Vladan Petrov

EUROPEAN VERSUS NATIONAL CONSTITUTIONAL IDENTITY IN THE REPUBLIC OF SERBIA

A CONCURRENCE OR UNITY?

CBPE CENTRUM BADAŃ POLITYKI EUROPEJSKIEJ

Vladan Petrov

European Versus National Constitutional Identity in the Republic of Serbia – a Concurrence or Unity?

INTRODUCTION

The concept of the constitutional identity created at the end of the 20th century originates from constitutional doctrine and jurisprudence of referent European countries (Germany, Italy, and France). However, it has remained insufficiently defined and blurry up until today. Is this the reason why we should have a questioning approach to it? Does it even have a purpose? Is it some normative construct? Maybe a doctrinal fiction? An unsuccessful attempt to differently name some "outdated" state sovereignty concept? Does it represent an implicit recognition that the EU can no longer be a real political community, supranational union or at least "a more perfect union"? Or is it the contrary – finding a new way to establish balance between the EU goals, principles and values (particularly defined in Art. 2, 4 and 6 of the European Union Treaty from 2009) on one hand, and political, legal and cultural peculiarities of member states on the other?

There are too many questions to be given a quite complete answer in this kind of paperwork. It might be inconvenient for the author coming from a non-EU country, a country that has been on the so-called European path for a relatively long time and that seemingly will not become a member state any time soon, to try to answer these questions.

Firstly, the author will give his point of view on the concept of the constitutional identity. Then, he will further explain why he believes the dilemma between European and national constitutional identity is false. He will also look into the role of the Venice Commission being the guardian of European constitutional identity in the process of reforming the national constitution [or 'national constitutions' if plural.]. Lastly, he will discuss several controversial solutions in the Constitution of Serbia which are contrary to both European and national

identity. The author adopts viewpoints that do not identify European, but national constitutional identity as a source, while perceiving European values and principles, represented also by the EU to a great extent, as a "framework" or "preferable environment" to preserve national features. He shares the doctrinal approach that supports harmony between European and national principles and values. The main idea is not dualism of value orders, especially not just a simple supremacy of the European system over national ones, but unity, or to be more precise - reaffirmation and fulfillment of the old formula "unity in diversity" under the contemporary circumstances.

BRIEFLY ABOUT THE CONCEPT OF CONSTITUTIONAL IDENTITY

At the end of the 20th century, constitutional identity was being written about more in political philosophy than in constitutional law or legal theory in general. It seems that the interest for the constitutional identity originates from two sources. The first one is the European integration that is an attempt to define the European Union as a community that is more than a loose (political) union of the member states, and less than a state itself. Writings about European constitution and European constitutional identity are numerous and seductive to a certain extent. It seemed as if some new questions arose that the traditional theory of the constitutional law could not answer (redefining the sovereignty concept and transferring jurisdiction from member states to the EU institutions, creating the European constitutional law, building a particular type of European federalism, etc.). It is where the particular contradiction between European and national constitutional identity comes from. Both needed to be reconciled because the greatest constitutional democracies did not want to renounce the "autobiographical" features of their constitutionality for the sake of the "chimera" of a supranational creation of the member states. What they were not ready for, they demanded from the new member states, which belonged to the former real-socialist bloc. Another "source" of the concept of constitutional identity lies here. In most of the cases, former real-socialist countries had a new task of reconciling the European and national constitutional identity when enacting new constitutions. They did it more in favor of "European" identity, and to the detriment of the national identity. In the last couple of years, some of the countries have been waking up to this fact (Poland, Hungary).

The concept of constitutional identity is extremely indeterminate, vague, and sometimes confusing. When reading about constitutional identity, it gives us the impression that not even

the best experts on this concept are entirely sure about what is the "minimum" that it has to encompass.[1]

The vagueness of the concept is by the rule its weakness.[2] The concept that is clearly and precisely defined has higher chances to succeed in practice. Otherwise, it stays on the level of abstract theoretical reasoning. However, in law and politics, the vagueness of terms and concepts sometimes serves a purpose. Here we will look at two examples. One is about constitutional customs and (or) constitutional conventions, while the other is about constitutional principles. Both types of rules are known to be part of what is called an "uncodified constitutional law in theory." What exactly are these rules?; Where is their source?; How are they formulated?; Is their violation resulting in some legal or similar sanctions? Those are all questions that cannot be given reliable answers. Nevertheless, it does not question their meaning and role in the life of the constitutional order. The constitutional customs in stable constitutional democracies allow the codified constitution to function better and last, to "live" longer, and not be formally changed too often. Certainly, these rules apply also to interpreting the constitution. Constitutional principles give basic criteria and guidelines for interpreting the constitution, for better and correct understanding the constitutional norms that are general and insufficiently clear, sometimes even mutually contradictory. Therefore, the vagueness of the constitutional identity concept does not need to be endangering the interpretation and application of the constitution but can contribute to constitutional stability as one of the core values of a modern constitutional democracy.[3]

