

National and European Identity – Opposing or Complementary Concepts in Czech, Polish and EU Law?

Abstract

This article gives a practical overview of the legal aspect of European identity and the role it plays in the EU Law. It analyses the mutual relationship and legal function of two concepts of European Union Law: national identity and European identity. It also summarises the functioning of national identity concepts in Czech and Polish constitutional practice and compares it with practice in the European Union.

Key words: National Identity, European Identity, Czech Constitution, Polish Constitution, Constitutional Law, Nation, Citizenship, EU Law

Introduction

In the social sciences, the concept of identity is defined as “the way an individual or group of individuals defines, feels their existence (their uniqueness), and on which they rely when they realize themselves in relation to others”.¹ Therefore, identity can be understood as a consciousness of relevance to a particular group of people. Subsequently, the concept of national identity is understood as belonging to a group of people defined by culture, the common state, and the psychological dimension (subjective consciousness of individuals about their belonging to the given nation – national consciousness). For the purposes of this article national identity will be understood as a collective social identity that manifests

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¹ C.D. Echaudemaïson et al., *Slovník ekonomie a sociálních věd (Dictionary of Economics and Social Sciences)*, Prague 1995, p. 114.

itself as a positive relationship of an individual to one's own nation and country, a sense of belonging to a given nation, and a definition of other nations and cultures that may be perceived as potentially endangering their own culture.² Since question of different concepts is not the main concern of this article, for further details we refer to Czech and Polish sociological literature.³

National Identity in Czech Constitutional Law

The present Czech Constitution of 1993 is based on citizenship principle. Although the Constitution drew inspiration from the Czechoslovak Constitution of 1920 in many aspects, the issue of nationality was not one of them. The 1920 Czechoslovak Constitution was based on the idea of a single Czechoslovak state – an idea promoted and followed by many prominent Czech and Slovak politicians, including President T.G. Masaryk the first Czechoslovak president. The preamble of the 1920 Czechoslovak constitution stated: “We, the Czechoslovak nation, declare that we will endeavour to carry out this constitution [...] in the spirit of the modern principles embodied in the slogan of self-determination...”⁴

² A. Zpěvák, *Co je co? Národ, nacionalismus a národní identita (What is what? Nation, nationalism and national identity)*, “Časopis argument”, <http://casopisargument.cz/2017/08/11/co-je-co-narod-nacionalismus-a-narodni-identita/> (13.10.2018).

³ M. Petrušek, *Národní identita v globalizujícím se světě (rizika výzvy naivního multikulturalismu a militantního nacionalismu [National Identity in a Globalizing World (Risks of the Challenge of Naive Multiculturalism and Militant Nationalism)]*, in: *Výchova k občanství v rámci školního vzdělávacího programu se zaměřením na potírání rasové a národnostní nesnášenlivosti. Sborník příspěvků z 13. ročníku Letní školy pro učitele občanské výchovy a základů společenských věd, 20. – 24. srpna 2006 na Pedagogické fakultě UP v Olomouci (Citizenship education within a school educational program aimed at combating racial and ethnic intolerance. Proceedings of the 13th Summer School for Teachers of Citizenship and the Foundations of Social Sciences, 20–24 August 2006 at the Pedagogical Faculty of UP in Olomouc)*, eds. M. Dopita, A. Staněk, Olomouc 2006, pp. 21–32; K. Vlachová, B. Řeháková, *Národ, národní identita a národní hrdost v Evropě (Nation, national identity and national pride in Europe)*, “Sociologický časopis/Czech Sociological Review”, vol. 40, no. 4/2004, pp. 489–508; M. Öbrink-Hobzová, L. Siarda-Trochtová, P. Sobková, *Národní identita v multikulturním prostředí (National identity in multicultural environment)*, “Sociální pedagogika/Social Education”, 2017, http://soced.cz/wp-content/uploads/2017/11/STUDIE_SocEd_3_5-2-2017.pdf (13.10.2018); E. Kornacka-Skware, *Tożsamość narodowa w świetle przemian kulturowych (National identity in the light of cultural changes)*, “Prace Naukowe Akademii im. Jana Długosza w Częstochowie”, vol. XX/2011, pp. 113–120.

⁴ E. Bakke, *The principle of national self-determination in Czechoslovak constitutions 1920–1992*, “Central European Political Science Review”, vol. 3, no. 10/2002.

