

# THE EUROPEAN UNION – FROM AN ECONOMIC UNION TO A UNION BASED ON COMMON VALUES. BUT WHAT ABOUT THE CONSTITUTIONAL IDENTITIES OF THE MEMBER STATES?

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**Book review: COMMON VALUES AND CONSTITUTIONAL IDENTITIES –  
*Can Separate Gears Be Synchronized?* edited by András Zs. Varga and Lilla Berkes,  
CEA Publishing, Miskolc-Budapest, 2023, Studies of the Central European  
Professors' Network – editor-in-chief of the series – János Ede Szilágyi**

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## I. Brief background

The idea of separate gears, of different degrees of integration available to the EU Member States, is not a novelty within the debates regarding the future of the European Union, as it was repeatedly thrown in the area of public scrutiny by various European leaders, like the President of France, Mr. Emmanuel Macron. A coherent description to the way this process would actually work was brought at the end of 2023 by the Report of the Franco-German working group on EU institutional reform<sup>1</sup>.

Concluding that some current member states may prefer looser forms of integration and that not all European states (candidates or not) will be willing or be able to join the EU in the foreseeable future, the Report recommends envisioning the future of European integration as four distinct tiers, each with a different balance of rights and obligations: the *inner circle* (basically the members of the Eurozone and Schengen Area and other member states which choose to participate in various coalitions of the willing on areas like climate, energy, taxation etc.), secondly *the present and future members of the EU*, then a first outer tier, consisting of *the Associate Members*<sup>2</sup> and, finally, *the EPC*<sup>3</sup>. This second outer tier would not include any form of integration with

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<sup>1</sup> Report of the Franco-German Working group on EU institutional reform: *Sailing on High Seas: Reforming and Enlarging the EU for the 21<sup>st</sup> Century*, Paris-Berlin, 18 September, available at: <https://www.auswaertiges-amt.de/blob/2617322/4d0e0010ffcd8c0079e21329bbbb3332/230919-rfaa-deu-fra-bericht-data.pdf>.

<sup>2</sup> The Report mentions the EEA countries, Switzerland and even UK and also the candidates for accession to the European Union. The basic requirement for this group would be “the commitment to comply with the EU’s common principles and values, including democracy and the rule of law”.

<sup>3</sup> The European Political Community (EPC), established in 2022, is a forum for dialogue and cooperation between the European Union and countries in its neighbourhood to address issues of common interest. It reunites 27

binding EU law or specific rule of law requirements and would not allow access to the single market. Instead, it would focus on geopolitical convergence and political cooperation, structured by bilateral agreements with the EU<sup>4</sup>.

According to the Report, the aim of such differentiation, based on separate gears of EU integration, is to provide “unity in diversity”, but the group of experts admits the inherent risk to the cohesion of the European Union, as the downside of such a process of reform of the EU<sup>5</sup>.

In this context, the regional views on how this process of integration should be further performed or if it contradicts or not the limits for the transfer of sovereignty originally assumed by the Treaties are especially important.

The book under review brings such a perspective, based on the opinions of distinguished academics from mainly Central European countries, trying to provide the answer to a fundamental question – can such separate gears be synchronized and how would such a process preserve and respect the constitutional identities of the member states.

## II. General presentation

*“Common Values and Constitutional Identities – Can Separate Gears Be Synchronized?”* is part of the book series *Studies of the Central European Professors’ Network*, which publishes the results of research by members of the aforementioned Network, established in 2021 by the Ferenc Madl Institute of Comparative Law and operated by the Central European Academy of the University of Miskolc.

Edited by professors András Zs. Varga and Lilla Berkes, the book reunites ten studies developed by highly esteemed academics. There is a very well-established balance between traditional members of the European Union (Germany, France, Italy) and newer ones (Hungary, Romania, Poland, Czech Republic, Slovakia and Croatia), between more balanced and more partisan perspectives on the issue under discussion and the general “feeling” of the book is that it creates a real and consistent debate about the relation between the Union and the member states, between the Treaties and the national constitutions and, also, about the foreseeable future of said relationships.

According to the conclusive overview provided by one of the editors<sup>6</sup>, professor *Lilla Berkes*, the book is the result of extensive and wide-ranging research aimed at understanding the constitutional jurisdictional responses of member states to the evolution of European Union law or the EU itself (p. 391). Although “the idea of the

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member states of the EU and 17 other European countries. Details available at: <https://spanish-presidency.consilium.europa.eu/en/news/european-political-community-granada-summit/>.