The fact that the constitutional identity concept is vague should not prevent the doctrinal reflection on this topic. This should be the task of the constitutional jurisprudence because constitutional principles and constitutional values are a part of constitutional identity content and are defined and developed best through the explanations of the constitutional court decisions. Concerning this, some of the questions that should be answered would be: Is the constitutional identity more than just a norm that defines the carrier of the sovereignty (people, nation, citizens)?; Can constitutional identity be found only in constitutional

[1]See: M. Rosenfeld, "Constitutional Identity", [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2012, pp. 756–757.
[2]See more: F. Fabbrini, A. Sajó, The *Dangers of Constitutional Identity*, "European Law Journal" 2019, vol. 25, pp. 457–473. https://doi.org./10.1111/eulj.12332.

[3] See: Venice Commission, *Compilation of Venice Commission Opinions concerning Constitutional Provisions for Amending the Constitution*, CDL-PI(2015)023, http://www.venice.coe.int./webforms/documents/?pdf=CDL-PI(2015)023-e [access date: 20/03/2021].

tradition; is the constitutional identity composed of all or only basic constitutional principles and values?; If the latter, then what is a "minimum of the identity"?; When and why do changes to constitutional identity happen and what needs to be changed so that we can discuss the new identity?; If the "autobiographical" part is the essential part of the identity of every constitution, is it even possible to talk about European constitutional identity when "Europe" does not have a constitution, etc.? Each one of these questions deserves to be given special attention, so they will not be discussed in detail here.

NATIONAL AND (OR) EUROPEAN CONSTITUTIONAL IDENTITY

National constitutional identity consists of constitutional principles and values that are the foundation and essence of every constitution. Since the European Union does not have a constitution of its own, at least not in the strict sense, the term "European constitutional identity" cannot be related to this union. The dualism of constitutional identities, as well as their potential opposition and need for adjustments, could exist only if we fully accept that besides the national constitutional identity, there is also European constitutional identity. However, this is absolutely disputable and hard to prove, and so it reminds us of the old quote of Lord Palmerston who said in the mid-19th century in the British Parliament that he was ready to give a great reward to the person who would bring him a copy of the English Constitution. Actually, it is not just about the fact that a formal document named "European Constitution" does not exist, not even an institutional structure and a clear enough division of competencies between European and national authority levels. It is about principles and values that are not originally a legacy of the European Union. They derive from European legal and political culture that is what is called "European constitutional heritage." National constitutional identity is "the other side of the same coin." It was created in the jurisprudence of European Constitutional Courts, firstly in stronger member states (Germany, France, Italy, Spain), and then in younger member states that have a firmly grounded historical and cultural identity (Poland, Hungary). At first site, it might seem as if its nature is "defensive" because its goal is to maintain the "broken" sovereignty as much as possible while, at the same time, protecting the national dignity. Nevertheless, its purpose is different. Constitutional identity is the "heart" of the constitution, its essence, which cannot be changed or is hard to change.[4] It

[4]"Constitutions entrench the principles of the political and societal order and shield them from rapidly changing majorities and situations. Rather, they provide the lasting structures and guidelines under which an adaptation of the legal system to new challenges or altered preferences can take place."D. Grimm, *The Basic Law at 60 – Identity and Change*, "German Law Journal" 2010, vol. 11(1), p. 33.

originally belongs to the nation if we consider that anti-identity question in the 19th century, even the first half of the 20th century, was about fighting for national liberation or defining national sovereignty. However, constitutional identity is certainly an amalgam of the highest achievements of European legal civilization and of the most valuable national features. This concept should reflect unity of common principles and values, and not a 'border stone' between original national and imposed European principles and values. When we look at it from the EU point of view, then it is based on exactly those European principles and values exposed in the first articles of the European Union Treaty. It is written in the Preamble: "… Resolved to mark a new stage in the process of European integration undertaken with the establishment of the European Communities, drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable right of the human person, freedom, democracy, equality and the rule of law (…) confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedom and of the rule of law (…) desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions (…) thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world etc." The Preamble evidently promotes a balance between "universalism" (common European values and principles) and "particularism" (the history, the culture and traditions of member states) in the system which needs more integration, more participation and democracy, more effectiveness and, consequently, more unity.[5] This main intention is further developed in "Common provisions" of TEU: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. (Article 1, paragraph 2). The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail (Article 2). In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States (Article 4, paragraph 1). The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental

[5]See about the "philosophy of balance" between European and national values and principles: A. Zs. Varga, *Rule of Law and Constitutional Identities: Concurring or Complementary European Values*, [in:] *Venice Commission. Thirty-Year Quest for Democracy through Law 1990–2020*, eds. S. Granata-Menghini, Z. Caga Tanyar, Lund 2020, pp. 703–716.

structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State (paragraph 2). Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."(underlined *V. P.*).