Shortly after being established, Czechoslovakia presented itself as a unitary state, though Czechs and Slovaks formed two thirds of its population. The remaining part of the population was composed of Germans, Jews, Hungarians, Poles and Ukrainians or Russians. Thus, the role of the nation in the form of an idea of a single Czechoslovak nation embodied in the Constitution served the purpose of self-determination. Some authors even describe it as a “self-serving construct”.⁵

Shortly after 1989 work on a new democratic constitution started. In its course the problem of political community of two nations arose. As a result of the impossibility to achieve a solution acceptable by both nations Slovakia invoked the right to self-determination and adopted the Constitution of the Slovak Republic in 1992. The problem of political autonomy of the Slovak nation was the reason for the decision to dissolve Czechoslovak federation and form two independent states in 1993. This development led drafters of the Czech Constitution to the decision to avoid any mention of a nation and base the text on the citizenship principle only. According to the opinion commonly shared at that time, any mention of the Czech nation in the text would open Pandora’s box and trigger a need to define nations forming part of the Czech Republic. As a consequence, the present text of the Czech Constitution does not contain any mention of a nation. Preamble simply states: “We, the citizens of the Czech Republic in Bohemia, in Moravia, and in Silesia...”.

It follows from the above that, in the history of the Czech Republic, strong identification with a particular nation or peoples was typically associated with an effort to break away from the existing state structure. In 1918, the creation of the idea of a unified Czechoslovak nation was the basis for the realization of the right of Czechs and Slovaks to self-determination and separation from Austro-Hungarian Empire. In 1992, similar developments led to the realization of the right of the Slovak nation to self-determination and thus to the collapse of Czechoslovakia. Therefore, it can be argued that the current situation, when the concept of a nation is not contained in the present Constitution of the Czech Republic stems from a negative historical experience.

A debate was recently held whether the notion of a nation is to be part of the constitution. Within this framework, the supporters of the inclusion of the concept of a nation in the Constitution pointed out the necessity of a clear anchoring and defining of Czech statehood. This was seen

⁵ See: M. Calda, *Constitution-Making in the Post-Communist Countries: A Case of the Czech Republic*, http://just.wz.cz/old_web/PM229_Calda_Constitution_Making.pdf (13.10.2018).

as important because of multiple challenges faced by modern nations in the context of globalization and migration. The discussion burst after the contribution of Professor Aleš Gerloch, who at the constitutional reform conference held on November 14, 2016, speculated on the need to return the concept of nation as a basic notion of statehood to the Czech Constitution. “Today, the Constitution begins with the words that the Czech Republic is a sovereign state. An article could be inserted here: The Czech Republic is the homeland of members of the Czech nation and members of national minorities and entities associated with it” proposed Gerloch. According to him, nationality constitutes an expression of this connection. His presentation met with a stormy reaction. The strongest criticism came from some judges of the Constitutional Court who considered the national element in state-building to be totally obsolete and even harmful. In a later interview for the press (*Pravo* daily), the President of the Constitutional Court Pavel Rychetský presented the following comment: “On the other hand, I would be very afraid of it. Look at nationalistic tendencies that are reflected in the Hungarian and Polish political situation. We see very dangerous trends for the whole of Europe. I am for the international model of the grouping, such as the European Union, rather than for hermetically sealed national states”.⁶

To sum up, as a result of historical experience in the Czech constitution, the concept of a nation was abandoned. Recently there has been a debate on the re-introduction of this concept into the Constitution. However, there were concerns that such a move could reinforce nationalistic tendencies.

The Concept of the Nation in the Polish Constitution and Its Development

The use of the term “nation” has a deep historical tradition in Polish constitutional law that dates back to the Constitution of May 3, 1791. In this historically first constitutional act in Europe, the notion of nation was used many times in various contexts. It is pointed out that the notion of a nation was connected primarily with the constitutionally privileged social elite – nobility (“*naród szlachecki*”) at that time.⁷ In the preamble this constitution characterised itself as national constitution. Just a few provisions used the term in conjunction with the “Polish” adjective

⁶ <https://www.novinky.cz/domaci/420565-ustavni-pravnik-gerloch-chce-vratit-do-ustavy-narod.html> (22.10.2018).

⁷ W.J. Wołpiuk, *Naród jako pojęcie konstytucyjne (Nation as a constitutional concept)*, “*Studia Iuridica Lublinensia*”, vol. 22/2014, p. 372.