<sup>4</sup> P. 34-36 of the aforementioned Report.

<sup>5</sup> P.33 of the Report of the Franco-German Working group on EU institutional reform.

<sup>6</sup> Lilla Berkes – Comparative Analysis: The Shells that Embrace Constitutional Identity (p. 391-408).

research was that the concept of constitutional identity emerged in the context of frictions between the EU and the member states in Eastern Europe” (...) it finally ended up showing that “(...) constitutional courts are not hurdles or deadweights of integration, but rather a kind of sentinel that holds up a mirror to the institutions of the EU” (p. 407).

### III. Contents of the reviewed book

The main topics covered by the studies published in this book refer to the following:

Professor *Alex Graser* addresses the matter of Constitutional Identity through the analysis of the jurisprudence of the German Federal Constitutional Court (GFCC) relating to European integration<sup>7</sup>, concluding that the role of the national constitutional court as a central actor in this process is changing and “presumably fading” (p. 13) or, in other words, as the author so eloquently puts it within the analysis of the historical jurisprudence of GFCC, that “barking dogs seldom bite” (p. 18).

French professor *Bertrand Mathieu*, member of the Venice Commission, focuses on the “confrontation” between national constitutional identity and the construction of an “European identity” and the main points of friction between these two types of identity<sup>8</sup>. In an interesting search for a mechanism of conciliation between these two identities, the author identifies as the most relevant methods – redefining the articulation of national and European competences, proper enforcement of the principle of subsidiarity and “moving from an obligation of submission to an obligation of constructive dialogue” (p. 73-75).

In regard to the situation of Italy, professor *Giacinto Della Cananea* analyzes the essential facts concerning the relationship between the Italian legal order and that of the European Union and looks into the effect of the emergence of political movements and parties characterized by skeptical views about European integration on the role of Italy within the Union<sup>9</sup>.

From the Croatian perspective<sup>10</sup>, brought by professor *Petar Bačić*, the national constitutional courts and the regular courts should “take an active (and not just a passive) dialogic approach towards European institutions” (p. 130). Such transnational dialogue “must be realized based on mutual partnership and respect” both to the national constitution and to the “regulatory authority” of the European Union (p. 131).

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<sup>7</sup> Alex Graser – The Dilemma of the Presumptuous Watchdog: Constitutional Identity in the Jurisprudence of the German Federal Constitutional Court (p. 13-50).

<sup>8</sup> Bertrand Mathieu – National Constitutional Identity Confronted with the Constraints of European Union Law (p. 51-78).

<sup>9</sup> Giacinto Della Cananea – Italy and the European Union: A Legal Analysis (p. 79-104).

<sup>10</sup> Petar Bačić – On Croatian Constitutional Identity and European Integration (p. 105-134).

Making a thorough analysis of the constitutional identity of the Czech Republic, professor *Michal Petr* presents the jurisprudence of the Czech Constitutional Court and the corresponding academic discourse<sup>11</sup>. Even though there are no provisions on the effects of EU Law in the Czech legal order, the Constitutional Court adopted the principle of primacy of EU Law “as long as it does not infringe on the material core of the Constitution, (...) (therefore) imposing on itself the role of *ultima ratio* supervisor regarding whether the EU does not exercise competences that had not been transferred on it” (p. 159). However, the principle of primacy has never been questioned in practice and the Czech Constitutional Court has always found *the European values*, as enshrined in Article 2 of the TEU *and national identity*, protected by Article 4, as being compatible (p. 160).

The complex and at times complicated relationship between the Court of Justice of the European Union (ECJ) and the Constitutional Court of Hungary is presented by the two editors – professors András Zs. Varga and Lilla Berkes<sup>12</sup>. The two authors find that “with the growing prevalence of EU Law, the (apparent?) protection and constitutional identities has been countered. (...) A successful European integration policy can only be based on a balanced relationship between national and European identities and due consideration of the requirements of these two identities. Consequently, any further extension of the competences in favor of the EU should be considered within a constitutional framework and in specific areas” (p. 217-218).

