science. According to the main approaches of constitutional doctrine, constitutional identity reflects the peculiarity and uniqueness of the constitution, embedded in its so-called “immutable provisions.”¹⁰

At the same time, constitutional scholarship has not yet developed a uniform understanding of constitutional identity. Considerable debate continues regarding its nature, content, and relationship to national identity, leading to the emergence of different, sometimes conflicting, doctrinal approaches.¹¹

Thus, if we turn to the work *The Constitution of Freedom* by A. Sajó and R. Uitz, in their opinion, constitutional identity is what is non-negotiable in times of constitutional change, for example, sovereign rights that may or may not be transferred to international organisations.¹²

M. Granat, a retired Judge of the Constitutional Tribunal of the Republic of Poland, identifies several functions of constitutional identity. In his view, constitutional identity is connected, first, with the protection of the fundamental principles and values that form the “core” of the constitution, including basic constitutional principles and human rights

10 Boryslavska, ‘State Language (n 6) 9.

11 Boryslavska, ‘The Concept of Constitutional Identity (n 7) 6.

12 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 65.

guarantees. Secondly, it determines the limits of permissible constitutional amendments by safeguarding those elements of the constitutional order that cannot be fundamentally transformed. Thirdly, constitutional identity performs an external function by defining the relationship between national constitutional law and European Union law and by limiting the extent of supranational influence on the national constitutional order.¹³

Professor Yu. Barabash, referring to the analysis of K. Bernal's opinion, points out that the essence of this concept generally lies in the recognition that the Constitution contains fundamental values and principles that define its "identity of the Constitution," and that undermining their essence is unacceptable in a legal democratic state. Based on this, the court's task is to block all constitutional initiatives aimed at the aforementioned values and principles, thereby preventing the "replacement of the Constitution". Importantly in this context, according to the scholar, the Court may, when interpreting the provisions defining constitutional identity, refer to human rights, the rule of law, the separation of powers, and deliberative democracy. It should be recognised that such doctrines of "constitutional identity" are, in fact, a weapon used by courts that display activism in defending constitutional values in the formal absence of adequate tools.¹⁴

M. Savchyn considers the concept of national constitutional identity more broadly. In his opinion, it includes the following main elements: "a) national constitutional culture and doctrine; b) legal style of decision-making; c) system of judicial constitutional review; d) institutional design: horizontal and vertical separation of powers; e) elections and control over power."¹⁵

According to M. Polzin, constitutional identity is closely connected with the constitution of a particular state, which generally relates either to the constructed identity of the "self" in relation to the constitution or to the identity of the constitution itself.¹⁶ Accordingly, the researcher distinguishes five different and independent discourses on constitutional identity: 1. The one that emerged from the European legal discussion arising from Article 4(2) of the Lisbon Treaty: constitutional identity as a counter-limit to EU law and as a justification for violating it;¹⁷ 2. The one that concerns national constitutional values as

13 Myroslaw Granat, 'Constitutional Identity and Its Significance' (2021) 4 Ukrainian Journal of Constitutional Law 4, doi:10.30970/jcl.4.2021.1 [in Ukrainian].

14 Yuri H Barabash, 'The Role of Academic Thought in the Formation of the Official Constitution of the Doctrine' (Mutual Achievements of the European Commission "For Democracy through Law" and Bodies of Constitutional Justice and Problems of Interpretation in Constitutional Proceedings: International Online Conference, Kyiv, 25 June 2020) 40 [in Ukrainian].

15 Mykhailo Savchyn, *Comparative Constitutional Law* (VAITE 2020) 37 [in Ukrainian].

16 Monika Polzin, 'Constitutional Identity as a Constructed Reality and a Restless Soul' (2017) 18(7) German Law Journal 1595, doi:10.1017/S2071832200022458.

17 Within European constitutional discourse, constitutional identity is frequently regarded as a counter-limit to European Union law.

It allows states to accept processes of legal harmonisation and integration while retaining the authority to reject supranational norms perceived as incompatible with the fundamental constitutional principles that form the basis of the national constitutional order. See, Boryslavska, 'The Concept of Constitutional Identity' (n 7).

constitutional identity and their interaction with international public law: whether these values can justify violations of international law and to what extent. Here, constitutional identity is understood as an indication of the degree to which international bodies, particularly international courts, should take into account important national constitutional norms and or values, i.e., as part of the theory of judicial self-restraint;

3. Understanding constitutional identity as the constitution's identity with itself, that is, a purely normative concept. This understanding is particularly widespread in Germany and received significant impetus in judicial practice since the famous Lisbon Decision (BVerfGE 123, 267 – Lisbon Decision (Lissabon-Urteil)), which defined constitutional identity as a legal concept describing the core of the German constitution that cannot be amended;¹⁸

4. An abstract doctrine situated in the interrelation between national tradition and the constitution. Here, constitutional identity is understood as a special collective identity of the people or nation, which is also expressed, defined, or shaped by the constitution;

5. Connected with immigration, which affects the nation's self-identification.¹⁹

According to O. V. Shcherbanyuk, constitutional identity is a system of interpretative arguments used by constitutional courts to justify decisions taken in cases concerning the conformity of constitutional norms to national specificity. Naturally, this concerns categories of so-called “hard cases” for which a system of strong reasoning is required.²⁰

According to O. Boryslavska, national identity reflects a community's identity, whereas constitutional identity represents its expression within the constitution. In this sense, the constitution can be viewed as a reflection of society's shared values and principles. The scholar emphasises that constitutional identity embodies the community's identity as the bearer of constituent power, manifested in the constitutional text as well as in the fundamental values and principles underlying it. Although this community is political in nature, it is grounded in the national identity of the state-forming subject whose exercise of the right to self-determination enabled the establishment of a sovereign state and the functioning of its constitution.²¹

18 Constitutional identity, understood as the identity of the constitution itself, is interpreted differently depending on the understanding of the nature of a constitution. One approach, reflected in the jurisprudence of the Federal Constitutional Court of Germany, associates constitutional identity with the fundamental constitutional values and principles that form the inviolable “core” of the constitution, protected by the eternity clause of the Basic Law.

Other scholars emphasise the distinctive features that make a constitution unique compared with other constitutional systems. Constitutional court jurisprudence has also developed a broader understanding of constitutional identity by extending it to the constitutional order. In this regard, the Constitutional Court of the Czech Republic, referring to the “eternity clause” in Article 9 of the Constitution, stated that the constitutional order of the Czech Republic, especially its substantive core, must prevail over European Union law. See, Boryslavska, ‘The Concept of Constitutional Identity’ (n 7) 9.

19 Polzin (n 16) 1597-8.

20 Oksana Shcherbanyuk, ‘Constitutional Identity in the Argumentation of Constitutional Court Decisions’ (2020) 3 Constitutional and Legal Academic Studies 77, doi:10.24144/2663-5399.2020.3.08.