European identity is formed by the principles and values of the modern European constitutionality such as a state of rights (rule of law), separation of powers, judicial independence, constitutional and international legal guarantees of human rights, etc. Those are, in fact, legacies of great civil revolutions that remained foundations of a modern national state even in a modified framework. If we can talk about a touchstone of European identity, then it would be the principle of the "unity in diversity." In other words, it means that European standards and European values, of which so much is said, are not given solutions in advance, nor can we discuss them as abstract categories not taking into account the legal and political culture of a political community. Therefore, for example, judicial independence is an indisputable value that is being accomplished by different constitutional means and mechanisms but their effectiveness depends on how a constitution-maker and law-maker managed to find a good measure for the given society. After all, this is nothing new. If it had been different, it would create a paradoxical situation in which each European country that shares a European constitutional identity must have the same constitutional solutions. The richness and the experience of the life of a constitution would be reduced to some European constitutional "form" that should be simply "filled out."

Let us develop this statement further on the mentioned example of judicial independence. Judicial independence is primarily defined as the absence of the influences of political authorities and any kind of politics on exercising judiciary. Judges judge based on the objective laws that nowadays are not just a law code. They also include constitution and international legal norms – ratified international treaties, even generally accepted principles of international law. Even though it is indisputable that one of the basic institutional guarantees of judicial independence is the method of judicial selection, still there is no European model to fit all.[6] There is not even an acceptable model. There are certain guidelines, benchmarks, outlines that should be taken into consideration in constitutional engineering. The diversity

[6]Venice Commission, *Report on the Independence of the Judicial System Part I: the Independence of Judges,* CDL-AD(2010)004, or. Engl., https://rm.coe.int/1680700a63, pp. 6–8.

between countries that were affirmed as the states of rights is regulated in such a way that in the majority of them the judicial council does not exist even though in theory it is considered to be the most appropriate solution. However, if the judicial council is entitled to elect judges, then their composition is very different – in some places, it is mainly composed of judges, in others, the number of representatives of judicial and political authorities is equal, while in some other places the majority are political representatives. Therefore, judicial independence is not guaranteed by the same structure and jurisdiction of the judicial council in two different states, but is guaranteed by the one that suits the legal and political culture of the state the most. Once again we must emphasize. If it had been different, national constitutions would not be needed. A big European constitutional charter would need to be adopted and it would contain principles and solutions applicable to all European countries. In fact, two constitutional charters would be needed – one for the stable (older) democracies and the other for unstable (young democracies). It is needless to waste time on further explanations on how absurd such an idea is.

Hence, there should be no major disagreement between the national and European constitutional identity. National constitutional identity of every European country would actually be European constitutional identity that specific national values and circumstances are "grafted" onto and that determine the state organization (simple or compounded state), forms of government (monarchy or republic), types of government (parliamentary system with a strong or weak head of state), territorial organization (one or more levels of a local government, as well as potential existence of territorial autonomy), etc.

European constitutional identity could be nothing more than just a "picture frame" or a legal framework as defined by the modern legal vocabulary. This legal framework is made of principles and values that we mentioned above, and a picture depends on their "creative evolution" in each country *per se*. There is no disagreement between the first European constitutional identity and national constitutional identity because they both suppose the rule of law. It is provided by different tools and mechanisms. For example, in some states, the rule of law is protected by constitutional judiciary, and in others, only by regular judiciary; in some states, constitutional judiciary is a part of the judiciary system, while in others, it is not; in some, there is a possibility on making a constitutional appeal on the protection of human rights, in others, it doesn't exist, etc.

We can conclude the following. The concept of the constitutional identity jeopardizes the tense division between European and national constitutional identity. This division is not only

artificial but also opposed to the definition of a constitutional identity. If identity is the essence of the constitution, then a state cannot have two essences being two identities. It has only one identity, the one that produces and portrays its political and national being. This being must be expressed through a culture of universal values such as rule of law, separation of powers, judicial independence, as well as tolerance, compromise, balance, etc.

FOLLOWING THE PATH OF THE UNITY OF IDENTITY

Hence, the need to establish harmony between two normative areas, the European and the national one, is just a misconception. The main idea is to have the principle of the unity of identity while respecting differences in a way that those differences (special features) reinforce the unity as long as the unity does not question the differences. The unity of identity is not just a legitimate base for the EU, but it is also a presumption of its survival and functionality. Not having a sufficient and real level of unity in the EU leads to having constant dilemmas regarding its longevity, its legal and political nature, the reason to exist and obvious lack of democratic institutions and decision processes within it. In other words, the EU must rest on decentralized unity of common principles and values, and not on imposed to a certain extent and a centralized principle of (almost) absolute primacy of the EU legislation over national legislation of member states.