(“naród polski”).⁸ Some authors suggest that relatively moderate emphasis on the notion of nation met two objectives. On the one hand, it helped non-Polish population to recognize the Polish state and its legal order as their own and, on the other hand, it was aimed at activating the civic behaviour of the bourgeoisie, a social class that gained a favourable civic and social status thanks to the Constitution of 3rd May.⁹

At the time of the adoption of the Constitution of the Republic of Poland of 17 March 1921, the new state was a multinational state. Nevertheless, the second sentence of the Constitution began with the words “We the Nation of Poland...c. However, this concept was not understood only in an ethnic sense. The preamble clearly stated that the aim of the Constitution is “the good of the whole, united and independent Mother-Homeland”. However, the authors of the Constitution did not regulate the issue of the position of the Polish nation and other nationalities, thus striving for the integration of people linked by a citizenship.¹⁰

The next Polish Constitution of 23 April 1935 completely abandoned the use of the term “nation” in the text. It was associated with the Constitution’s rejection of the idea of a nation as a supreme authority. The term “nation” was replaced by the term “state” (“państwo”) and, in several cases, by the term “Polish State” (“Państwo Polskie”) or by the terms “all citizens” (“wszyscy obywatele”), “society” (“społeczeństwo”) or “generation” (“pokolenie”).¹¹ In this way, the draftsmen sought to emphasize the citizen’s loyalty to the state and its influence on public affairs. However, as noted, in this case, we are dealing with the classic phenomenon of a gap between the *de jure* constitution and the *de facto* constitutional order.¹²

⁸ See: art. V and VII in: *Konstytucje w Polsce 1791–1990 (Constitutions in Poland 1791–1990)*, eds. T. Kołodziejczyk, M. Pomianowska, Wydawnictwo Przemiany, Warsaw 1990, pp. 14–15.

⁹ W.J. Wołpiuk, op. cit., p. 373.

¹⁰ Ibidem, p. 375.

¹¹ A. Ajnenkiel, *Jutro Europy (Tomorrow of Europe)* in: *Przyszłość państw narodowych w zjednoczonej Europie (The future of nation states in a united Europe)*, Warszawa 2001, p. 203, as well as E. Gdulewicz, *Niektóre koncepcje ustroju politycznego w Konstytucji Rzeczypospolitej polskiej z 23 kwietnia 1935 (Some concepts of the political system in the Constitution of the Republic of Poland of 23 April 1935)* both referenced in: W.J. Wołpiuk, op. cit., pp. 377–378.

¹² J. Kuciński, W.J. Wołpiuk, *Zasady ustroju politycznego państwa w Konstytucji Rzeczypospolitej Polskiej z 1997 roku (Principles of the political system of the state in the Constitution of the Republic of Poland of 1997)*, Wolters Kluwer, Warsaw 2012, p. 151.

Another constitution in the history of the republic, namely the Constitution of the People's Republic of Poland of 22 July 1959, did not constitute the political position of the nation either. Similarly to other states of real socialism, it adopted the formula of class sovereignty of the state power.¹³

The creation of the present Constitution of 1997 was accompanied by a strong awareness of the danger of making it ideological and the consequences resulting from it. So, there was a clear tendency to give its text legal character as far as possible.¹⁴ However, the word "nation" and its derivatives have not been omitted from the text and it can be found in the Preamble as well as in the substantive provisions of the Constitution. The term "Nation" (always capitalized) appears twice in the Preamble, of which once in with the adjective "Polish".¹⁵ In the substantive provisions, the word "Nation" or derived words can be found in 10 cases.¹⁶ Most often, more precisely 5 times, the term "nation" appears in Chapter I. of the Constitution entitled "The Republic". Article 4 paragraph 1 of the Constitution provides the basis for supreme authority of the state as follows: "Supreme power in the Republic of Poland shall be vested in the Nation." In the second paragraph of the same article, the legislator defined the exercise of power in the following words: "The Nation shall exercise such power directly or through their representatives." Arguably, this provision of the Constitution expressly states the principle of national sovereignty forming an axiom.¹⁷ It is contended that the principle of national sovereignty constitutes the determinant of a democratic state governed by the rule of law.¹⁸ Two subsequent references to the Nation appear in chapters regulating the parliament (Chapter IV entitled "The Sejm and the Senate") and in Chapter V concerning the functions of the President. Chapter IV, Article 104 paragraph 1 contains the following sentence: "Deputies shall be representatives of the Nation".¹⁹ The provision which sets out the

¹³ Ibidem, p. 151.

¹⁴ W.J. Wołpiuk, op. cit. p. 381.

¹⁵ The Constitution of the Republic of Poland of 2nd April 1997, as published in *Dziennik Ustaw* (Journal of Laws) no. 78, item 483 as amended. For English translation see: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (22.10.2018).

¹⁶ Situations where the derivation is part of the name of an authority are not included (e.g. National Bank of Poland).

¹⁷ A. Domańska, *Zasada suwerenności narodu. Rozważania na tle art. 4 Konstytucji RP z 1997 r. (Principle of national sovereignty. Reflections on the basis of Article 4 of the Polish Constitution of 1997)*, <http://dspace.uni.lodz.pl:8080/xmlui/handle/11089/22960> (22.10.2018), p. 38.

¹⁸ Ibidem.

