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Constitutional Identity Between Riga and Strasbourg: The Courts' Dialogue Developing Latvian Constitutional Law*

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The article provides insight into the recent development of the concept of constitutional identity in the Latvian legal system. The authors mainly focus on the dialogue between the national highest courts, especially the Constitutional Court, and the European Court of Human Rights and the Court of Justice of the European Union, concerning the concept of constitutional identity. In recent years, both supranational courts have dealt with cases involving various aspects of Latvia's constitutional identity and the respected constitutional values, norms, and principles that define it, as well as the relevant jurisprudence of the national highest courts. The case study of Latvia demonstrates that it is possible to guarantee a harmonious approach to implementing constitutional identity in light of the state's international obligations as a member of the European Union and the Convention on Human Rights.

Keywords: constitutional identity, inviolable core of the *Satversme*, Constitutional Court, Supreme Court, European Court of Human Rights, Court of Justice of the European Union, Court's dialogue.

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Introduction

The concept of constitutional identity, its meaning, scope, and impact on interaction between the national highest courts and European Court of Human Rights and Court of Justice of the European Union is widely discussed in recent years both in academic discourse and in growing jurisprudence of courts. Developments in Latvian legal doctrine and jurisprudence have not been an exception in this context.

The emergence of this debate is linked to several factors, including the raise of globalization and federalization trends at the European level and fears at local level to lose identity of each Member State. These fears are especially understandable in Latvia due to its history, long occupation period, when Soviet authorities tried to eliminate characteristics essential to Latvian state and nation. At the same time, emergence of the debate around national constitutional identity has raised a question – how to reconcile this concept with multilayer legal system that characterizes European states today,¹ namely, priority of international law, including European Convention on Human Rights² and supremacy of the European Union law.

The aim of this article is to explore answers to this question by, firstly, analysing theoretical developments of the concept of constitutional identity in Latvian legal discourse, secondly, its application in the jurisprudence of Latvian Supreme Court and Constitutional Court and thirdly – by examining discourse between the Latvian courts and the European Court of Human Rights on the use of national constitutional identity as a ground of limitation of human rights.

The analysis of debate about the place of constitutional identity in relationship between the national courts and Court of Justice of the European Union is left outside the scope of this article, and would be the subject of another research due to the *sui generis* nature of the European law compared to international law as well as specific recognition of the constitutional identity of Member States in founding treaty of the European Union.

1. Constitutional identity in Latvian legal system

The concept of constitutional identity is relatively new in the Latvian legal system.³ It was first proposed by the Constitutional Law Commission – a high-profile legal expert group (think tank) created by the State President – as the concept of the inviolable core of the *Satversme*⁴ on 17 September 2012.⁵ This concept was

¹ *Lenaerts, K.* Introductory speech by Mr. Koen Lenaerts, President of the Court of Justice of the European Union. In: *EUnited in diversity: between common constitutional traditions and national identities*. International Conference Riga, Latvia – 2–3 September 2021. Conference proceedings. Luxembourg: Court of Justice of the European Union, 2022, p. 15.

² European Convention on Human Rights. Available: https://www.echr.coe.int/documents/d/echr/convention_ENG [last viewed 06.06.2024]

³ *Kušņš, G.* Konstitucionālo tiesību pamati [Foundations of Constitutional law]. In: *Publiskās tiesības*. Ievads. Rīga: Tiesu Namu Aģentūra, 2024, p. 263.

⁴ The Constitution of the Republic of Latvia. Available: <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia> [last viewed 06.06.2024].

⁵ See more: *Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu*. Konstitucionālo tiesību komisijas 2012. gada 17. septembra viedoklis [On the Constitutional Foundations of the Latvian State and the Inviolable Core of the *Satversme*. Opinion of the Constitutional Law Commission on 17 September 2012]. In: *Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu*. Konstitucionālo tiesību komisijas viedoklis un materiāli [On the Constitutional Foundations of the Latvian State and the Inviolable Core of the *Satversme*. Opinion and Materials of the Constitutional Law Commission]. Rīga: Latvijas Vēstnesis, 2012, pp. 27–155.

soon accepted in legal doctrine and practice. The concept of the inviolable core of the *Satversme* is based on the idea that there exists a set of constitutional values, norms, and principles that define the identity of the Latvian state and are inviolable. It is not possible to legally change these constitutional values, norms, and principles included in the core of the *Satversme*, even via constitutional amendments.⁶ The main function of the concept of the constitutional identity is to guarantee the existence of Latvia as an independent state based on the principles of the democratic republic governed by the rule of law. The concept of constitutional identity reflects importance of the national state and democratic principles for the Latvian society.⁷