Coming from a non-EU member state, Article 1 of the Constitution of Serbia from 2006 supports the thesis on the unity of constitutional identity: “The Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values”. Maybe a constitution-maker was not aware of the overall positive consequences of this kind of constitutional definition of a state. Most probably, referencing to European principles and values was only for declarative reasons. Legally and substantially Serbia is bound to respect European values and principles and make them an integral part of its own constitutional identity. Historical roots of this constitutional identity lay in ‘traces’ of the Declaration of the Rights of Man and of the Citizen from 1789, then in certainly the first written European constitution – the Polish Constitution from 1791, but also in the first Serbian Constitution “Candlemas Constitution” (the “Sretenje Constitution”) from 1835. This constitutional identity contains the modern process of internationalization of the constitutional law, being both legal through a direct application of widely accepted rules of

the international law and affirmed international agreements in the Constitution (Art. 16 of the Constitution), and also factual through a legal and moral duty to respect opinions and suggestions of the Venice Commission. Therefore, European identity is present in the core of the modern Serbia being a constitutional state even though it is not an EU member state. What does it prove if not that constitutional identity is a unity of European and national identity?

It is another thing how much the Constitution of Serbia from 2006 managed to implement this concept into most of its provisions. In this regard, it succeeded in some aspects by expanding jurisdiction of the Constitutional Court and giving it the right to decide on constitutional appeals and in this way become the last national "judicial" level to have a direct communication with the European Court of Human Rights in Strasbourg, while in other aspects it differs from constitutional provisions regarding the so-called partisan imperative mandate or the "trial mandate" of judges elected for the first time for a judicial position that we shall discuss further on.

To conclude, when it comes to the thesis of the unity of constitutional identity, although we are very aware that it is difficult, and sometimes even impossible, to completely "harmonize" the EU law and national laws, we absolutely stand for the principle of unity of European and national constitutional identity. From the point of view of the EU, that unity is reflected in the common system of values and principles, which are not originally European, but are of national origin, or more precisely, they originate from the common European heritage. However, with the evolution from national to legal identity (end of the 19th and the first half of the 20th century), and later in the process of internationalization of constitutional law (first human rights in the second half of the 20th century), they became common European values and principles. From the point of view of the national order, these principles and values remain a "dead letter" if they lose their national legal basis. In this endeavor the key role is not only the written constitutional norm, but also the unwritten constitutional law that is the right that comes from the jurisprudence of European constitutional courts.[7]

Often found in the "gap" between the primacy of European law and the requirement to preserve the dignity of the national legal order, they strive to unite these two into a unity. Thus, for example, the Constitutional Court of Serbia has developed several formulations that show not only the identity of rights guaranteed by the Constitution and the European

[7] See the overview of the newest practice of national constitutional courts as well as European courts: T. Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach*, "German Law Journal" 2020, vol. 21, pp. 106–112.

Convention on Human Rights, but also the obvious efforts of the Constitutional Court not to jeopardize its own constitutional position and role of human rights defender.[8]

"ON THE TRAIL" OF MODERN CONSTITUIONAL IDENTITY OF SERBIA

Sources

Although opponents of the concept of constitutional identity emphasize its vagueness, it seems that certain sources of constitutional identity deserve the right attention such as: 1) national and European constitutional history (national and European constitutional heritage); 2) interpretation of the constitution, and especially of constitutional principles and values by the constitutional court, as well as a 'dialogue' between the constitutional court and supranational courts such as the European Court of Human Rights and the European Court of Justice (for the EU member states); 3) internationalization of constitutional law as a process that especially contributes to the affirmation of the thesis of the unity of identity. The constitutional doctrine can be added (although not everywhere and not equally) as an "additional source" that is a tool for joining the action of all the above factors into a single unity.

Constitutional doctrine – description of foreign models and an uncompleted concept

There are numerous factors that take part in the creation of a national constitutional identity. This is, among other things, a constitutional doctrine. In Serbia, this is not the case for now. Constitutional identity has been written about sporadically and no doubt insufficiently to set a clear direction in theory for the future constitution-maker when building a modern constitutional identity. Serbian authors are familiar with the works of modern world theoreticians of constitutional identity, especially Michel Rosenfeld.[9] However, there was no

[8] For example, "the Constitutional Court finds that in a situation when the judgment is challenged by the constitutional appeal due to the violation of the right to fair trial from Article 32 Paragraph 1 of the Constitution awarding compensation for non-material damage caused by the violation of the right to trial within a reasonable time and determined due to the impossibility to collect a legally-awarded claim from the employer - the debtor that is a company with exclusive or majority of social or public capital, the alleged violation of the guaranteed right must be examined by applying the decisions of the European Court expressed in *Stankovic v. Serbia*. In this regard, in the mentioned Constitutional Court case, the assessment of the awarded amount of compensation for non-material damage is not instantiation of the Constitutional Court, but is a mechanism to ensure that guaranteed rights are interpreted in accordance with European Court as an international institution that oversees their implementation, etc.", Decision Už – 6218/2018.