¹⁹ In Polish: „Posłowie są przedstawicielami Narodu.”

text of the oath taken by deputies also refers to the Nation.²⁰ Three times the term “Nation” is mentioned in part VI that regulates the position of the President. Most importantly, the following phrase appears with regard to the performance of the office of the President: “The President of the Republic shall be elected by the Nation...”²¹

Therefore, the concept of a nation should be regarded as one of the key constitutional concepts in Poland. The Polish Constitutional Tribunal has defined the meaning of the term ‘Polish Nation’ in the context the wording contained in the Preamble: “We the Polish Nation – all the citizens of the Republic”.²² In its judgment of 31 May 2004 the Tribunal stated that the Constitution uses the concept of the Nation in the political sense and not the ethnic one.²³ Thus, under the term “Nation” it defines the community formed by all citizens of the Republic of Poland. As a consequence of this statement, the Constitutional Tribunal considers the possession of Polish citizenship and, as a consequence, the ability to participate in public life to be a legal criterion of belonging to the Nation.²⁴

In conclusion, the emergence of the concept of a “nation” and its relatively frequent use in constitutional regulations is a deeply rooted element of Polish legal culture. Consequently, the constitutional principle of national sovereignty established a kind of axiom. When interpreting the term “Polish Nation” the Constitutional Tribunal expressed the opinion that the Constitution uses it not from the ethnic but rather the political point of view. In this sense this term includes all citizens of the Republic of Poland, irrespectively of their ethnic origin. Thus, it is contended that the concept of a nation is a key determinant of national identity in Poland.

National and European Identity in the EU Law

The concept of national identity first appeared in the Maastricht Treaty. Then article F (1) stated that “the Union shall respect national identi-

²⁰ “I do solemnly swear to perform my duties to the Nation diligently and conscientiously...”. („Uroczyście ślubuję rzetelnie i sumiennie wykonywać obowiązki wobec Narodu...”).

²¹ In Polish: „Prezydent jest wybierany przez Naród...”.

²² In Polish: „My Naród Polski – wszyscy obywatele Rzeczypospolitej...”; Sign. K 15/04.

²³ Some scholars consider this concept to be philosophical and social in nature. See: L. Garlicki, *Polskie Prawo Konstytucyjne. Zarys wykładu (Polish Constitutional Law. Outline of the lecture)*, Liber, Warsaw 2006, p. 55.

²⁴ In addition to the term “nation”, the text of the Constitution also includes other terms for collective entities, such as “all citizens” – “wszyscy obywatele”, “all residents” – “ogół mieszkańców” or “those who believe in God” (“ludzie wierzący”). Meanwhile, the Constitution does not include the term “society”, which is similar to the term “nation”.

ties of its member states”. This provision has been amended by Article 6 (3) of the Treaty of Amsterdam. These earlier versions of the identity clause were not subject to the jurisdiction of the European Court of Justice and, therefore, they remained largely inoperative in governing the relationship between member states and the EU.²⁵ National identity clause is currently contained in a much widened version of Article 4 (2) of the Treaty on European Union, the wording of which is based on Article I-5 of the unratified Constitution for Europe.

Compared to the original wording of the article, the current version is more developed and, in addition, it can be found among legal provisions concerning the division of competences between the EU and the Member States. Arguably, the concept of national identity is not used in European law as an expression of the uniqueness of nations that make up the European Union but has a different purpose. The purpose of this regulation is to define the limits of the European Union’s competences in relation to the Member States.²⁶

One may wonder about the reasons that led to the introduction of this improved treaty provision. A closer look shows that unratified text of the Constitution for Europe also contained an explicit adaptation of the primacy of European law over the law of the Member States. Probably, yet another attempt to codify the principle of primacy led the Member States’ representatives to formulate certain limits of it.²⁷ Thus the national identity clause has served as a guarantee of maintaining certain competences in the hands of the Member States.²⁸ Following the failure of the European Constitution, the codification of the primacy principle has not been adopted in the Lisbon Treaty, but the national identity clause has remained in the text. Its re-use was justified by the Member State’s interest in creating a safety mechanism or an emergency brake needed to tackle fears of an unlimited expansion of EU competencies. Thus, the notion of national identity is not a state-building tool for enforcing the individuality of a given nation or nations, but a tool of defence against uncontrolled limitation of the competences of the Member

²⁵ A. von Bogdandy, S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, “Common Market Law Review”, vol. 48, issue 1, p. 6.

²⁶ T. Konstadinides, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, “Cambridge Yearbook of European Legal Studies”, vol. 13/2011, p. 195.

²⁷ See: B. Davies, *Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and Solange in its Intellectual Context*, “European Law Journal”, vol. 21, issue 4, p. 434.

²⁸ On the optimal trade-off between integration and accomodiaton see: E. Cloots, *National Identity in EU Law*, Oxford University Press, Oxford 2015, p. 226.