21 Boryslavska, ‘State Language’ (n 6) 10.

Polish researcher E. Krzysztofik notes that the principle of respect for constitutional identity is examined both at the national level and within the European Union as an essential component of the broader concept of national identity. According to the scholar, national identity encompasses the values a nation develops and preserves that distinguish it from other communities. Constitutional identity, however, represents a more specific dimension, as it relates primarily to constitutional traditions, legal culture, and the political ideas that have evolved through the historical development of a particular state. In this regard, both national and constitutional identity play important roles in shaping the state's and the nation's positions within the system of international relations. At the same time, the principle of respect for national identity is regarded as one of the European Union's fundamental constitutional principles.²²

V. Kolisnyk, H. Berchenko, and T. Slinko quite reasonably emphasise that constitutional identity is an embodiment of constituent power, since indeed the constitution, as the fundamental act of the people, not only reflects their will but also serves as a key source of the formation of constitutional identity and at the same time functions as a mechanism for controlling the exercise of power.²³

Researcher O. Nykorak emphasises the strong connection between constitutional identity and national identity. She interprets constitutional identity as a set of distinctive characteristics embedded in the constitutional system and fundamental values of a particular state. These characteristics, on the one hand, contribute to the consolidation of citizens into a unified political community, such as a people or a nation, and on the other hand, distinguish the state, its nation, and its population from other states as well as from international and regional organisations and the broader global community.²⁴

V. Kovalchuk examines the relationship between constitutional and national identity and argues that constitutional identity may be understood as a distinctive collective identity of a nation embodied in its constitution. In this context, it includes the fundamental and stable provisions that reflect the underlying principles and the "spirit" of the constitution. According to the scholar, limitations on certain constitutional amendments are intended to safeguard the nation's existing identity by preventing changes that could eliminate the

22 Edyta Krzysztofik, 'The Principle of Respect for the Member States' National Identity with Regard to the Rights and Obligations of Migrant Citizens of the European Union' (2018) 57(79) *Proceedings of the Faculty of Law in Niš* 157, doi:10.5937/zrpfni1879157K.

23 Viktor Kolisnyk, Hryhorii Berchenko and Tetyana Slinko, 'Constitutional Identity as an Embodiment of Constituent Power' (2022) 29 (3) *Visnyk of the National Academy of Legal Sciences of Ukraine* 72, doi:10.31359/jnalsu.29(3).2022.69-88 [in Ukrainian].

24 Olha Nykorak, 'Constitutional Identity as a Category of Constitutional Law' (PhD thesis, Ivan Franko National University of Lviv 2023) 24 [in Ukrainian].

features that distinguish it from other peoples. Such restrictions protect the core elements of constitutional identity and help preserve the nation's uniqueness and sovereignty.²⁵

In European Union law, the concept of identity is primarily connected with the category of “national identity” rather than constitutional identity. The origins of this approach may be traced to the Maastricht Treaty of 1992, which required the European Union to respect the national identities of Member States whose systems of government are founded on democratic principles.²⁶ In its current version, Article 4(2) of the Treaty on European Union provides that the Union shall respect the national identities of the Member States inherent in their fundamental political and constitutional structures. References to national identity are also contained in other sources of EU law, including the Charter of Fundamental Rights of the European Union and the Treaty establishing a Constitution for Europe.²⁷ At the same time, the concept of constitutional identity itself was developed primarily through the jurisprudence of constitutional courts, which relied on these Treaty provisions in defining the limits of supranational influence on national constitutional orders.²⁸

In contemporary constitutional scholarship, two principal approaches to constitutional identity are usually distinguished, which J.L. Martí describes as the “identity of the constitution” and the “identity of the people.” The first approach associates constitutional identity with the fundamental values and principles embodied in the constitution itself, which form its immutable “core”. In this sense, constitutional identity encompasses those essential constitutional foundations that cannot be abolished or fundamentally distorted even through formal constitutional amendments, since they determine the democratic and legal character of the state.²⁹ These foundations include, in particular, human rights, the rule of law, the separation of powers, and democratic mechanisms of citizen participation. A key role in protecting these fundamental principles from any attempts to undermine them belongs precisely to the bodies of constitutional review.

As regards the relationship between constitutional and national identity, constitutional identity may be understood as a constitutional expression of the political community's identity, which constitutes the source of constituent power. Since constituent power is realised through the constitution, elements of national identity, including language, culture, traditions, and national symbols, become incorporated into the constitutional order and

25 Viktoriia Kovalchuk, ‘Constitutional Identity and National Values in the Conditions of Permanent Threats to Ukraine’s Stateship’ (2024) 86-1 Scientific Bulletin of Uzhhorod National University, Series: Law 207, doi:10.24144/2307-3322.2024.86.1.30.

26 Treaty on European Union (adopted 7 February 1992) [1992] OJ C 191/1.

27 Charter of Fundamental Rights of the European Union (adopted 2 October 2000) [2012] OJ C 326/391; Treaty establishing a Constitution for Europe (adopted 18 June 2004) [2004] OJ C 310/1.

28 Boryslavska, ‘State Language’ (n 6) 12.

29 Jose Luis Martí, ‘Two Different Ideas of Constitutional Identity: Identity of the Constitution v Identity of the People’ in Carina Alcobarro Llivina and Alejandro Saiz Arnaiz (eds), *National Constitutional Identity and European Integration*, vol 4 (Intersentia 2013) 17.

form part of constitutional identity. In this sense, constitutional identity reflects the community's national identity, as embodied in the constitution.³⁰ In the context of globalisation and European integration, modern constitutional theory increasingly emphasises the coexistence of multiple layers of identity. As noted in the literature, "nested identities are lower- and higher-order identities such that the latter encompass the former. My identity as a resident in city 'a' is nested in my identity as a resident of region 'A', which is in turn nested in my identity as a resident of country 'Alpha', and so on".³¹ This concept demonstrates that national and supranational identities are not necessarily mutually exclusive.

Empirical research further confirms that these identities may coexist within the same political community. As Díez Medrano and Gutiérrez observe, "people who identify strongly with Spain or with their region also identify strongly with Europe," indicating the emergence of a so-called "hyphenated identity" in the European context.³² Such an approach allows European integration to be perceived not as a threat to national or constitutional identity, but rather as a process that can coexist with the preservation of the state's fundamental constitutional values.

In this context, scholars also emphasise that the formation of European identity can be explained through different theoretical approaches. As noted in the literature, two main approaches are particularly relevant for understanding this process: the instrumental and the cultural approach. The instrumental approach assumes that European identification is based on individuals' rational evaluation of the benefits or losses associated with "being European," including economic opportunities, freedom of movement, and participation in European programmes.³³ At the same time, the cultural approach highlights the role of shared history, traditions, and civilisational ties in shaping a sense of belonging to Europe. As empirical studies demonstrate, "cultural considerations such as perceptions of a common civilisation, history, or ancestry also contribute to the development of European identity."³⁴ Thus, European identity may emerge both from pragmatic interests and from a shared cultural and historical space, which allows it to coexist with national and constitutional identities. Within this framework, constitutional identity serves to preserve the fundamental principles and values of the national constitutional order in the context of European integration. As noted in Ukrainian constitutional scholarship, constitutional identity may be

30 Boryslavska, 'The Concept of Constitutional Identity' (n 7) 8.

31 Luis Díez Medrano and Paula Gutiérrez, 'Nested Identities: National and European Identity in Spain' (2001) 24(5) *Ethnic and Racial Studies* 756, doi:10.1080/01419870120063963.

32 *ibid* 772.