[9] Particularly these works: J.G. Jacobson, *Constitutional Identity*, Cambridge 2010; M. Rosenfeld, *The Identity of the Constitutional Subject – Selfhood, Citizenship, Culture and Community*, London 2010; idem, *Constitutional*

more than just a description or some attempt to determine who is the constitutional government ("Who are we?") and how a new constitution should be adopted in order for it to exercise its legitimate function.[10] However, this is not enough to determine reliably what the constitutive elements of the modern constitutional identity of Serbia are. Questions that are open: territory and borders (Kosovo and Metohija), political identity (with or without Kosovo, European path for the EU membership or for adopting real European values and principles – democracy, rule of law, human rights), territorial decentralization (whether the political autonomy of Vojvodina is an integral part of a modern constitutional identity or is it a legal construction of socialist constitutionalism),[11] types of government (a pure parliamentary system or a more consistent semi-presidential system), judicial independence and its main institutional guarantees (election and termination of judicial office, composition and constitutional role of the High Court Council, position and role of the Judicial Academy), etc.

The Constitutional Court – why is it quiet?

The Constitutional Court of Serbia, the second and, in fact, potentially the first creator of the constitutional identity, did not deal with this issue almost at all.[12] Part of the justification lies in the fact that Serbia is not yet a member of the EU, and that the effect of the supremacy of the EU law over national law cannot be felt yet. However, identity issues have been on the "agenda" of the Constitutional Court for the past ten years approximately – general re-election of judges and rough violation of the permanence of judicial office, the First Brussels Agreement, statutory "expansion" of the territorial autonomy of Vojvodina outside the borders established by the Constitution, etc. Apart from the last mentioned issue, the Constitutional Court was in general refusing the jurisdiction to serve meritorious decisions and, thus, missed a good opportunity to at least try to develop the doctrine of national constitutional identity. The term "constitutional identity" appears in several individual opinions in these cases. The authors of these individual opinions were professors of

Identity, [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2012, pp. 756–776.

[10] M. Jovanović, *O ustavnom identitetu – slučaj Srbije*, [in:] *Ustav i demokratija u procesu tranzicije* ed.. M. Podunavac, Beograd 2011, pp. 9–26.

[11] See: D. Simović, "*Da li je teritorijalna autonomija Vojvodine deo ustavnog identiteta Republike Srbije*, "Zbornik radova Pravnog fakulteta u Novom Sadu" 2019, vol. 3, pp. 803–832.

[12] See: T. Korhecz, *Ustavna revizija i manjinska prava – u kojoj meri je reviziona vlast slobodna da menja posebna prava manjina u Ustavu Republike Srbije*, [in:] *Reviziona vlast u Srbiji – proceduralni aspekti ustavnih promena*, eds. E. Šarčević, D. Simović, Sarajevo 2017, p. 123.

constitutional law (Olivera Vučić, Dragan Stojanović) or those judges who were also engaged in theory (Bosa Nenadić), which indicates the connection between the constitutional doctrine and the concept of constitutional identity. For legal practitioners, constitutional identity is an illusion, a legal construct that cannot be found in the Constitution nor has its own constitutional basis.

Probably the Constitutional Court missed the best opportunity to establish the foundations of the concept of constitutional identity in 2013 when a proposal to assess the constitutionality and legality of the signed "First Agreement of Principles Governing the Normalization of Relations" between the Government of the Republic of Serbia and the self-declared Government of Kosovo Albanians (also known as the "First Brussels Agreement") was submitted. Briefly, the Constitutional Court assessed that this agreement is not considered an international agreement or a legal act in general, but that it is a political act. Given its political nature, this act cannot be subject to constitutional review. Therefore, the Constitutional Court declared itself incompetent and refused this proposal for the assessment of constitutionality and legality, even a year and a half after the submission of the proposal. In her separate statement on the decision (conclusion) of the Constitutional Court, Judge of the Constitutional Court and Professor of Constitutional Law, Olivera Vučić, pointed out that the task of the Constitutional Court in this particular case was "to deal with the issue of Serbia's constitutional identity and while dealing with it, it would deal with matters of our southern province Kosovo and Metohija as one of the central features of that identity." Even though Judge Vučić did not determine what the constitutional identity would represent in her opinion, she undoubtedly determined one element of its content – the constitutional (legal) status of Kosovo and Metohija. From a few concluding sentences in this individual opinion, it can be presumed that Judge Vučić derived the constitutional identity from the concept of loyalty to the Constitution: "The Constitution is a guideline for every Constitutional Court, even this one in Serbia. Having read it carefully, it is easy to establish that the Constitution of the Republic of Serbia is only mentioned and barely quoted, while a systematic and dedicated analysis of those norms that were directly related to the issue of the Autonomous Province of Kosovo and Metohija was completely missing. It is quite justified to ask why a more important place in the explanation of the decision is given, for example, to the UN Charter than to the Constitution of the Republic of Serbia. Why is the current Constitution, both qualitatively and quantitatively neglected and discarded, why is it treated as less important for

this constitutional dispute than some other acts, such as the Constitutional Framework for Provisional Self-Government in Kosovo, etc."[13]