The idea of a bloc of fundamental constitutional norms and principles that form the constitutional basis for the Latvian state has always existed in Latvian legal science and practice. Article 77 of the *Satversme*, adopted on 15 February 1922, prescribes that any amendments to Articles 1, 2, 3, and 6 of the *Satversme* must be ratified in a national referendum in order to come into force as a law. Professor Kārlis Dišlers, one of the most authoritative Latvian constitutionalists, recognized that Article 1, 2, 3 and 6 of the *Satversme* prescribe the most important constitutional norms and principles which define essence of Latvia as an independent and democratic republic.⁸

In Article 4 of the Declaration of 4 May 1990, "On the restoration of the independence of the Republic of Latvia", these articles of the *Satversme* were described as the constitutional basis of the State of Latvia:

"[...] Articles which determine the constitutional basis of the State of Latvia and which, in accordance with Article 77 of the *Satversme*, are to be amended only upon national referendum, namely:

Article 1 – Latvia is an independent democratic republic;

Article 2 – The sovereign power of the State of Latvia is vested in the people of Latvia;

Article 3 – The territory of the State of Latvia, within the borders established by international agreements, consists of Vidzeme, Latgale, Kurzeme and Zemgale;

Article 6 – The *Saeima* shall be elected in general, equal and direct elections, and by secret ballot based on proportional representation."⁹

As it is recognized, Article 77 of the *Satversme* and Article 4 of the Declaration of 4 May 1990, already defined the core elements of the constitutional identity.¹⁰ With constitutional amendments on 15 October 1998 Article 77 was amended to include Article 4 and Article 77 itself in the constitutional basis. Article 4 prescribes that

⁶ See more: Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu. Konstitucionālo tiesību komisijas 2012. gada 17. septembra viedoklis [On the Constitutional Foundations of the Latvian State and the Inviolable Core of the Satversme. Opinion of the Constitutional Law Commission on 17 September 2012]. In: Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu. Konstitucionālo tiesību komisijas viedoklis un materiāli [On the Constitutional Foundations of the Latvian State and the Inviolable Core of the Satversme. Opinion and Materials of the Constitutional Law Commission]. Rīga: Latvijas Vēstnesis, 2012, pp. 146–152.

⁷ See also: *Lazdiņš, J.* Consolidation of the Principle of Democratic Elections in the Law of the Latvian People. *Journal of the University of Latvia. Law*, Vol.16, 2023, pp. 169–172.

⁸ *Dišlers, K.* Ievads Latvijas valststiesību zinātnē [Introduction to the Science of Latvian Public Law]. Rīga: A. Gulbis, 1930, p. 110.

⁹ Par Latvijas Republikas neatkarības atjaunošanu [On the Restoration of Independence of the Republic of Latvia]. Available: <https://likumi.lv/ta/en/en/id/75539-on-the-restoration-of-independence-of-the-republic-of-latvia> [last viewed 31.05.2024.]

¹⁰ *Kusiņš, G.* 1990. gada 4. maija deklarācija [Declaration of 4 May 1990]. Available: <https://enciklopedija.lv/skirklis/146164-1990-gada-4-maija-deklar%C4%81cija> [last viewed 31.05.2024.]

“the Latvian language is the official language in the Republic of Latvia. The national flag of Latvia shall be red with a band of white.”¹¹

As Article 77 of the *Satversme* provided for a national referendum for changes to Articles 1, 2, 3, 4, 6, and 77 of the *Satversme*, the constitutional doctrine, recognizing these constitutional norms as a fundamental basis of the State of Latvia, also acknowledges that it is legally possible to hold such a referendum and change the constitutional basis of the state. As noted by Professor Kārlis Dišlers, the defence of Latvia as an independent and democratic republic is entrusted to the people of Latvia. The existence of Latvia as an independent and democratic republic depends on the will of the people of Latvia expressed in a national referendum.¹² The Constitutional Court also held that the *Satversme* guarantees exclusive rights to deal with the fundamental norms of the *Satversme* to the people of Latvia, namely, to repeal the constitution or to establish a new constitutional order.¹³

The proposal of the inviolable core of the *Satversme* was a reaction to the referendum on 18 February 2012, regarding the Russian language as a second state language.¹⁴ Despite the initiative for the Russian language as a second state language being rejected with a constitutional majority in a national referendum, the fundamental constitutional foundations of the State of Latvia were put at risk of regular ballots and destabilization. Attempts were made to use constitutional procedures to introduce painful issues dealing with the traumas of the Soviet occupation into the political agenda.¹⁵ In 2012, another initiative group proposed a legislative initiative for a referendum to recognize all former citizens of the USSR who do not hold Latvian citizenship or citizenship of any other state (commonly known as non-citizens of Latvia) as citizens of Latvia. At that moment, the Constitutional Law Commission introduced the concept of the inviolable core of the *Satversme*, and the potential referendum on citizenship was halted as unconstitutional.¹⁶