33 Natalia Waechter, 'Instrumental and Cultural Considerations in Constructing European Identity among Ethnic Minority Groups in Lithuania in a Generational Perspective' (2017) 45(4) *Nationalities Papers* 652, doi:10.1080/00905992.2016.1258048.

34 *ibid* 653.

understood as a safeguard protecting the core of the constitution and the fundamental values it embodies, even under conditions of increasing supranational legal influence.³⁵

The doctrinal approaches discussed above demonstrate that constitutional identity may be understood both as the identity of the constitution itself and as the constitutional expression of the political community's identity. For the purposes of this study, constitutional identity is understood as a combination of these two dimensions, with particular emphasis on the latter. In this regard, it is worth agreeing with O. Boryslavska's position that repeated references to national (political) culture as a determinant of constitutional identity are, in essence, references to national identity itself since such culture constitutes one of its elements and serves as a source of constitutional identity. Accordingly, constitutional identity encompasses, on the one hand, the fundamental constitutional principles that form the constitutional core and, on the other hand, the values and characteristics of the political community embodied in the constitution by constituent power.³⁶ National identity, as the identity of the community exercising constituent power, forms the foundation of constitutional identity. Through constituent power, elements of national identity, including language, culture, traditions, and symbols, become embodied in the constitution and transformed into components of constitutional identity.

3 THE DOCTRINE OF CONSTITUTIONAL IDENTITY IN THE DECISIONS OF CONSTITUTIONAL COURTS OF EUROPEAN STATES

This section identifies the principal approaches developed in the jurisprudence of European constitutional courts concerning the doctrine of constitutional identity. The comparative analysis of constitutional case law demonstrates how national constitutional courts use constitutional identity both to protect the fundamental principles of the constitutional order and to define the limits of the primacy of European Union law within domestic legal systems. Against the background of deepening European integration, the question of the limits of the primacy of European Union law over national legal systems has attracted increasing scholarly and judicial attention. In response to the growing scope of EU competences, national constitutional courts have begun to invoke the concept of constitutional identity as an instrument to safeguard state sovereignty and protect the fundamental principles of national constitutional orders. In this regard, the practice of European constitutional courts demonstrates a growing recognition that the application of EU law within domestic legal systems may be subject to certain constitutional limitations.³⁷

35 Stanislav Shevchuk, 'Constitutional and European Identity in the Protection of Fundamental Rights: Ukrainian Dimension' (2025) 10 *Law of Ukraine* 49, doi:10.33498/louu-2025-10-048 [in Ukrainian].

36 Boryslavska, 'State Language' (n 6) 10.

37 Maksym Solokha, 'Protection of Constitutional Identity in the Context of Interaction between National Law and European Union Law' (2025) 3 *Pravo.ua* 43, doi:10.71404/LAW.UA.2025.3.7 [in Ukrainian].

First, attention should be paid to the legal positions of the Federal Constitutional Court of Germany, which was among the first to address the primacy of EU law over the German Basic Law. In its judgment of 29 May 1974 in the *Solange I* case, the Court did not recognise the automatic primacy of EU law over national constitutional law.³⁸ The Court noted that Article 24 of the Basic Law does indeed provide for the transfer of sovereign rights to supranational institutions, but it cannot be interpreted in an absolute sense, since “it does not open the way to altering the basic structure of the Basic Law, which forms the foundation of its identity, without formally amending the Basic Law.” In addition, the Court referred to the protection of fundamental rights, noting that the section of the Basic Law concerning fundamental rights is an inalienable, essential feature of the existing Basic Law of the Federal Republic of Germany and forms part of its constitutional structure. It therefore concluded that the German Constitution contains fundamental rights that can under no circumstances be restricted by EU law until legal certainty in this sphere is achieved at the EU level. Consequently, if the integration process has not been completed and the EU does not provide an adequate level of protection for these rights, in the event of conflicts between legal norms, Germany’s constitutional guarantees retain priority.

In its subsequent judgment of 22 October 1986 in the *Solange II* case, the Federal Constitutional Court of Germany somewhat softened its legal stance, recognising that human rights under EU law were already sufficiently protected.³⁹ Therefore, as long as the EU ensures effective protection of fundamental rights, the Court would no longer review European legal acts for compliance with the Basic Law.

One of the most important decisions in the context of the doctrine of constitutional identity, which significantly influenced the development of approaches of other national constitutional courts that began to apply the concept of constitutional identity more actively in their jurisprudence, was the judgment of the Federal Constitutional Court of Germany of 30 June 2009 in the *Lisbon* case.⁴⁰ In the Lisbon judgment, the Court supplemented the previously developed mechanisms for reviewing EU actions, the review of fundamental rights (*Solange I*) and the *ultra vires* control (*Maastricht*), with a new type of review: the control of EU legal acts for compliance with Germany’s constitutional identity.

First, the Court granted legal legitimacy to the concept of constitutional identity, formulating its content on the basis of the “eternity clause” of Article 79(3) of the Basic Law, which protects the fundamental elements of the constitutional order: the democratic and social character of the state, the principles of sovereignty, the rule of law, popular representation, social security, and human dignity (Articles 1 and 20 of the Basic Law). In particular, the Court clarified that Article 79(3) of the Basic Law defines the Constitution’s identity (para. 208). By means of the so-called eternity guarantee, the regulation of the

38 Case no 2 BvL 52/71 *Solange I* (Bundesverfassungsgericht, 29 May 1974) BVerfGE 37/271.

39 Case no 2 BvR 197/83 *Solange II* (Bundesverfassungsgericht, 22 November 1986) BVerfGE 73/339.

40 Case no 2 BvE 2/08 *Lissabon* (Bundesverfassungsgericht, 30 June 2009) BVerfGE 123/167.

identity of the free constitutional order is excluded from the powers of the legislature amending the Basic Law: “The Basic Law not only prescribes the sovereign statehood of Germany but also guarantees it” (para. 216). The Federal Constitutional Court of Germany interprets Article 4(2) of the Lisbon Treaty as obliging respect for the constitutional principles of the Member States, as well as for their constituent power (paras. 234, 235).

Second, the Court linked the concept of constitutional identity with the constituent power of the German people. In its view: “The constituent power of the Germans, who adopted the Basic Law for themselves, intended to establish an insurmountable boundary to any future political development. Amendments to the Basic Law that affect the principles set out in Articles 1 and 20 of the Basic Law are inadmissible (Article 79(3) of the Basic Law)”. The Court emphasised that the EU derives legitimacy only through the Member States as the “masters of the Treaties,” not through an abstract “European demos.”

Third, the Court established a procedural control mechanism: any citizen may file a constitutional complaint challenging EU actions that, in their view, contradict Germany’s constitutional identity. This made the Court the sole arbiter in the sphere of identity protection.

Fourth, the Court imposed obligations on the government and parliament to act within the limits defined by this doctrine. It established the requirement for parliamentary control over the use of the flexibility clause (Article 352 TFEU) and the “passerelle” clause (Article 48(7) TEU) to prevent the hidden or opaque expansion of EU competences without the approval of the German legislature.⁴¹

At the same time, the Court stressed that the protection of constitutional identity must not become an instrument of isolationism: review must be conducted in a spirit of openness towards European law and genuine cooperation. However, in the event of violations of these principles, whether through exceeding delegated powers (*ultra vires*) or encroachments upon identity, EU law is not applicable within the German legal order.