Six years later, the Constitutional Court chose a different path when deciding on several initiatives submitted to assess the constitutionality of the Decision [I presume the capital D here is intentional?] on declaring a state of emergency due to the COVID-19 pandemic. The court did not qualify the decision to declare a state of emergency as a political, but as a legal act *sui generis* by which the state moves from a regular constitutional state to an irregular constitutional state and its main feature is the possibility to derogate from certain constitutionally guaranteed human rights in order to protect the right to life of citizens and the right to life of the state. Although it rejected the initiatives for assessing the constitutionality of the mentioned decision, the Constitutional Court did not miss the opportunity to define the elements of the constitutional court doctrine on the state of emergency.[14] Addressing issues that are tightly related to sovereignty, the Court announced the possibility of paying attention to the concept of constitutional identity in the near future.

In the normative control procedure, the Constitutional Court rarely and sporadically refers to the positions of the European Court of Human Rights, however, they are present in almost every decision of the Constitutional Court when deciding on constitutional appeals. At the beginning selectively and timidly, and today in a way that shows a high level of self-confidence when it comes to understanding the practice of the European Court of Human Rights, the Constitutional Court of Serbia treats the standpoints of this court not only as formally and legally binding but also as main argumentative bases in meritorious decisions on constitutional appeals.[15] Therefore, the European Convention on Human Rights has neither constitutional nor supra-constitutional force as some authors claim,[16] but it has sufficient legal force. It is a supra-legal judicial force (according to the Constitution of Serbia, all ratified international treaties are subordinate tothe Constitution, and also superior to laws of the Parliament, Art. 194 of the Constitution of Serbia). Its binding application increasingly contributes to the constitutionalization of European values and principles, that is, the translation of the normative value of Art. 1 of the Serbian Constitution into legal reality.

[13]Dissenting opinion of Judge Olivera Vučić in the Brussels Agreement Case, IUo-247/2013.
[14]Ruling of the CC from 21 May 2020, IUo-42/2020.

[15]See in the examples in jurisprudence of Constitutional Court of Serbia: M. Nastić, *ECHR and National Constitutional Courts*, "Zbornik radova Pravnog fakulteta u Nišu" 2015, vol. 71, pp. 212–216.
[16] T. Šurlan, *Revizija Ustava Republike Srbije u svetlosti internacionalizacije ustavnog prava*,[in:] *Reviziona*…, *op. cit*., p. 173.

Two historical constitutions

According to Ratko Marković, "Serbia is a country that has its own constitutional identity nothing less important for its overall national identity than other European countries with the greatest constitutional traditions, such as France and Germany," while "in Serbian constitutions, especially those from the 19th century, there are provisions that are in effect even though nowadays they are no longer binding to anyone because the constitutions they are part of ceased long ago."[17] Therefore, to a question where the constitutional identity lies, Marković says it lies in exemplary provisions of old Serbian constitutions from the 19th century, the same ones that are binding even nowadays due to the extraordinary solutions they offer rather than by their legal force.

The modern constitutional identity of Serbia should be searched for in its constitutional past, and especially in the two best constitutions – the Constitution of the Kingdom of Serbia from 1888 and the Constitution of the Republic of Serbia from 1990. Maybe this statement is too strong because these constitutions lack some of the key features of a good constitution. However, they certainly contain "traits" of that constitutional identity.

The imbalance was the main weakness of the Constitution from 1888. This Constitution failed at finding and establishing the right balance between meeting the requests for modernity and the needs of Serbian society at that time. On the one hand, the provisions in this Constitution represent the highest reaches of a then constitutional science, but, on the other hand, they also represent the constitutional discontinuity, constitutionality based on making compilations or experiments, as well as tendencies in creating constitutional delusions. Even though this constitution failed at the main task of modern constitutionality, which is finding and keeping the constitutional balance; still its content is full of "traces" necessary for conceptualizing the modern constitutional identity of Serbia. They can be found in the provisions related to the position of the Parliament; the free mandate of Parliament members; judicial independence; strong and developed local governments, etc. Even more than 130 years later those are still fundamental constitutional questions that Serbian constitution-makers must answer: 1) How to empower the position and the role of a body representing the electorate?; 2) What is the best type of government and especially what is the role of a head of state in this system?; 3) How to find the right balance between the freedom