The concept of the inviolable core of the *Satversme* was borrowed from German constitutional thought¹⁷, where it was well elaborated by German Federal Constitutional Court in the so-called Lisbon judgement.¹⁸ It should be noted that in Germany, the concept of constitutional identity was necessary to address external

¹¹ Grozījumi Latvijas Republikas Satversmē [Amendments to the *Satversme* of the Republic of Latvia] (15.10.1998). Available: <https://likumi.lv/ta/id/50292-grozijumi-latvijas-republikas-satversme> [last viewed 31.05.2024].

¹² Dišlers, K. Ievads Latvijas valststiesību zinātnē [Introduction to the Science of Latvian Public Law]. Rīga: A. Gulbis, 1930, p. 110.

¹³ Judgement of the Constitutional Court of the Republic of Latvia of 7 April 2009 in case No. 2008-35-01, para.14. Available: https://www.satv.tiesas.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/09/2008-35_01_ENG.pdf [last viewed 31.05.2024].

¹⁴ Levits, E. Desmit gadi kopš konstitucionālā satricinājuma [Ten years since the constitutional upheaval]. Jurista Vārds, No. 8(1222), 22.02.2022, pp. 8–10.

¹⁵ See more: Druviete, I., Veisbergs, A. The Latvian language in the 21st century. In: Latvia and Latvians. Collection of scholarly articles in 2 volumes. Volume 1. Rīga: Latvian Academy of Sciences, 2018, pp. 257–259.

¹⁶ Judgement of the Supreme Court of the Republic of Latvia of 12 February 2014 in case No. SA-1/2014. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/355724.pdf> [last viewed 31.05.2024].

¹⁷ Osipova, S. Tautas gars, pamatnorma un konstitucionālā identitāte [Spirit of nation, Grundnorm and constitutional identity]. In: Tiesību interpretācija un tiesību jaunrade – kā atrast pareizo līdzsvaru. Latvijas Universitātes 71. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2013, pp. 305–306.

¹⁸ Judgement of the Federal Constitutional Court of 30 June 2009 in case No. 2BvE 2/08. Available: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html [last viewed 31.05.2024].

threats of losing national statehood and sovereignty during the process of European integration. In contrast, for Latvia, the concept of the inviolable core of the *Satversme* was necessary for internal reasons, strengthening the principle of self-defending democracy against potential threats to the principle of a national state (mostly expressed in the Latvian language as the only state language) and the principle of a democratic state based on the rule of law.¹⁹ It also enables overcoming Russian hybrid threats to the Latvian constitutional order.

Supreme Court, as a first of the national highest courts, accepted the concept of the inviolable core of the *Satversme* and applied it in its jurisprudence.²⁰ It was also accepted by constitutional doctrine.²¹ The politicians introduced the concept of the inviolable core of the *Satversme* through constitutional amendments, including a new preamble to the *Satversme*.²²

The Constitutional Court remained sceptical of the concept of the inviolable core of the *Satversme* for quite a long time.²³ It was only in 2015 that the Constitutional Court recognized the concept of constitutional identity.²⁴ Now, the Constitutional Court widely uses the concept of constitutional identity, but it differs in content from what was developed by the Constitutional Law Commission. There are enough differences in details that, for proper application of the concept of constitutional identity, it is necessary to study the relevant jurisprudence of the Constitutional Court. As recently stated by the Constitutional Court,

Each state is characterized by its constitutional identity, which allows differentiating it from other states. The formation of identity, inter alia, constitutional identity, is a long process that depends upon historical circumstances [...] It follows from the above, in turn, that the constitutional identity is not static.

The constitutional identity comprises the state law identity that characterizes a state and the identity of the state order. It provides an answer both to the question what the particular state is like, i.e., reflects the classical constitutive elements of the state recognized in international law – territory, nation and sovereign state power, and to the question what the particular

¹⁹ See more: *Osipova, S.* Latvijas Republikas konstitucionālā identitāte *Satversmes* tiesas spriedumos [The constitutional identity of the Republic of Latvia in the jurisprudence of the Constitutional Court]. *Jurista Vārds*, No. 27(1033), 03.07.2018, pp. 8–13.

²⁰ For example: Judgement of the Supreme Court of the Republic of Latvia of 30 April 2013, in case No. SKA-172/2013. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/127853.pdf> [last viewed 31.05.2024].