Thus, precisely through the safeguard of “eternity,” the Federal Constitutional Court of Germany developed the doctrine of constitutional identity.⁴² Such legal positions of the German constitutional review body laid the foundation for the further development of the doctrine of national constitutional identity on the European continent.

For instance, in its judgment of 24 November 2010 (K 32/09), the Constitutional Tribunal of Poland held that the identity of the Constitution of the Republic of Poland is defined by “non-transferable powers of state authorities,” which are determined by various provisions of this act.⁴³ The Tribunal further stated that “non-transferable powers” also stem from the sovereignty of the state, the normative expression of which is the Constitution of the

41 *ibid*

42 Kolisnyk, Berchenko and Slinko (n 23) 75, 79.

43 Case no K 32/09 (Constitutional Tribunal of Poland, 24 November 2010) [2010] DzU 229/1506.

Republic of Poland itself. The competences prohibited from transfer reflect the values on which the Polish Constitution is based. These competences correspond to the “hard core” (“the cardinal foundations of the system of government”). Thus, the Court’s reasoning shows that it leaned towards the category of state powers (those which can never be transferred to EU institutions). However, the Polish experience after 2021 demonstrated that the doctrine of constitutional identity may be transformed from a legitimate constitutional mechanism into an instrument used to justify anti-constitutional practices. In the context of the judicial reforms initiated in Poland, the Constitutional Tribunal increasingly relied on the concepts of sovereignty and constitutional identity to challenge the binding force of interim measures and judgments of the Court of Justice of the European Union concerning judicial independence. In this respect, references to the “non-transferable core” of sovereignty no longer served primarily to protect democratic constitutional values but were increasingly used to justify legislative measures aimed at expanding political control over the judiciary.

This situation revealed a significant risk inherent in the doctrine of constitutional identity: in the absence of an independent and legitimate constitutional court, constitutional identity may become a tool for weakening the rule of law rather than protecting the constitutional order. In this regard, it is worth supporting the position of O. Boryslavska that the plurality and indeterminacy of approaches to constitutional identity create risks of misuse of this doctrine in constitutional practice.⁴⁴ Unlike the approach of the Federal Constitutional Court of Germany, which traditionally maintained constitutional dialogue with the Court of Justice of the European Union through procedural cooperation, the Polish Constitutional Tribunal increasingly asserted the unconditional primacy of its own position without relying on mechanisms of judicial dialogue.

The reaction of European institutions to the developments in Poland was also of fundamental importance. In its judgments concerning Poland delivered in 2021 and subsequent years, the European Court of Human Rights emphasised that a body formed in violation of constitutional requirements could not be regarded as a “tribunal established by law.” Likewise, the Court of Justice of the European Union has repeatedly stressed that the principles of judicial independence, autonomy, and the primacy of EU law are binding on all Member States. This position was further reaffirmed in the judgment of the Court of Justice of the European Union of 18 December 2025 in *European Commission v Republic of Poland* (Case C-448/23), in which the Court emphasised that references to constitutional identity cannot justify disregard for the fundamental principles of the European Union legal order.⁴⁵ The Polish case, therefore, demonstrated that the doctrine of constitutional identity may serve either as a constitutional safeguard of democratic order or, conversely, as a mechanism for legitimising its erosion, depending on the institutional legitimacy and independence of the constitutional court applying it.

44 Boryslavska, ‘The Concept of Constitutional Identity’ (n 7) 5.

45 Case no C-448/23 *European Commission v Republic of Poland* (CJEU Grand Chamber, 18 December 2025) ECLI:EU:C:2025:975.

In its judgment of 30 November 2016 (22/2016. (XII. 5.) AB), the Constitutional Court of Hungary emphasised that the respect for and protection of the country's sovereignty and constitutional identity is an obligation of all state bodies, including the National Assembly and the government, which participate in the EU's decision-making mechanisms. According to Article 24(1) of the Basic Law, the Constitutional Court is the main body responsible for this protection.⁴⁶

The Court determined that constitutional identity is not a static or closed list of values, but its key elements include: human rights and freedoms, separation of powers, republican form of government, autonomy of public law, freedom of religion, lawful exercise of power, parliamentarism, equality of rights, recognition of the independence of the judiciary, and protection of national minorities. These principles reflect the heritage of the historical constitution, which underlies the Basic Law and the entire Hungarian legal system.⁴⁷

Relying on Article 4(2) TEU, the Constitutional Court ruled that national authorities may disregard EU acts if they infringe on the country's sovereignty or constitutional principles, thereby allowing a broad interpretation of Article 4(2) without necessarily making a preliminary reference to the CJEU. In its judgment of 5 December 2016, the Court clarified that, in exceptional cases and as a last resort, it may review whether human dignity, the essence of fundamental rights, the sovereignty of the country (including the scope of transferred competences), or constitutional identity has been violated. At the same time, the Court stressed the necessity of constitutional dialogue with EU institutions and other Member States' constitutional courts based on equality, mutual respect, and cooperation.

In addition to the already known review mechanisms, compliance with rights and freedoms and *ultra vires* review, the Hungarian Constitutional Court introduced two new mechanisms: sovereignty review and constitutional identity review. This underscores the Court's aspiration to strike a balance between protecting national interests and fulfilling obligations within the European Union.

Accordingly, the Constitutional Court of Hungary, beyond the existing mechanisms of review such as compliance with fundamental rights and *ultra vires* review, introduced two additional types: sovereignty review and constitutional identity review. The Court also developed its own interpretation of "constitutional identity," which it linked to Hungary's "historical constitution".

The Constitutional Court of Latvia remained sceptical of the concept of the inviolable core of the Satversme for quite a long time.⁴⁸ The concept of constitutional identity began to

46 Decision no 22/2016 (XII. 5) AB (Constitutional Court of Hungary, 30 November 2016).

47 Petra Bárd, Nóra Chronowski and Zoltán Fleck, *Inventing Constitutional Identity in Hungary* (MTA Law Working Papers no 6, ELKH 2022) doi:10.2139/ssrn.4100075.

48 Artūrs Kučs and Jānis Pleps, 'Constitutional Identity Between Riga and Strasbourg: The Courts' Dialogue Developing Latvian Constitutional Law' (2024) 17 Journal of the University of Latvia, Law 193, doi:10.22364/jull.17.12.

appear in the Constitutional Court's practice only in 2015. Since that time, the Court has relied on this concept in several of its decisions, although its interpretation has not always aligned with the understanding initially proposed by the Constitutional Law Commission. Because of these differences in interpretation and application, the proper use of the concept of constitutional identity requires careful analysis of the Constitutional Court's relevant jurisprudence. In its recent case law, the Court has emphasised that every state possesses its own constitutional identity, which differentiates it from other states. The formation of such identity, including constitutional identity, does not occur instantly but develops gradually under the influence of historical circumstances and political evolution. For this reason, constitutional identity should not be perceived as a fixed or immutable concept. Rather, it represents a dynamic phenomenon that evolves together with the development of the state and its constitutional system. At the same time, constitutional identity encompasses two closely interconnected dimensions: the identity of the state itself and the identity of its constitutional order.