States by the EU. European law thus becomes an area where the national element gains importance not in relation to other nations but in relation to the international organization itself. For that reason, national identity is becoming a criterion in the European Union's decision-making practice.²⁹

As in European law, the notion of “national identity” is distinct from the same term used in constitutional law it must be tested whether and how the concept of “European identity” is conceived.³⁰ In particular, is this concept in European law set as an opposite to the concept of “national identity”? One is common to these two concepts, in both cases, they are very blurred terms, the use of which in law is more like the application of legal principles than the application of the rule of law. It is almost impossible to clearly define what elements form part of the national or European identity.³¹ There are many different features of identity, the most important being the state-building feature. In Czech legal literature, the notion of national identity is traditionally conceived as a group identity that is a necessary expression of national identity and a condition for the formation of the nation and its duration. The disappearance of national identity is linked to the extinction of the nation itself, which in the national state can break the existence of the nation itself.³² A similar thesis cannot be put forward in the case of a European identity that does not have a state-building purpose as the existence of a common European identity does not form a prerequisite for European integration. Conversely, European integration has long existed on a purely economic basis for decades and the notion of “European identity” does not appear in the founding treaties, nor is it a concept of a European constitution. This does not mean, however, that this concept does not appear in EU legal acts and other documents. European identity is often mentioned in connection with the program activities of the European Union institutions.

Should we believe the search tools of the Eur-lex database, the term “European identity” is found in four regulations. On closer examination, it turned out that in all four cases this term was used in the

²⁹ P. Faraguna, *Constitutional Identity – a Shield or a Sword? The Dilemma of Constitutional Identities in the EU*, www.academia.edu (13.10.2018), p. 4.

³⁰ D. Sarmiento, *The EU's Legal Identity and the Three Normative Ideals*, in: *National Constitutional Identity and European Integration*, eds. A. Saiz Arnaiz, C. Alcobarro Llivina, Intersentia 2013, p. 179.

³¹ On identity of European law see: Ch. Harding, *The Identity of European Law: Mapping Out the European Legal Space*, “European Law Review”, vol. 6, issue 2, p. 128.

³² P. Maršálek, *Evropská integrace, unijní občanství a česká národní identita (European Integration, Union Citizenship and Czech National Identity)*, “Acta Universitatis Carolinae – Iuridica”, vol. 2/2014, p. 74.

recitals, not the substantive text itself. In three cases, out of four, the regulation constituted the legal basis for various European programs (e.g. Rights, Equality and Citizenship Programme,³³ Erasmus + programme³⁴, “Europe for Citizens” programme³⁵).

Quite unexpectedly, the term “European identities” also appears in Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring

³³ Regulation (EU) No 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020 (Text with EEA relevance) OJ L 354, 28.12.2013, pp. 62–72, ELI: <http://data.europa.eu/eli/reg/2013/1381/oj> Paragraph 13 of the Preamble is worth quoting in full: “Citizens should be more aware of their rights deriving from citizenship of the Union, namely their right to move and reside freely in the Union, their right to vote and stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence under the same conditions as nationals of that State, their right to petition the European Parliament in any of the Treaty languages, their right to submit citizens’ initiatives and their right to lodge complaints with the European Ombudsman against institutional maladministration, and should be able to exercise those rights. Encouraging citizens to play a more active role in democracy at Union level will strengthen European civil society and foster the development of a **European identity**. Citizens should feel at ease about living, travelling, studying, working and volunteering in another Member State, and should feel able to place their trust in equal access, full enforceability and protection of their rights without any discrimination, no matter where in the Union they happen to be.”

³⁴ Regulation (EU) No 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing ‘Erasmus+: the Union programme for education, training, youth and sport and repealing Decisions No 1719/2006/EC, No 1720/2006/EC and No 1298/2008/EC (Text with EEA relevance), OJ L 347, 20.12.2013, pp. 50–73, ELI: <http://data.europa.eu/eli/reg/2013/1288/oj> Paragraph 23 of the preamble provides: “The Commission’s communication of 18 January 2011 titled ‘Developing the European Dimension in Sport’ sets out the Commission’s ideas for action at Union level in the field of sport following the entry into force of the Treaty of Lisbon, and proposes a list of concrete actions to be taken by the Commission and Member States in order to increase sport’s **European identity** in three broad chapters: the societal role of sport, the economic dimension of sport and the organisation of sport. It is also necessary to take into account the added value of sport, including indigenous sport, and its contribution to the Union’s cultural and historical heritage.”