[17] R. Marković, *Ustavnost Srbijina*, [in:] *Spomenica akademiku Gaši Mijanoviću*, Banja Luka 2011, p. 14.

of thought of electorate representatives and their inevitable connection to the political party they actually "owe" their representative mandate to; in other words, how to "empower" the principle of a free mandate, which is an old but still current and needed principle, in order to persist in a regime of political party dominance?; 4) How to define a judicial independence in order to serve the justice and within a reasonable deadline as well as how to increase its reputation among citizens and in the society?; 5) What is the right measure for territorial decentralization of Serbia?; on the one hand, what is the right scope of original local government authorizations and what should its structure be like?; on the other hand, should territorial autonomy exist at all and, if it is undoubtedly a part of a Serbian constitutional identity, how should it be defined for Vojvodina and how for Kosovo and Metohija?

The Constitution of Serbia from 1990 was adopted at the time and with a tendency to finally solve the question of identity. As written by Professor Miodrag Jovičić, through the entire constitutional history, "Serbian citizens had to express and prove their identity by creating and defending their own country, as well as by conquering and exercising rights of organising the system on their own. None of the fights were easy because they happened under the hardest historical circumstances."[18] Such circumstances were also present at the time when the Constitution of Serbia from 1990 was adopted. This Constitution was created in discrepancies between a tendency for a complete rupture with the old socio-political system and establishing grounds of a new socio-democratic order on the one hand, and maintaining the deceptive or some kind of a relationship with the common state on the other. It strived for, or at least created, the deceptive joining of what was incompatible – choosing statehood to protect its territorial integrity and constitutional dignity damaged by the resolutions of the SFRY Constitution from 1974 on the one hand, and maintaining the common state that was created more than 70 years ago thanks to the military merits of the Kingdom of Serbia. Therefore, the Constitution from 1990 had to tackle certain questions related to identity, to open and address them in the content itself, but could not answer almost any of them with objectivity. It is not the fault of either the constitution writer or of the formal constitution-maker, but of political and historical circumstances that could not provide the right constitutional moment. However, there are for sure some "traces" of the modern constitutional identity of Serbia in this Constitution.

[18]M. Jovičić, *Kakve nam poruke upućuje ustavna istorija Srbije*, "Anali Pravnog fakulteta u Beogradu" 1989, vol. 5, p. 562.

First of all, it was a completely new constitution content-wise. The procedure for creating a constitution had to be new and democratic. Conditions for implementing such a procedure that would indicate a new constitutional fundamental nature and not just meet the formal requirements were not met. Therefore, from an objective point of view, even if that Constitution had been adopted by some constitutional assembly formed in a rushed way, its democratic legitimacy and civil potential would have remained disputable. Nevertheless, thirty years later, it is clear that Serbia needs a new constitution. To become manifest of a new constitutional identity, this constitution would have to be adopted by the new original procedure with the mandatory consent given by the citizens on a referendum. Later on, this constitution not only would not have to be changed according to such a procedure, but it would be enough, even for the most important provisions, if a qualified majority of the members of Parliament in a "regular" Parliament would give their opinion on it.

Secondly, the Constitution from 1990 defined fundamental principles and values correctly, that is basic elements of the constitutional identity: the rule of law, civil democracy, and the social role of a state. Unlike the current Constitution, this Constitution understood better why it is important that Serbia as a multinational country, where traditionally there is not much balance between the nation and national minorities, is defined as a civil state and not a "state of Serbian people and other citizens" even though this difference can be perceived as more formal and symbolic than fundamental and real.

Thirdly, the Constitution from 1990 remained more as a constitutional declaration of constitutional principles and values than as a clear and credible strategic plan for accomplishing and protecting them. It might be the most obvious in the provisions related to territorial autonomy that were "lifeless" as they represented an attempt to return to the state that must have been known to be irreversible. Tending to complete its protective role, the Constitution was too narrow and rigid, thereby being almost unchangeable, in the period when it had to be exactly extensive, flexible, and easy to change because of the changes in the content and structure that Serbian society had to go through, regardless of the Kosovo question. The message that this Constitution sends is that there must be openness, flexibility, and compromise to the highest level in order to potentially solve the political question related to identity – the Kosovo question. For Kosovo and Metohija to remain physical, and above all a spiritual and institutional centre of the Serbian political and constitutional identity, the new Constitution must be based on fundamental, historical, and, at this moment, still an unimaginable agreement between the Serbian nation and Kosovo Albanians. Hence, as much

as the new Constitution of Serbia is needed, it must not exist if it were based on this fundamental, historical compromise.