From this perspective, constitutional identity addresses not only the question of what a particular state is, but also what characterises its constitutional structure. In terms of statehood, identity reflects the classical elements recognised in international law: territory, population, and sovereign authority. However, when these elements are expressed in a constitution, they are interpreted through the broader context in which the state exists. As a result, the constitution also reflects factors that extend beyond strictly legal considerations, including the state's historical development, political traditions, and the society's national and cultural characteristics. These elements help shape the state's overall identity as expressed in its constitutional framework. At the same time, the identity of a particular constitutional order is defined primarily by the fundamental legal principles that organise and characterise that order. Consequently, constitutional identity should be understood as a complex and multidimensional concept comprising elements of various kinds, not all of which necessarily function as binding legal rules. Certain principles embedded in the constitutional framework play a central role in defining the character of the constitutional system. For example, overarching principles such as democracy, the rule of law, the nation-state, and the concept of a socially responsible state may determine the fundamental features of a state's constitutional order. In addition to these principles, constitutions often include references to other elements that help define the state's identity. Such references may include the historical development of the state and the nation, the traditions of the society, the circumstances surrounding the state's establishment, the purposes for which the state was created, and other factors that contribute to understanding the distinctive character of a particular political community. From a constitutional law perspective, these elements help identify and interpret the state's specific constitutional order. They give meaning to the constitutional framework and contribute to understanding the context in which constitutional principles operate. Thus, the elements that form constitutional identity include both legal principles that structure the constitutional system and broader value-based considerations that

influenced the historical development of that system. While some of these elements constitute binding legal norms, others serve as interpretative references that explain the evolution and foundations of the constitutional order. Together, they reflect the values, traditions, and historical experiences that have shaped the state's constitutional identity.⁴⁹

D. Žalimas, in his study *The Doctrine of Supra-Constitutionality and Lithuanian Constitutional Identity*, analyses the development of the concept of constitutional identity in the jurisprudence of the Constitutional Court of Lithuania. In this work, the author uses the notion of “constitutional identity” to describe the set of constitutional principles and norms that express the fundamental character of the constitutional order and constitute the constitution's protected core. According to Žalimas, these elements represent the essential foundations of the constitutional system and therefore require a higher level of protection within the constitutional framework. At the same time, the scholar stresses that the concept of constitutional identity should not be equated with the doctrine of supra-constitutionality. In his view, constitutional identity has a broader meaning. While the doctrine of supra-constitutionality focuses primarily on the unchangeable core of the constitution, constitutional identity also includes constitutional traditions and historically shaped constitutional values that have developed within a particular constitutional order. These traditions, together with the fundamental constitutional principles, play an important role in defining the specific character of the Lithuanian constitutional system. Žalimas also explains that the doctrine of supra-constitutionality itself rests on several assumptions. First, certain provisions forming the core of the constitution must be recognised as possessing a special status that places them above ordinary constitutional amendments. These provisions are considered to have a higher normative authority because they express the fundamental values and structural principles of the constitutional order. Second, these core provisions, together with the fundamental constitutional principles that cannot be amended, collectively determine Lithuania's constitutional identity and ensure the continuity and stability of its constitutional system.⁵⁰

Žalimas notes that the origins of the doctrine later described as supra-constitutionality can already be traced in the jurisprudence of the Constitutional Court of Lithuania, particularly in its rulings of 24 January 2014 (Case No. 22/2013) and 11 July 2014 (Case No. 16/2014-29/2014). According to the scholar, these decisions illustrate the early stage of the development of this doctrine, which was subsequently consolidated in the Court's official case law. In these rulings, the Court emphasised that the Constitution derives its legitimacy from the state community understood as a civic nation. In its ruling of 11 July 2014, the Constitutional Court underlined that such values as the inherent nature of human rights and freedoms, democracy, and state independence form the foundation of the Lithuanian constitutional

49 Case no 2020-39-02 (Constitutional Court of the Republic of Latvia, 4 June 2021) para 14.1 <<https://www.satv.tiesa.gov.lv/web/viewer.html>> accessed 25 December 2025.

50 Dainius Žalimas, “The Doctrine of Supra-Constitutionality and Lithuanian Constitutional Identity” (2022) 15 Journal of the University of Latvia, Law 5, doi:10.22364/jull.15.01.

order. These values constitute the essential basis of the Constitution; therefore, denying the constitutional provisions that embody them would mean denying the Constitution's very essence. Žalimas further observes that an important step in the development of this doctrine occurred in the ruling of 30 July 2020, which he describes as historic for Lithuanian constitutional jurisprudence. In this decision, the Constitutional Court explicitly acknowledged the doctrine of supra-constitutionality and recognised that certain fundamental constitutional acts possess a special normative status and form the core of constitutional identity. In particular, the Court considered that the fundamental values expressed in the 1918 Declaration of Independence, the 1990 Act on the Re-establishment of the Independent State of Lithuania, and other foundational acts represent principles of exceptional constitutional significance. These acts define the essential foundations of the Lithuanian state and therefore possess a higher normative authority within the constitutional order. Consequently, the Court concluded that such fundamental constitutional acts form part of the constitutional core and cannot be denied even during constitutional revision.⁵¹

Therefore, even though the Court did not explicitly mention the term "constitutional identity" in the 2020 ruling, it effectively acknowledged that Lithuania's constitutional identity rests on fundamental acts with supra-constitutional force, which cannot be annulled or amended, even by constitutional amendments. Accordingly, no constitutional modifications may contradict the immutable core that defines the identity of Lithuanian statehood: independence, democracy, and human rights.

Reference should also be made to the concept of counter-limits, or constitutional boundaries, which originated in Italian legal doctrine and was advanced by Paolo Barile. According to his approach, the legal effect of EU and UN law in the national legal system is limited, and the degree of integration of supranational norms depends on their conformity with the general principles of the country's constitutional order. These principles are recognised as a barrier (counter-limit), a kind of restriction on the effect of community norms.

The Constitutional Court of the Italian Republic was the first to introduce the idea of constitutional identity in its doctrine of "counter-limits" (*controlimiti*). In its judgment of 18 December 1973 in the *Frontini* case, the Court officially recognised the principle of primacy of EU law, but at the same time laid the foundation for the formation of the doctrine of *controlimiti*.⁵²

The Court held that, pursuant to Article 11 of the Constitution of Italy, the transfer of part of sovereignty is permitted solely for the purposes expressly defined in this article.

51 *ibid*

52 Case no 183/1973 *Frontini* (Italian Constitutional Court, 18 December 1973) <<https://www.cortecostituzionale.it/scheda-pronuncia/1973/183>> accessed 25 December 2025.

Therefore, the limitations of sovereignty envisaged by the Rome Treaty, concluded between states whose legal systems are based on the principles of the rule of law and which guarantee fundamental freedoms, cannot be interpreted as granting the institutions of the European Communities the authority to violate the fundamental principles of the constitutional order or the inalienable rights of individuals.

Accordingly, the Constitutional Court stressed that Italy may join international treaties and organisations that provide for limitations on sovereignty, but only insofar as they do not conflict with fundamental constitutional principles and fundamental human rights.