³⁵ Preamble of the Council Regulation (EU) No 390/2014 of 14 April 2014 establishing the ‘Europe for Citizens’ programme for the period 2014–2020 (OJ L 115, 17.4.2014, pp. 3–13, ELI: <http://data.europa.eu/eli/reg/2014/390/oj>) provides: “The European Parliament resolution of 2 April 2009 on European conscience and totalitarianism and the Council Conclusions of 9–10 June 2011 on the memory of the crimes committed by totalitarian regimes in Europe underline the importance of keeping the memories of the past alive as a means of moving beyond the past and building the future, and highlight the value of the Union’s role in facilitating, sharing and promoting the collective memory of these crimes. The relevance of historical, cultural and intercultural aspects should therefore also be taken into account, as well as the existing links between remembrance and **European identity**.”

certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. It is worth noting that the drafters of the text have underlined the role of audiovisual works in the creation of European identities (in plural).³⁶

At present, the concept of national identity is not used in any directive but in the past, it appeared in the recitals of now repealed directive on technical specifications for satellite broadcasting.³⁷

Finally, the concept of European identity appears in 15 decisions. As in the case of regulations, most of the decisions are related to the establishment of new EU programs or to the introduction of new EU actions. Although these decisions are legally binding to their addressees, their practical legal effects are rather limited. It is worth noting that the amendment to the European Parliament's legislation on the use of the symbols of the Union adopted in 2010 states in recitals: "having regard to the importance of symbols for reconnecting the citizens with the European Union and for building a European identity which is complementary to the national identities of the Member States".³⁸ Obviously, the European Parliament has approached the question of the character of European identity, similarly to that of European citizenship, as one that complements the citizenships of the Member States without replacing it.

It is clear from the above that the term "European identity" is not a term used in the substantive text of primary or secondary EU law. Its function is more of an idea or an interpretative aid. That is why the concept of European identity is referred to in the recitals of various acts which, in themselves, do not have normative meaning.

³⁶ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (Text with EEA relevance), OJ L 187, 26.6.2014, pp. 1–78 ELI: <http://data.europa.eu/eli/reg/2014/651/oj> It specifies in point 73 of the Preamble: "Audiovisual works play an important role in shaping **European identities** and reflect the different traditions of Member States and regions."

³⁷ Preamble of the Council Directive 86/529/EEC of 3 November 1986 on the adoption of common technical specifications of the MAC/packet family of standards for direct satellite television broadcasting, Official Journal L 311, 06/11/1986 P. 0028, CELEX number: 31986L0529 Third whereas states: "the implementation of common technical specifications simplifies the broadcasting of television programmes in all countries of the Community and makes a significant contribution to European unification and to the development of a true **European identity**;"

³⁸ Use by Parliament of the symbols of the Union (new Rule 202a) European Parliament decision of 9 October 2008 on insertion in Parliament's Rules of Procedure of a new Rule 202a on the use by Parliament of the symbols of the Union (2007/2240(REG)) OJ C 9E, 15.1.2010, pp. 67–68.

The Concept of European Identity in the Application Practice of the EU Judicial Institutions

The concept of “European identity” has not been used in the judgments of the two EU courts yet. Neither the General Court nor the Court of Justice have used this term in their reasoning. However, it can be found in two opinions of Advocate General Maciej Szpunar who referred to the European identity twice. For the first time he mentioned it in his opinion in *McCarthy* case (point 40) in the context of the right to free movement. It is clear from the wording of the opinion that M. Szpunar regards EU citizenship as the cornerstone of the European identity. He clearly writes: “Since then, citizens of the Union who move within the territory of the Member States not only integrate the movements central to their daily life, but also see therein a central element of the way in which they perceive themselves as citizens of the Union. All the rights and obligations that are granted to and imposed on Union citizens and the members of their family too, facilitate, in particular, their movement, their residence, their access to studies, their search for employment or their work. Their citizenship is therefore an essential element of their European identity”.³⁹

In addition, Advocate General Szpunar supports his findings by referring to the survey carried out in 2010. It showed that almost nine out of 10 citizens knew that they had the right to free movement. See the Commission’s *EU Citizenship Report 2010, ‘Dismantling the obstacles to EU citizens’ rights’*.⁴⁰ Citizenship of the Union therefore became almost synonymous with freedom of movement.⁴¹

The second occasion, when M. Szpunar expressed his opinion on the issue of European identity, are joint cases *C-165/14 Alfredo Rendón Marín v Administración del Estado* and *C-304/14 Secretary of State for the Home Department v CS*.⁴² With a strong reference to *McCarthy*’s opinion the Advocate General concludes: “The fundamental freedom to move throughout the Union and to reside anywhere in the Union attaches to the status of citizen of the Union. Thus, as a ‘personal status having transnational implications’, it has created the necessary conditions for mutual recognition, and so for mutual knowledge, among the societies of the Member States and their citizens. That recognition and knowledge have developed in the particular context of the actual relationships

³⁹ *McCarthy and Others* (C-202/13, EU:C:2014:345, points 39 and 40).