Finally, the Constitution of Serbia from 1990 as well as the Constitution from 1888 are written in a beautiful Serbian language and clear style. This should be also the quality of the modern constitutional identity of Serbia. No foreign influences, globalization, and "internationalization" can be reasons for the national constitution-maker to 'spoil' the Serbian language and use foreign words and formulations. Serbia has enough 'treasure' in its previous constitutions, as well as in the Constitution from 1990 to destroy its constitutional identity and use ready-made sentences and phrases from international legal acts, no matter how important and exemplary these acts are.[19]

The Venice Commission – the Guardian of Common legal heritage and the key factor of the internationalization of national constitutional law

The Venice Commission has a key role in bringing Serbia closer to European values and principles, as well as to those expressed in Art. 2, 4 and 6 of the EU Treaty and their implementation in legal reality. The relationship with the Venice Commission was established in January 2001, when the Federal Republic of Yugoslavia, composed of Serbia and Montenegro, obtained the status of an associate member.[20]

The Venice Commission is an authoritative guardian of European principles and values, or more precisely – of European constitutional heritage.[21]Resistance to its role in the process of constitutional changes in Serbia, which is no longer only factual, but also legal, because it is based on Art. 1 (European principles and values) and 16 of the Constitution (internationalization of constitutional law), comes from the so-called constitutional traditionalists. They see the role of the Venice Commission as an unacceptable interference into the "sovereign will" of the constitution-maker and an obstacle to building a constitutional order based on a national constitutional identity. Their position is based on the dualism of

[19] See more in detail about the historical constitutions as the sources of national constitutional identity: V. Petrov, *Ponovno rađanje liberalno-demokratske ustavnosti u Srbiji i ustavni identitet – uz tri decenije od donošenja Ustava Srbije iz 1990*, "Arhiv za pravne i društvene nauke" 2020, vol. , 4, pp. 27–32.
[20] See more in detail: V. Petrov, M. Prelić, *Contribution of the Venice Commission to the Constitutional Reform in Serbia with Special Reference to the Judiciary*, [in:] *Venice…*, *op. cit*., pp. 547–567.
[21] See more in detail, e.g.: C. Grabenwarter, *Standard-Setting in the Spirit of the European Constitutional Heritage*, [in:] *Venice…*, *op. cit.*, pp. 257 –279.

European and national constitutional identity, which, as we have already shown, is an outdated and unacceptable concept. National constitutional identity can be built and developed only on the principle of unity of constitutional identity. National constitutional identity is a European identity in a national way. These are European principles and values to which national political and cultural peculiarities are "grafted" onto. This is also the main message delivered by the common provision of the EU Treaty.

In the construction of national constitutional identity, the role of the Venice Commission is necessary and useful. The most referenced opinion of the Venice Commission concerning Serbia so far, the Opinion on the Constitution of Serbia (2007),[22] shows in fact a high degree of agreement between the opinion of this body and local constitutional doctrine both in terms of general remarks on the quality of the constitution and in terms of some specific solutions, for example, those on the judiciary, the so-called partisan imperative mandate and excessive influence of political parties on the exercise of power or those on the unjustified complexity of the procedure for revision of the Constitution. "It is evident that the success on the road of the future constitutional reform will depend on finding a balance between abstractly understood European values and principles and their normative elaboration that will correspond to specific socio-political circumstances of the country. After all, *a flexible approach* and *finding a balance* are perhaps the main messages the Commission has been sending to national states over the past 30 years. After all, the essence of modern constitutional democracy lies in those words."[23]

CONCLUSION – UNITY INSTEAD OF CONCURRENCE OF IDENTITIES

Therefore, from the state point of view and national interest of Serbia, the principle of the unity of the constitutional identity is important for adopting a new, truly modern, and, at the same time, European and national constitution. It should be a Constitution that will derive its particular constitutional solutions from the common denominator of two sources – European heritage and national constitutional history. In this regard, in the coming period, Serbia will especially benefit from the exchange of experiences and good practice with constitutional institutions, especially national courts and constitutional courts of the EU countries that are not ready to crush their national identity for the sake of some abstract, contentless and

[22] Venice Commission, *Opinion on the Constitution of Serbia*, CDL-AD(2007)04, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004 [access:20/03/2021].
[23] V. Petrov, M. Prelić, *op. cit.*, p. 567.

devaluated, quasi-European constitutionality, which does not meet the two basic requirements of a modern political community – democracy and efficiency.

Without finding the right balance between democracy and efficiency, the political community or community that aspires to be such (the EU) will not have the life-giving capacity. The COVID-19 pandemic reminded us of this old "lesson" of a political life. The constitutional right to life as a fundamental right of the individual, but also the sovereign right of the state, can be effectively defended at the supranational level only when consistently respecting the old formula of "unity in diversity." This formula, so obvious in its simplicity, and so complex in its realization, is still far from the real life of the EU, and even from what can be foreseen in the near future.