²¹ For example: *Balodis, R.* Latvijas Republikas *Satversmes* ievads [The preamble of the *Satversme* of the Republic of Latvia]. In: *Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi.* Rīga: Latvijas Vēstnesis, 2014, pp. 118–135; *Grigore-Bāra, E., Kovaļevska, A., Liepa, L., Levits, E., Mišs, M., Rezevska, D., Rozenvalds, J., Sniedzīte, G.* *Satversmes* 1. pants [Article 1 of the *Satversme*]. In: *Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi.* Rīga: Latvijas Vēstnesis, 2014, pp. 157–160.

²² *Grozījums Latvijas Republikas Satversmē* [Amendment to the *Satversme* of the Republic of Latvia] (19.06.2014). Available: <https://likumi.lv/ta/id/267428-grozijums-latvijas-republikas-satversme> [last viewed 31.05.2024].

²³ Decision of the Constitutional Court of the Republic of Latvia on terminating judicial proceedings in case No. 2012-03-01 of 19 December 2012. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2012/01/2012-03-01_Lemums_izbeigsana_ENG.pdf [last viewed 31.05.2024].

²⁴ Judgement of the Constitutional Court of the Republic of Latvia of 2 July 2015, in case No. 2015-01-01, para. 15.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/01/2015-01-01_Spriedums_ENG.pdf [last viewed 31.05.2024].

state order is like. In reflecting the territory of the state, the nation and the state power in the constitution, such extra-legal factors as history, politics, national, cultural and other factors that identity the respective state are taken into account. Whereas the identity of the particular state order is determined by the general overarching legal principles that characterize this order of the state. Hence, constitutional identity is a broad phenomenon, deep as to its content, consisting of elements that are different as to their nature, of which only a part are generally binding legal norms. Such are, for instance, the overarching principles of democracy, rule of law, nation state and socially responsible state that determine the identity of Latvia's order of the state. Whereas the references included in the constitution to, inter alia, the history of the state and the nation, traditions, circumstances in which the state was established, purposes of the state and other elements, which, from the perspective of constitutional law, help to recognize the particular state, ascribes a specific meaning to it, characterize it, are elements of the state's identity on which the particular state is founded [...] These elements comprise both references to the legal principles of the particular state and to values which determined the path in which the constitutional identity of this state evolved; however, per se, these are not generally binding legal norms.²⁵

2. Constitutional identity in the jurisprudence of the national courts

The concretization of constitutional identity is contained in several judgements of the Constitutional Court and the Supreme Court. Most often, the Constitutional Court and the Supreme Court has applied the concept of constitutional identity in cases affecting the role and functions of the Latvian language as the only state language in society, especially considering the need to overcome the consequences of the occupation, as well as the challenges caused by globalization to the use of the state language.

The Constitutional Court in its judgement of 23 April 2019 assessed the compliance of several legal norms, which deal with the proportion of the use of the national language and the minority language in the learning of the curriculum at the primary education level and the transition to studies in the national language at the secondary education level, with the *Satversme*. In the judgement, the Constitutional Court concluded, among other things, 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.”²⁶

On the other hand, in the judgement of 15 February 2024 the Constitutional Court evaluated the norm of the transitional provisions of the Immigration Law, according to which changes were made regarding permanent residence permits for Russian citizens, including requiring a certain level of knowledge of the national language. In this case, the Constitutional Court emphasized:

²⁵ Judgement of the Constitutional Court of the Republic of Latvia of 4 June 2021, in case No. 2020-39-02, para. 14.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/08/2020-39-02_Judgement.pdf [last viewed 31.05.2024].

²⁶ Judgement of the Constitutional Court of the Republic of Latvia in case No. 2018-12-01 of 23 April 2019, para. 24.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/07/2018-12-01-12.-Saeimas-dep_latvie%C5%A1u-valoda-valsts-skol%C4%81s_ENG.pdf [last viewed 03.06.2024].