Furthermore, the Court expressly reserved to itself the right to exercise constitutional review of European treaties under Article 11 of the Constitution, emphasising that in the event of doubts as to their conformity with constitutional principles, “the guarantee of judicial review by this Court will always be ensured.”⁵³

Thus, even in the process of European integration, Italy retains the ability to protect its constitutional principles, if necessary, by limiting the application of EU law norms. This doctrine of *controlimiti* (often translated as the counter-limits doctrine) was later developed in the judgment of the Constitutional Court of Italy of 5 June 1984 in the *Granital* case.⁵⁴

The analysed jurisprudence demonstrates that European constitutional courts generally recognise constitutional identity as a constitutional limit to the primacy of European Union law. Although the courts acknowledge the importance of European integration and the binding nature of EU law, they simultaneously emphasise that supranational norms cannot prevail where they threaten the fundamental principles of the constitutional order, the constitutional core, or essential constitutional rights. At the same time, the approaches developed by constitutional courts differ significantly. While some courts, particularly the Federal Constitutional Court of Germany and the Constitutional Court of Italy, view constitutional identity primarily as an instrument of constitutional dialogue and balanced interaction with EU law, other courts have interpreted it more broadly as a mechanism for safeguarding sovereignty and restricting supranational influence. Thus, the doctrine of constitutional identity has become one of the key instruments through which European constitutional courts seek to reconcile participation in European integration with the preservation of national constitutional autonomy.

53 *ibid*

54 Case no 170/1984 *Granital* (Italian Constitutional Court, 5 June 1984) <<https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1984&numero=170>> accessed 25 December 2025.

4 GUARANTEEING CONSTITUTIONAL NATIONAL IDENTITY IN THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF UKRAINE

When addressing this issue, it is necessary first to focus on the external aspect of constitutional identity, which found its expression in the amendments introduced to the preamble to the Constitution of Ukraine, namely: "...affirming the European identity of the Ukrainian people and the irreversibility of Ukraine's European and Euro-Atlantic course, ...". Thus, only in 2019 did Ukraine finally, at the level of its Basic Law, clearly declare its objective of acquiring membership in the European Union and NATO. As Yu. Barabash rightly observes that, in Ukraine, this issue was complicated by the political establishment's ongoing "flirtation" with Russia, a neighbour that openly maintained imperial ambitions, and by its reluctance to fully embrace the European path of development.⁵⁵ Even the basic step of enshrining a commitment to EU and NATO integration in the Constitution of Ukraine, along with establishing minimal mechanisms to protect national identity, provoked a severe response from the Kremlin.

The external aspect of constitutional identity enshrined in the preamble to the Basic Law necessitates harmonising national legislation with that of the European Union. Consequently, the issue of defining the scope of authority of the national body of constitutional jurisdiction in relation to possible constitutional review of acts of European Union institutions becomes particularly significant.

As was already noted in the first part of this article, the doctrine of constitutional identity is fundamentally shaped by its national aspect, that is, the national self-identification of a given political nation and state.⁵⁶ As scholars emphasise, constitutional identity is "revealed" through the reconstruction of the historical facts of a nation's life. Therefore, the foundation of national constitutional identity lies in the idea of a political nation as a stable community of people that historically emerged from a common language, territory, economic life, and psychological traits, which manifest in shared culture and statehood. It should be emphasised that a peculiarity of the Basic Law of Ukraine is that the concept of the nation is employed both in a political sense (as "the people") and in an ethno-cultural sense (as "the Ukrainian nation"). Reference to the Ukrainian nation is found in the Preamble, which states that the Constitution of Ukraine was adopted based on "the Ukrainian nation's, the entire Ukrainian people's exercise of the right to self-determination." Moreover, several provisions enshrine the following: "the state shall promote the consolidation and development of the Ukrainian nation" (Article 11); "land is the principal national wealth" (Article 14); "Ukraine's foreign policy activities shall be aimed at ensuring its national

55 Yuriy Barabash, 'Is It Possible to Preserve Statehood Without Protection of National Identity? (Some Lessons from Post-Soviet Constitutionalism Based on the Experience of Ukraine)' (2025) 18(6) *Baltic Journal of Law & Politics* 34, doi:10.2478/bjlp-2025-0004.

56 Granat (n 13) 4-5.

interests” (Article 18). According to Yu. H. Barabash, this position of the parliamentarians is explained by “their insufficient confidence that the ethnic factor, after the adoption of the Constitution, would not further intensify to the extent of encouraging separatist sentiments and the emergence of interethnic conflicts”.

This particular aspect of constitutional identity was first recognised by the Constitutional Court of Ukraine when it formulated the relevant concept in its ruling of 14 July 2021, No. 1-r/2021, in the case upon the constitutional petition of 51 Members of Parliament of Ukraine concerning the conformity of the Law of Ukraine “On Ensuring the Functioning of the Ukrainian Language as the State Language” with the Constitution of Ukraine:

“Taking into account the previous official interpretation of Article 10 of the Constitution of Ukraine and further developing it, the Constitutional Court of Ukraine notes that the legal status of the Ukrainian language as the state language, enshrined in parts one and two of Article 10 of the Constitution of Ukraine, constitutes a fundamental constitutional value, an inherent feature and a key factor of unity (sobornist) of the Ukrainian state, and an integral part of its constitutional identity.”⁵⁷

It should also be emphasised that the change in Ukraine’s state policy and this legal position of the Constitutional Court on the language issue were dictated by the large-scale invasion and occupation of Ukrainian territories by the aggressor state in 2014. One of the narratives of Russian propaganda on the eve of the occupation of Crimea was the decision of the Verkhovna Rada of Ukraine of 23 February, adopted in the midst of revolutionary events, to repeal the Law “On the Principles of State Language Policy,”⁵⁸ enacted under V. Yanukovych, which in practice had granted the Russian language the status of a second official language. Although Parliament voted to repeal this act, the then Acting President O. Turchynov did not sign it, being aware of the negative consequences of such a step. The problem was that the repeal of the law occurred without the adoption of a new normative act to regulate language, thereby creating a potential legal vacuum and providing grounds for further political manipulation.⁵⁹

The final point in this matter was made by the Constitutional Court of Ukraine, which, by its Decision of 28 February 2018, No. 2-r/2018, declared this law unconstitutional.⁶⁰

Another important stage in the transformation of language policy was the adoption on 25 April 2019 of the Law of Ukraine “On Ensuring the Functioning of the Ukrainian Language as the State Language,” which significantly strengthened the position of the

57 Case no 1-179/2019(4094/19) (n 9).

58 Law of Ukraine no 1190 ‘On the Recognition of the Law of Ukraine “On the Principles of State Language Policy” as Invalid’ (adopted 23 February 2014) <<https://www.rada.gov.ua/news/Povidomlennya/88068.html>> accessed 25 December 2025.

59 Barabash (n 55) 43.

60 Case no 1-1/2018 decision no 2-r/2018 (Constitutional Court of Ukraine, 28 February 2018) [2018] Official Gazette of Ukraine 37/ 1315.