An even more complicated relationship of this sort is the one involving Poland and professor *Aleksander Stepkowski*'s paper<sup>13</sup> aims at describing, “in a synthetic but still systematic way, the impact that EU has for Polish legal system in general and constitutional order in particular” (p. 225). In the opinion of the author „the delegation of certain powers to the EU pursuant to Article 90 of the Constitution has profoundly affected the domestic balance of power between the three branches. This process has at least two different dimensions, although one common denominator – the decline of political power as possessed by national legislature”. The author also emphasizes the position of the national judiciary, which, due to its close cooperation with the CJEU, „considers itself to be less and less bound by the statutory law as provided by the Parliament”, which results, in the author's opinion, “in practical deprivation of the legislative power of its inherent competences, that were never conferred upon the EU” (p. 266-267).

A broad and well-balanced paper is dedicated by professor *Tudorel Toader* and professor *Marieta Safta* to the issue of Romanian constitutional identity, viewed

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<sup>11</sup> Michal Petr – Constitutional Identity of the Czech Republic (p. 135-163).

<sup>12</sup> András Zs. Varga, Lilla Berkes – Constitutional Identity and Relations Between the European Union Law and the Hungarian Law (p. 165-224).

<sup>13</sup> Aleksander Stepkowski – Polish Constitutional Identity and the EU Challenges: European Law as a Tool for the Redrafting of the Polish Constitution (p. 225-270).

through the prism of the equation between EU Law and Romanian Law<sup>14</sup>. The article examines the constitutional basis of the incorporation of EU primary and secondary sources of law in the Romanian legal system, the method used for this process and the evolution of the jurisprudence of the Constitutional Court of Romania **both** in defence of national law and EU Law. The authors also present the development of the concept of the rule of law and the concept of constitutional identity in the Romanian doctrine and jurisprudence (p. 271). One of the strong points of the article is that all perspectives, both in favor of full primacy of EU Law or in favor of national limits or safeguards are taken into consideration and are „clinically” presented and further examined, with a special regard not only to the jurisprudence of the Constitutional Court of Romania, but also to the way these decisions were received and commented on by law scholars.

The main conclusion of the article is that dialogue of the judges (in all of its various forms – preliminary references, bilateral and multilateral meetings, international congresses and conferences etc.) is safe to be considered the way to establish the meaning of the constitutional identity and a “key” of a harmonious European constitutional order (pp. 335-345).

Finding that “constitutional dialogue (...) is well developed in Romania” (p.345), the authors also observe that the issue of authority relationships (between EU and national authorities and courts) remained latent and may sometimes cause some “turbulence”.

Also, one of the most interesting conclusions is that need for dialogue “also exists horizontally, at the national level, in the relationships between the constitutional courts and courts of law”, which is proven, for example, by the preliminary references addressed to the CJEU, regarding the effects of the CCR’s decisions (ibid. p. 345).

Finally, professor *Alena Krunková* examines the identity of the Slovak Constitution<sup>15</sup>, emphasizing that this concept “is a variable that determines the direction of the State” (p.353). The first part of the article puts the concept of constitutional identity versus national identity. In the second part, the author takes a closer look to the impact of constitutional revisions, examining several constitutional amendments and also the relationship between EU Law and Slovak national Law. On this last issue, the author considers the aforementioned relationship as “undoubtedly bidirectional” and that “EU Law will prevail in Slovakia in most cases, (...) (even though) a national legal order could carve out certain inviolable zones (...) that protect the fundamental political decision of the national sovereign(ty)” (p. 386).

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<sup>14</sup> Tudorel Toader, Marieta Safta – Constitutional Identity and Relations between EU Law and Romanian Law (p. 271-352).

<sup>15</sup> Alena Krunková – Constitutional Identity and Relationship between European Union Law and National Law of the Slovak Republic (p. 353-390).

## IV. Conclusions

In my opinion, although the perspectives presented in the book are undoubtedly different and refer to each single national experience and some of us may even find several of the expressed opinions as maybe too partisan, the articles selected by the editors provide a coherent and valuable analysis on the functioning of the Union at a systemic level and the way in which EU Law is integrated in the national legal systems, one of the elements of originality being that, for this once, things are viewed not through the prism of EU institutions and their respective interests, but instead through the eyes of national stakeholders, the member states.

I strongly think that may be little doubt that the further integration of the EU should be the result of “soft power” rather than “hard power”, in other words that it should be the result of cooperation rather than conformation, at least because history have shown that best practices and right solutions are easier achieved if they are the result of a common effort. As a logical consequence, dialogue and empathy for the opinions of others is the right path to follow and this book provides an excellent basis for such a well-needed scientific, juridical and judicial dialogue.