...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.²⁷

Similarly, the Supreme Court held that “language is one of the central elements forming constitutional identity [...]. The value of the Latvian language as the state language is emphasized in the preamble to the *Satversme*. [...] Thus, the language is established as the foundation of the state and a symbol of the state, i.e., a constitutional value, with the highest level of legal protection.”²⁸

In a number of rulings, the Constitutional Court has also developed other elements forming Latvia's constitutional identity. The Constitutional Court in its judgement of 2 July 2015 assessed whether the legal norm, which determines the penalty for not placing the Latvian national flag on residential buildings belonging to natural persons, complies with the Constitution. The Constitutional Court concluded that “the days determined by the *Saeima*, on which the Latvian national flag should be placed on residential buildings belonging to individuals, mark particularly important historical events for the creation and existence of the Latvian state. Thus, the national flag of Latvia as a national symbol is an integral element of the constitutional and international identity of the Latvian state.”²⁹ On the other hand, in the decision of 18 February 2022, the Constitutional Court has indicated the entirety of Latvian citizens as one of the constituent elements of the Latvian state, which forms the legal identity of the Latvian state.³⁰ Likewise, the Supreme Court stipulated the principle

²⁷ Judgement of the Constitutional Court of the Republic of Latvia in case No. 2023-04-0106 of 15 February 2024, para. 18.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2023/03/2023-04-0106_Spriedums.pdf [last viewed 06.06.2024].

²⁸ Judgement of the Supreme Court of 22 March 2019, in case No. SKA-232/2019, para. 12. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/378561.pdf> [last viewed 31.05.2024.]

²⁹ Judgement of the Constitutional Court of the Republic of Latvia in case No. 2015-01-01 of 2 July 2015, para. 15.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/01/2015-01-01_Spriedums_ENG.pdf [last viewed 06.06.2024].

³⁰ Decision on terminating legal proceedings of the Constitutional Court of the Republic of Latvia in case No. 2021-10-03 of 18 February 2022, para. 14.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/03/2021-10-03_lemums_par_tiesvedibas_izbeigšanu.pdf [last viewed 06.06.2024].

of state continuity and protection of the entirety of the Latvian citizens as elements of the constitutional identity. The Supreme Court held, that “the circle of citizens must not be manipulated. First, it must retain its identity, as it is an essential part of the state’s constitutional identity. In principle, this can only be ensured through individual naturalization, where the degree of integration of the candidate into the existing circle of citizens, their loyalty to the Latvian state, and their personal desire to belong to the Latvian nation as a citizen are evaluated.”³¹

Finally, in the judgement of 4 June 2021, in which the Constitutional Court assessed the compliance of the Council of Europe Convention on preventing and combating violence against women and domestic violence with several constitutional norms, the court stated: “Both Christian values and the postulate that the family is the basis of a cohesive society are among the constituent elements forming the constitutional identity of Latvia that help to identify the state of Latvia.”³²

The aforementioned elements of constitutional identity have been developed by the Constitutional Court in its jurisprudence to date. However, this does not mean that they are exhaustive. For example, at the Constitutional Court hearing of case No. 2022-45-01, in which the Constitutional Court evaluated the norms that determine the acquisition of education in private educational institutions only in the state language, the applicant’s representative stated that respect for minorities is also part of Latvia’s constitutional identity.³³ Therefore, in the future, the Constitutional Court may need to provide arguments as to whether and which other elements form the constitutional identity of the Latvian state.

The Supreme Court also recognized that democracy, as a fundamental state value, is part of the constitutional identity of Latvia.³⁴ Similarly, the Supreme Court specified the principle of self-defending democracy as an element of constitutional identity. The Supreme Court stated: “According to the basic norm reflected in Article 1 of the *Satversme*, in conjunction with Article 3, Latvia exists in a certain territory as an independent democratic state. [...] The preamble to the *Satversme* reveals the meaning and purpose of the establishment of the Latvian state and provides a clear indication of the integral elements of Latvia’s constitutional identity. [...] The state of Latvia was and is needed so that the Latvian nation living there could democratically self-determine and live in their national state (instead of existing as a minority in Russia). This goal is the basis of the identity acquired and embodied by the state of Latvia created by the Latvian nation. [...] No one – either the nation, or state institutions, or an individual person – may use their rights contained in the *Satversme* for the purpose of destroying the Latvian state (its identity) or its democratic system. The constitutional identity of the Latvian state, chosen by the Latvian nation and included in the core of the *Satversme*, must not be amended (and thus destroyed)

³¹ Judgement of the Supreme Court of the Republic of Latvia of 12 February 2014, in case No. SA-1/2014, para. 27. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/355724.pdf> [last viewed 31.05.2024].

³² Judgement of the Constitutional Court of the Republic of Latvia in case No. 2020-39-02 of 4 June 2021, para. 14.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/08/2020-39-02_Judgement.pdf [last viewed 06.06.2024].

³³ Information about the case No. 2022-45-01. Available: [https://www.satv.tiesa.gov.lv/cases/?search\[number\]=2022-45-01](https://www.satv.tiesa.gov.lv/cases/?search[number]=2022-45-01) [last viewed 06.06.2024].