Ukrainian language in public and state life.⁶¹ The Verkhovna Rada adopted this law to reinforce the state-building and integrative role of the Ukrainian language and to increase its importance in safeguarding the country's territorial integrity and national security. These measures are intended to promote the unity of Ukrainian society and to counter attempts to justify territorial expansion by invoking claims of "protecting" Russian-speaking populations. The consolidation of Ukrainian citizens in resisting Russian aggression and achieving victory over the invader may become an important element of collective historical memory that shapes the Ukrainian political nation as a multiethnic, multilingual and multiconfessional community. This understanding also guided the Verkhovna Rada when, on 13 December 2022, it adopted the Law of Ukraine "On the Basic Principles of State Policy for Affirming Ukrainian National and Civic Identity."⁶²

The Constitutional Court of Ukraine emphasised that threats to the Ukrainian language should be regarded as threats to national security, the existence of the Ukrainian nation, and the statehood of Ukraine. According to the Court, language represents not only a means of communication but also a unique code of the nation. If the Ukrainian language does not function fully across all spheres of public life throughout the territory of Ukraine, there is a risk that the Ukrainian nation may lose its role as the titular and state-forming nation, which, in turn, could jeopardise the continued existence of the Ukrainian state. In this context, the Court stated that the Ukrainian language constitutes an essential condition (*conditio sine qua non*) for Ukraine's statehood and territorial integrity. Ukraine is the only territory where the preservation, existence, and comprehensive development of the Ukrainian language, and, consequently, of the Ukrainian nation as a state-forming community, can be ensured. For this reason, any attempts to undermine the legal status of the Ukrainian language as the state language within Ukraine are inadmissible, since such actions would violate the constitutional order, threaten national security, and endanger the very existence of Ukrainian statehood (para. 4.1(6), section 4 of the reasoning part).⁶³

Furthermore, considering the current circumstances resulting from the military aggression of the Russian Federation and the use of the "language issue" as an instrument of geopolitical expansion, the Constitutional Court stressed that threats directed at the Ukrainian language must equally be considered threats to the national security of Ukraine (para. 13.9(1), section 13 of the reasoning part).⁶⁴

Thus, over the past decade, positive changes have occurred in Ukraine: the Ukrainian language, as the state language, has come to be perceived and understood as a symbol of the country and as one of the key factors in consolidating the multiethnic people of

61 Law of Ukraine no 2704-VIII 'On Ensuring the Functioning of the Ukrainian Language as the State Language' (adopted 25 April 2019) [2019] Official Gazette of Ukraine 41/1422.

62 Law of Ukraine no 2834-IX 'On the Basic Principles of State Policy for Affirming Ukrainian National and Civic Identity' (adopted 13 December 2022) [2023] Official Gazette of Ukraine 3/199.

63 Case no 1-179/2019(4094/19) (n 9).

64 *ibid*

Ukraine. As emphasised by the Constitutional Court of Ukraine, the Ukrainian language, alongside the State Flag, the State Emblem, and the State Anthem, is an inseparable attribute of the Ukrainian state. Therefore, any manifestations of disrespect toward it should be regarded as acts that disgrace the state itself and, consequently, are inadmissible. Public mockery of, or deliberate disparagement of, the Ukrainian language constitutes an encroachment upon the constitutional order of Ukraine and an insult to the national dignity of its citizens, which must be prosecuted under the law (decision of 14 July 2021, No. 1-r/2021). Hence, O. Boryslavska's assertion that the state language forms part of constitutional identity precisely because it is an essential component of national identity deserves agreement. Given the history of the Ukrainian language, not only difficult, marked by numerous attempts to prohibit, eradicate, or suppress it, but also often tragic—the provision designating it as the sole state language belongs to the category of constitutional norms that form the core of the Constitution, enjoy special protection, and constitute part of constitutional identity.⁶⁵

Analysis of this decision shows that the national body of constitutional review did not link constitutional identity directly to issues of European integration, but rather approached it through the prism of national self-identification, employing the concept to strengthen the argumentation for the constitutionality of the language law and to attribute to certain elements of the constitutional order (whether to all remains debatable) the characteristic of constitutional identity.⁶⁶

At the same time, an analysis of the Constitutional Court of Ukraine's decision indicates that this practice by constitutional review bodies is not unique. For example, the Lithuanian Constitutional Court addressed the issue of national identity in its ruling of 21 October 1999 (Case No. 14/98), concerning the spelling of names and surnames in passports. In particular, the Court noted that “The provisions of the Resolution, which stipulate that a person's name and surname in the passport shall be written in Lithuanian characters and according to the pronunciation of the name and surname, are applicable to all citizens without exception, irrespective of their nationality and other characteristics. The Court therefore ruled that the Resolution is not contrary to the Constitution”.⁶⁷ As E. Orbán observes, the Constitutional Court of Lithuania in its ruling of 21 October 1999 confirmed the legality of the practice of recording names and surnames in passports in accordance with Lithuanian language rules, notwithstanding objections raised by certain individuals and minority groups. This case demonstrates that national courts may reject a more liberal approach when it is necessary to protect linguistic standards or constitutional traditions

65 Boryslavska, ‘State Language’ (n 6) 13.

66 Hryhorii Berchenko, ‘Respect for the Constitutional Identity of the EU Member States: Prospects for Ukraine’ (Ukrainian Constitutionalism: Challenges Born of Freedom: International Scientific Conference, Kharkiv, 23 December 2022) 34 [in Ukrainian].

67 Case no 14/98 (Constitutional Court of the Republic of Lithuania, 21 October 1999) <<https://lrkt.lt/en/court-acts/search/170/ta1147/content>> accessed 25 December 2025.

connected to national identity.⁶⁸ In other words, this case demonstrates how national courts can prioritise the protection of linguistic norms and identity-related constitutional traditions over more permissive or flexible policies.

A similar approach can be observed in the Constitutional Court of Latvia's case law concerning the protection of the state language. In its judgment of 23 April 2019, the Court considered whether several legal provisions governing the proportion of state-language and minority-language use in primary education, as well as the transition to state-language education at the secondary level, were compatible with the Satversme. In this decision, the Court noted that "the Preamble to the Satversme reveals the values that are the basis for building an inclusive democratic society. The Latvian language is one of these values. It is an integral part of the constitutional identity of the Latvian state. The function of the state language to be the common language of society's communication and democratic participation follows from the constitutional status of the state language."⁶⁹ In its judgment of 15 February 2024, the Constitutional Court of Latvia examined a transitional provision of the Immigration Law that introduced new requirements for Russian citizens holding permanent residence permits, including the obligation to demonstrate a certain level of proficiency in the state language. In reviewing the constitutionality of this regulation, the Court addressed the relationship between language policy and the protection of the constitutional order. It emphasised that "...the Latvian language is an integral part of the constitutional identity. The national language is the common language of society's communication and democratic participation. Moreover, Latvia is the only place in the world where the existence and development of the Latvian language and thus the Latvian nation can be guaranteed. The state has an obligation to develop and defend the only state language, Latvian. The narrowing of the use of the Latvian language as the state language in the national territory can also be considered a threat to the democratic state system. Therefore, the restriction of fundamental rights, as contained in the contested norm, is aimed at strengthening the state language and protects a democratic state system. In addition, such regulation is also aimed at protecting the right of Latvian residents, including nationals, to use the national language. In other words, the restriction contained in the disputed norm is aimed at ensuring that persons who lead their daily lives in Latvia, form social ties, work, engage in daily communication with other people, should be able to use the Latvian language at least at a basic level, and thus it protects the right of individuals to use the national language in communication. Therefore, the limitation of fundamental rights contained in the contested norm in the aspect of strengthening the national language is aimed at protecting the democratic state system and the rights of other people."⁷⁰

68 Endre Orbán, 'Constitutional Identity in the Jurisprudence of the Court of Justice of the European Union' (2022) 63(2) *Acta Juridica* 147, doi:10.1556/2052.2022.00374.