⁴⁰ COM(2010) 603 final, p. 16.

⁴¹ See: Proposal of 11 August 2011 for a Decision of the European Parliament and of the Council on the European Year of Citizens (2013), COM(2011) 489 final, p. 1.

⁴² ECLI:EU:C:2016:75.

between nationals of the Member States and national authorities. It is precisely those relationships that have enabled the nationals concerned to claim rights on the basis of their status as citizens of the Union. The fact that those rights have been recognised in the case-law of the Court played a major, even a decisive, role in the construction of this fundamental status which, today, forms an essential part of the European identity enjoyed by citizens.“

The abovementioned, very clear wording of the Advocate General's opinion demonstrates that Advocate General Szpunar considers EU citizenship (and the rights attached to it) to be one of the elements of European identity.⁴³ Other elements that form the European identity, which are reflected in law, will be discussed below.

It is not uninteresting to ask why the Polish Advocate General is the only member of the EU judiciary to comment on the question of European identity. The answer can be found in the approach of the Polish Constitution and in the case-law of the Constitutional Court, where the concept of national identity, in conjunction with national sovereignty, establishes a key, if not to say predominant, constitutional law concept. It is therefore understandable that the promotion of European identity in EU law is considered to be crucial, especially in relation to a strong national identity by Advocate General Szpunar. In any case, it will be interesting to observe if Mr Szpunar's example will be followed by other Advocates-General and whether in the future the concept of European identity will find the way into the jurisprudence of the Court of Justice as a legal concept.

Axiological Importance of European Identity

As mentioned above the concept of European identity is not limited to the question of citizenship of the Union.⁴⁴ In order to be able to define other elements of European identity, the question must be asked whether the use of the concept of European identity meets the same objectives in EU law as the concept of national identity in constitutional law. Concerning the function of national identity, in Czech literature, it is emphasized that national identity is a necessary expression of statehood and consti-

⁴³ For the conceptual perspective of relationship between nationality and identity see: I.P. Karolewski, *The citizenship – identity nexus in the EU revisited in: European identity revisited: new approaches and recent empirical evidence*, eds. V. Kaina, I.P. Karolewski, S. Kuhn, Routledge: Taylor & Francis Group, London; New York, NY 2017, p. 15.

⁴⁴ In more detail on territorial aspects of identity see: E. Guild, *The legal elements of European identity: EU citizenship and migration law*, Kluwer Law International, 2004, p. 2.

tutes a condition for the formation of a nation and is a condition for the formation of the nation and its duration. Loss of national identity means the extinction of the nation itself, eventually in a national state, may undermine the existence of such a state.⁴⁵ In relation to European identity, it is impossible to formulate such a statement. The existence of a European identity was not, and probably will not be, a necessary precondition for European integration. Its function is rather to emphasize the common historical and cultural heritage of Europe. Part of European identity will therefore be a set of common values that are recognized not only by the member states as such but also by the nations that make up the Union. Among the values of the Union, the constitutional value has a standard of general human rights and democracy's performance of EU member states.⁴⁶ For this reason, the promotion of a single axiological system based on Article 2 of the Treaty on European Union can be considered as an essential element of European identity. In other words, as Union Europeans, among other things, that we also share the same system of basic values and principles.⁴⁷

If we assume that the foundations of a European identity constitute basis for a common axiological structure, then it is impossible to agree with the view that European identity is a more pious desire than a realistic goal.⁴⁸ This view disregards the true function that European identity has. It is not a state-building function, but a uniting and complementary one rather than one eliminating or substituting national identity.⁴⁹ Culture and history will remain the foundation of the nation's identity (as only most recent historical literature conceives some of the personalities of European history as the personalities that gave the foundation of European identity).⁵⁰ If we understand history and culture as the basis, first of all, of national identity, the most important values on which European

⁴⁵ See: P. Maršálek, *Evropská integrace, unijní občanství a česká národní identita (European Integration, Union Citizenship and Czech National Identity)*, "Acta Universitatis Carolinae – Iuridica", no. 2/2014, p. 74.

⁴⁶ A. von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, "Common Market Law Review", p. 1337.

⁴⁷ A. von Bogdandy, *The European Constitution and the European Identity: Text and Subtext of the Treaty establishing the Constitution for Europe*, "International Journal of Constitutional Law", vol. 3, issue 2–3, p. 307.

⁴⁸ See: P. Maršálek, op. cit., p. 78.

⁴⁹ In the context of political identity on European identity as being not dilemma of sharply dividing alternatives, but, rather, a process of supplementing and expanding forms of identity see: J. Příbáň, *Legal symbolism: on law, time and European identity*, Ashgate Publishing, Aldershot; Burlington 2007, p. 116.