³⁴ Judgement of the Supreme Court of the Republic of Latvia of 30 April 2013 in case No. SKA-172/2013, para. 21. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/127853.pdf> [last viewed 31.05.2024].

even in a legal and legitimate way or procedure.”³⁵ Likewise, the Supreme Court has highlighted and strengthened the principle of human dignity as an essential element of Latvia’s constitutional identity. The Supreme Court stated: “The constitutional value of Latvia as an independent and democratic state based on the principle of rule of law is human dignity. The value of every individual is the essence of fundamental rights. Human dignity characterizes the person as the highest value of a democratic state based on the principle of rule of law. [...] It follows from the principle of human dignity that every person is a value. In addition, the principle of human dignity requires recognition of the oneness of all human beings, because human dignity is inherent in every human being, regardless of any conditions.”³⁶

3. Constitutional identity in dialogue with the European Court of Human Rights

The concept of national constitutional identity has traditionally been used in the discourse on the supremacy of European Union law in the relations between the Court of Justice of the European Union and constitutional courts.³⁷ It goes without saying, because the Article 4(2) Treaty on European Union reads, as follows: “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.”³⁸ For example, in the case of *Cilēvičs v. Latvia*, the Court of Justice of the European Union entered into a dialogue with the Constitutional Court of Latvia, concluding that the national language is part of the country’s constitutional identity. At the same time, the Court of Justice has made it clear that constitutional identity is a concept which is essential not only for Member States, but it is a fundamental pillar of the European Union. Therefore, the constitutional identities of Member States may not be manipulated in such a way that turns into a violation of the constitutional identity of the European Union. In its decision about the rule-of-law conditionality mechanism concerning Hungary and Poland the Court defined the constitutional identity of the EU, as follows: “The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.”³⁹

The text of the Convention does not *expressis verbis* refer to the national constitutional identity of member-states. The drafters of the Convention rather focused on the shared values of Member States. As stated in the Preamble: “Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to

³⁵ Judgement of the Supreme Court of the Republic of Latvia of 31 May 2019 in case No. SKA-238/2019, para. 10. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/384111.pdf> [last viewed 31.05.2024].

³⁶ Judgement of the Supreme Court of the Republic of Latvia of 10 December 2021 in case No. SKA-[B1]. Available: <https://www.at.gov.lv/downloadlawfile/8243> [last viewed 31.05.2024].

³⁷ *Breuer, M.* (ed.). *Principled Resistance to ECtHR Judgments: A New Paradigm?* Berlin: Springer, 2019.

³⁸ Treaty on European Union OV C 202, 7.6.2016, pp. 0016–0045. Available: <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html> [last viewed 06.06.2024].

³⁹ Judgement of 16 February 2022 of the Court of Justice of the European Union in case *Hungary v. Parliament and Council*, No. C-156/21, para. 127. Available: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=254061&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9604709> [last viewed 06.06.2024].

take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.⁴⁰ The European Court of Human Rights has emphasised the role of the Convention as a “constitutional instrument of European public order.”⁴¹ Presumption that Convention reflects the common values and European heritage and the European Court of Human Rights is the guardian of European identity and constitutional values is widely acknowledged. There are a number of arguments in the legal doctrine supporting this argument. First, all member states of the Council of Europe have recognized the jurisdiction of the European Court of Human Rights, giving the right to every citizen of a member state to appeal to the European Court of Human Rights. Second, the European Convention on Human Rights is incorporated into the legal system of most member states, sometimes even with a rank comparable to the constitution. Thirdly, the European Convention on Human Rights is used on a daily basis by national courts. Finally, the European Court of Human Rights evaluates the evolution of law in all 46 member states and, based on this, decides on the extension of the scope of the protection of some human rights.⁴²

However, the discourse that the Convention and the European Court of Human Rights should be equated with constitutional courts was expressed ten years ago. As the former president of the European Court of Human Rights, Róbert Spanó, has concluded, today we are increasingly living in an era where countries do not want international institutions, including the European Court of Human Rights or the Court of Justice of the European Union, to be able to decide on their internal affairs. Therefore, not only politicians in their rhetoric, but also national supreme courts and constitutional courts increasingly refer to national constitutional identity in their decisions in order to justify deviations from the case-law of the European Court of Human Rights and limitations of human rights.