69 Case no 2018-12-01 (Constitutional Court of the Republic of Latvia, 23 April 2019) para 24.2 <<https://www.satv.tiesa.gov.lv/web/viewer.html>> accessed 25 December 2025.

70 Case no 2023-04-0106 (Constitutional Court of the Republic of Latvia, 15 February 2024) para 18.2 <<https://www.satv.tiesa.gov.lv/web/viewer.html>> accessed 25 December 2025.

In this respect, attention should also be drawn to the decisions of the French Constitutional Council concerning the protection of the French language. In its decision of 15 June 1999, the Council declared unconstitutional the provisions of the law ratifying the European Charter for Regional or Minority Languages that allowed the use of regional languages in public administration, education, information, and culture in areas inhabited by speakers of regional or minority languages. The Council referred to the principle that the French people are indivisible and that no part of it may claim to exercise national sovereignty, which itself has constitutional status. Within the framework of these fundamental principles, no collective rights may be recognised as belonging to any group sharing common origin, culture, language, or beliefs. Since these provisions, in the view of the constitutional jurisdiction, were incompatible with the Constitution of France (Articles 1 and 2) and could undermine the constitutional principles of the indivisibility of the Republic, equality before the law, and unity of the French people (para. 10 of the decision), they were declared unconstitutional. Moreover, these provisions of the Charter also conflicted with the first paragraph of Article 2 of the Constitution, inasmuch as they appeared to recognise a right to use a language other than French not only in “private life” but also in “public life”, a category which the ratification statute extended to judicial and administrative authorities and public services.⁷¹ In *Décision n° 2021-818 DC* of 21 May 2021, the Constitutional Council of France partially annulled the provisions of the law on the protection and promotion of regional languages, ruling in particular that “immersive teaching” of regional languages in public educational institutions contravenes Article 2 of the Constitution, which establishes French as the language of the Republic.⁷² Thus, the decision of the French constitutional jurisdiction also rested on the identity of the French political nation, whose key markers are recognised as the French language as the state language, the indivisibility of the French community, and its unity, all of which constitute fundamental constitutional values.

5 CONCLUSIONS

This study demonstrates that the doctrine of constitutional identity in contemporary constitutionalism serves not only an integrative but also a state-preserving function. While in the jurisprudence of many European constitutional courts, constitutional identity primarily developed as a counter-limit to supranational legal integration, the Ukrainian experience shows that under conditions of external aggression, constitutional identity also serves as an instrument for safeguarding statehood, constitutional continuity, and national unity.

71 Decision no 99-412 DC (Constitutional Council, 15 June 1999) <<https://www.conseil-constitutionnel.fr/en/decision/1999/99412DC.htm>> accessed 25 December 2025.

72 Decision no 2021-818 DC (Constitutional Council, 21 May 2021) <<https://www.conseil-constitutionnel.fr/decision/2021/2021818DC.htm>> accessed 25 December 2025.

A comparative analysis of the jurisprudence of European constitutional courts allows for the identification of two principal models of constitutional identity. The first, represented primarily by the Federal Constitutional Court of Germany and the Constitutional Court of Italy, focuses on protecting the constitutional “core” from excessive interference by supranational institutions and preserving the limits of delegated sovereignty within the European Union. The second, more characteristic of the constitutional practice of Lithuania, Latvia, and Ukraine, places particular emphasis on the protection of the political nation, state language, historical memory, and the constitutional foundations of the national community. In this respect, the Ukrainian approach demonstrates closer affinity with the Baltic constitutional tradition than with the classical German model.

The practice of the Constitutional Court of Ukraine demonstrates the gradual transformation of constitutional identity from a predominantly doctrinal concept into an operative constitutional mechanism. By recognising the Ukrainian language as an element of constitutional identity and linking it directly with national security and territorial integrity, the Constitutional Court effectively constitutionalised the protection of national identity as a component of the protection of statehood itself. This indicates that in contemporary Ukraine, constitutional identity functions not only as a constitutional limitation but also as a constitutional instrument of resistance against attempts to undermine the state's sovereignty and democratic constitutional order.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

КОНСТИТУЦІЙНА ІДЕНТИЧНІСТЬ ЯК ГАРАНТІЯ ДЕРЖАВНОСТІ: ЄВРОПЕЙСЬКИЙ ДОСВІД ТА УКРАЇНСЬКІ ВИКЛИКИ (НА ОСНОВІ ПРАКТИКИ КОНСТИТУЦІЙНИХ СУДІВ)

Євгеній Ткаченко*, Любомир Летнянчин, Вікторія Дубас та Ірина Лященко

АНОТАЦІЯ

Вступ. У статті аналізується доктрина конституційної ідентичності в контексті як європейського, так і українського конституціоналізму. Стверджується, що конституційна ідентичність є відносно новою категорією конституційної теорії, яка відображає фундаментальні та незмінні цінності, закріплені в Конституції, та слугує для захисту цих цінностей від зовнішнього впливу, зокрема з боку наднаціональних правових систем. Особлива увага приділяється розвитку цієї доктрини в практиці європейських конституційних судів (Німеччина, Польща, Угорщина, Литва, Італія, Франція) та формуванню її в Україні у відповідь на сучасні виклики, зокрема військову агресію Російської Федерації та необхідність захисту державної мови, суверенітету та національної єдності.

Методи. У дослідженні використано системно-структурний та порівняльно-правовий методи для аналізу доктрини конституційної ідентичності, її складових елементів та правових позицій конституційних судів у різних країнах. Логіко-правовий метод дозволив простежити еволюцію підходів до взаємозв'язку між конституційною ідентичністю, національним суверенітетом та інтеграційними процесами в Європі. Дослідження ґрунтується на аналізі конституційних текстів, судової практики та наукових джерел.

Результати та висновки. Конституційна ідентичність розуміється як сукупність фундаментальних конституційних принципів (суверенітет, права людини, верховенство права, демократична форма правління, державна мова), що становлять «ядро» Конституції та не можуть бути змінені навіть конституційними реформами. Практика європейських конституційних судів (насамперед Федерального конституційного суду Німеччини) заклала основу для доктрини конституційної ідентичності як інструменту обмеження впливу наднаціонального права на фундаментальні основи національних конституційних систем. В Україні ця доктрина формувалася крізь призму захисту державної мови, національного суверенітету та консолідації суспільства, що відображено в рішеннях Конституційного Суду України 2018 та 2021 років, а також законодавчих змінах, ухвалених між 2014 та 2025 роками.

Ключові слова. Конституційна ідентичність, національна ідентичність, Конституційний Суд України, державна мова, верховенство права, суверенітет, європейська інтеграція, конституційні цінності, доктрина контрмеж.