The idea that the norms of the constitution or the values contained in the constitution can be a basis for non-implementation of the rulings of the European Court of Human Rights is not new. Already in 2019, the German legal scholar Martin Breuer spoke about principled resistance to the judgements of the European Court of Human Rights – that is, situations in which the non-execution of court judgements is based not on political considerations, but on the rulings of the constitutional or supreme courts, which prevent the legislator, even if the legislator would like to do so, to comply with the ruling of the European Court of Human Rights.⁴³

The use of national constitutional identity as an argument to challenge the findings of the European Court of Human Rights was first used by the German Federal Constitutional Court after the judgement in case *Gorgulu v. Germany*.⁴⁴ While the German Federal Constitutional Court only expressed the theoretical possibility

⁴⁰ European Convention on Human Rights, Rome, 4.XI.1950, preamble. Available: https://www.echr.coe.int/documents/d/echr/convention_ENG [last viewed 06.06.2024].

⁴¹ See, for example, judgement of 13 February 2020 of the European Court of Human Rights in case *N.D. and N.T. v. Spain* [GC], No. 8675/15 and 8697/15, para. 110. Available: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%222001-201353%22%5D%7D> [last viewed 06.06.2024].

⁴² See, for example, the judgement of 13 July 2021 of the European Court of Human Rights in case *Fedotova and others v. Russia* [GC], No. 40792/10. Available: <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2240792/10%22%5D%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%5D%2C%22itemid%22:%5B%222001-222750%22%5D%7D> [last viewed 06.06.2024].

⁴³ *Breuer, M.* (ed.). *Principled Resistance*.

⁴⁴ Judgement of 26 February 2004 of the European Court of Human Rights in case *Gorgulu v. Germany*, No. 74969/01, Available: <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2274969/01%22%5D%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%5D%2C%22itemid%22:%5B%222001-61646%22%5D%7D> [last viewed 06.06.2024].

that national constitutional identity might create an obstacle for the implementation of the European Court of Human Rights judgement, few years later Russian Constitutional Court applied this theory in practice in a number of cases.⁴⁵ What is more, Russian Parliament adopted a law which precluded execution of those European Court of Human Rights judgements that are contrary to the Constitution of Russia. Another example is a Polish Constitutional Court which has declared that certain European Court of Human Rights judgements cannot be executed due to being contrary to the Constitution of Poland.⁴⁶

Can national constitutional identity be an obstacle to the execution of European Court of Human Rights judgements? According to international public law, namely, Article 27 of the Vienna Convention on the Law of International Treaties,⁴⁷ national law cannot justify a country's failure to fulfil its international obligations. Moreover, national judges, including judges of the Constitutional Courts bear the primary responsibility for the application of the European Convention on Human Rights in light of the principle of the subsidiarity. At the same time, the issue is not as simple as it might look. To rephrase Martin Beuer one cannot change "constitutional identity" like changing clothes.⁴⁸ Many constitutional courts see as their primary responsibility to safeguard constitution and constitutional identity of the state. Due to common constitutional traditions of member states and special status of the Convention in legal system of many Member States the possibility of conflict between the Constitution of state and Convention is rare. Moreover, not every conflict with the Constitution will concern the constitutional identity of Member State. However, if there is a conflict between the European Court of Human Rights judgement and constitutional identity, there is a serious likelihood that European Court of Human Rights judgement will not be implemented. This calls into question the very system of Convention supervision. Therefore, as Andreas Paulus, former judge of the German Federal Constitutional Court, has emphasized, the concept of constitutional identity must be applied very carefully. The German Federal Constitutional Court, which created this concept, has so far never applied it to the European Court of Human Rights.

The solutions to avoid a deep disagreement between the national courts and European Court of Human Rights on the protection of human rights are not simple but might lie in the mutual respect and constructive dialogue between the European Court of Human Rights and national courts. It can be debated whether the tools for mutual dialogue between courts are sufficient. Thus, for example, Professor Joseph Weiler has expressed the idea of the involvement of national constitutional judges in the sessions of the European Court of Human Rights Grand Chamber in cases where

⁴⁵ See, for instance, the judgement of 4 July 2013 of the European Court of Human Rights in case *Anchugov and Gladkov v. Russia*, No. 11157/04 and 15162/05. Available: <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2211157%2F04%22%2C%2215162%2F05%22%5D%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%5D%2C%22itemid%22:%5B%22001-122260%22%5D%7D>, and the judgement of 31 July 2014 of the European Court of Human Rights in case *Neftyanaya Kompaniya Yukos v Russia* [GC], No. 14902/04. Available: <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2214902%2F04%22%5D%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%5D%2C%22itemid%22:%5B%22001-145730%22%5D%7D> [last viewed 06.06.2024].

⁴⁶ Judgement of The Polish Constitutional Tribunal in case No. K 6/21 of 24 November 2021. Available: <https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosc-i-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny> [last viewed 06.06.2024].

⁴⁷ Vienna Convention on the Law of International Treaties. Available: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [last viewed 06.06.2024].

⁴⁸ *Breuer, M.* (ed.). *Principled Resistance*.

questions affecting the constitutional identity of one or more countries have to be decided. Protocol 16 of the Convention provides further opportunities for dialogue between the European Court of Human Rights and national higher courts. It provides for the possibility for the national court to ask the European Court of Human Rights to provide advisory opinions on fundamental issues regarding the interpretation or application of the rights and freedoms established in the Convention or its protocols.

At the same time a number of ECtHR recent judgements against Latvia reveal the openness of the European Court of Human Rights to engage in dialogue with reasoning of the national constitutional court. In 2009, in the case *Andrejeva pret Latviju*⁴⁹, the Grand Chamber found a discrimination of the applicant – a person belonging to the category of Latvian non-citizens – in that the calculation of her pensione did not include years of employment in the USSR in the factory registered outside the territory of Latvia, whereas the pension of a Latvian national would include such employment. A few years later, the Latvian Constitutional court faced constitutional complaint submitted by the Mr. Savickis, who was in a relatively similar position. The Constitutional court analysed judgement in *Andrejeva* case and concluded that in addition to the protection of the economic system of the state – the only legitimate aim established in *Andrejeva* case – the restriction of the rights of the applicant serves the protection of constitutional identity of state based in the doctrine of the state continuity. In this judgement, the Constitutional Court stated that, according to the doctrine of state continuity, Latvia is not the inheritor of the rights and obligations of the former USSR, and the Latvian state does not have to undertake other state obligations to provide persons with a pension for the time worked outside the territory of Latvia.⁵⁰ Taking into account this primary legitimate aim of the restriction and broader legal framework, the Constitutional Court concluded that applicant's rights have not been violated.

After the judgement of the Constitutional Court, the Grand Chamber of the European Court of Human Rights passed the judgement in the case of *Savickis and Others v. Latvia*. Also in this case, similar to the case of the applicant in the case *Andrejeva v. Latvia*, the periods when the applicants had worked outside the territory of Latvia were not included in the calculation of pension of the applicants. However, in this case, the European Court of Human Rights changed its jurisprudence and came to the opposite conclusion than in the case *Andrejeva v. Latvia*, admitting that there was no violation of the applicants' rights contained in Article 1 of Protocol 1 of the Convention in conjunction with Article 14 of the Convention. In this judgement, the court referred to the judgement of the Constitutional Court, agreeing with the assessment of the Constitutional Court that Latvia was not obliged to take over the obligations of public law that were established on the territory of Latvia by the Soviet government. Namely, Latvia did not have to assume the obligations of the USSR after the restoration of independence.

Another vivid example of dialogue between the Constitutional Court and the European Court of Human Rights in cases affecting the country's national constitutional identity are the judgements of the European Court of Human Rights

⁴⁹ Judgement of 18 February 2009 of the European Court of Human Rights in case *Andrejeva v. Latvia* [GC], No. 55707/00. Available: <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2255707/00%22%2Ddocumentcollectionid%22:%5B%22GRANDCHAMBER%22%2DCHAMBER%22%2Ditemid%22:%5B%22001-91388%22%5D%7D> [last viewed 06.06.2024].

⁵⁰ Judgement of the Constitutional Court of the Republic of Latvia in case No. 2010-20-0106 of 17 February 2011, paras 11 and 13. Available: https://www.satv.tiesas.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/03/2010-20-0106_Spriedums_ENG.pdf [last viewed 06.06.2024].

constitutional identity is a broad phenomenon and not a static concept. Until now both highest national courts have identified, *inter alia*, the following elements of Latvia's constitutional identity: Latvian as state language, principle of Latvian state continuity and the protection of the entirety of the Latvian citizens, the national flag of Latvia as a national symbol, the family as a basis of a cohesive society, human dignity, and self-defending democracy. However, these elements are not exhaustive and may be expanded in future jurisprudence of both courts.

The emergence of the concept of constitutional identity has raised issues how to reconcile this concept and role of the national highest courts with multi-level governance system in Europe where legal system is affected not only by the national constitutions but also state's international and supra-national obligations. In a legal discourse the arguments have been advanced to oppose national constitutional identity to states' international obligations and use this concept as a ground to challenge the findings of the international courts, including the European Court of Human Rights. However, the interaction between national highest courts and the European Court of Human Rights in several recent cases illustrates that such concerns have been overestimated. Common values and principles between the Latvian legal system and European Convention of Human Rights, careful and *bona fide* use of the concept of constitutional identity by national courts as well as readiness of the European Court of Human Rights to engage with reasoning of the national highest courts and openness to dialogue is a key to mutual reinforcement of both legal systems.

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