⁵⁰ R. McKitterick, *Charlamagne: the formation of a European identity*, Cambridge University Press, Cambridge 2008, p. 5.

civilization is based remain common.⁵¹ It is even sometimes argued that being “European” is not only compatible with being “national” but it is a constituent element of national identity.⁵² This envisages a conception of European citizenship in which the core elements of citizenship, rights and identity are not “attached” to citizens as members of separate member states that together form the European Union, but to citizens as citizens of the European Union, perceived as a democratic political Union.⁵³

It does not automatically follow from the above that the existence of a European identity must be or should be enshrined in the founding treaties or legal acts and shall not be limited to political symbols without a soul.⁵⁴ European legal system does not have the communicative ability to codify identity.⁵⁵ As V. Havel observed, the European identity demands charismatic bonds even more than a constitutional act or a political resolution.⁵⁶

A similar axiological structure alone does not automatically ensure that the Union’s citizens will perceive their identity not only as national but also as European. As mentioned at the beginning, European identity is a kind of collective social identity, and therefore the degree of identification is also conditioned by social, economic and political factors. It is observed, on one hand, that the most-well-off citizens now think of themselves as European and less-well-off citizens oppose the EU as they have not shared the fruits of economic integration.⁵⁷ As empirical research shows a strong sense of togetherness among the EU citizens is crucial when they are “asked to refrain from benefits in order to support

⁵¹ In more detail on the question of the consistency of democratic values and the limitation of the sovereignty of states, see: P. Mlsna, *Občanství národních států a Evropské unie – filozofické základy a vývoj (Citizenship of National States and the European Union – Philosophical Basis and Development)*, “Acta Universitatis Carolinae – Iuridica”, no. 2/2014, p. 92.

⁵² H. Case, *Being European: East and West*, in: *European identity*, eds. J.T. Checkel, P.J. Katzenstein, Cambridge University Press, Cambridge 2009, pp. 111–131.

⁵³ P.B. Lehning, *European Citizenship: Toward a European Identity?*, “Law and Philosophy”, vol. 20/2001, p. 240.

⁵⁴ G. Resta, *Beethoven’s Ninth and the Quest for European Identity. A Law and Music Perspective*, in: *Law and Opera*, eds. F. Annunziata, G.F. Colombo, Springer, 2018, p. 361, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103657 (28.10.2018).

⁵⁵ J. Přibáň, op. cit., p. 135.

⁵⁶ Ibidem, p. 127. More on relationship of politics and identity in Central and Eastern European perspective see: *Politics and identity: considerations on Ukrainian, Polish and European identity*, ed. R. Szwed, The John Paul II Catholic University: Lublin Business School, Lublin 2007.

⁵⁷ N. Fligstein, *Euroclash: the EU, European Identity, and the Future of Europe*, Oxford University Press, Oxford; New York 2008, p. 245.

other members of (EU) citizenry⁵⁸. This approach seems to be closer to reality than the views of some authors linking the identity crisis to the democratic deficit of the European Union.⁵⁹

At the end, it is worth to conclude with a quotation from the work of Polish historian Jerzy Kłoczowski, who, referring to the issue of patriotism, observed: “[...] we can maintain the Polish national consciousness in the world of globalization today, only by referring wisely to a thousand years of tradition and linking it more strongly with the European culture, of which we have been a part from the beginning. The community of the European Union is to serve our culture. [...] People everywhere are beginning to appreciate their cultural roots. It can be seen that people “without cultural roots” easily get lost in the face of threats. They must also have a stronger and stronger base on a larger, broader framework, on local and national frameworks, religious communities and others. [...] everyone is looking for broader support, because smaller communities may not be able to defend themselves against the negative effects of globalisation. [...] Our consciousness and culture, our thousand-year-old continuous Polish-European tradition, are our greatest capital today”⁶⁰.

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⁵⁸ A. Follesdal, *Why there is a democratic deficit in the EU: A response to Majone and Moravcsik*, “Journal of Common Market Studies”, vol. 44, issue 3, pp. 553–562.

⁵⁹ *European identity revisited: new approaches and recent empirical evidence*, eds. V. Kaina, I.P. Karolewski, S. Kuhn, Routledge: Taylor & Francis Group, London; New York, NY 2017.

⁶⁰ J. Kłoczowski, *Patriotyzm polski w długim trwaniu (Polish Patriotism In the Long Term)*, in: *Patriotyzm wczoraj i dziś. (Patriotism yesterday and today.)* “Seminarium, Polskiej Akademii Umiejętności 2002”, Kraków 2003, s. 114 quoted from E. Kornacka-Skwara, *Tożsamość narodowa w świetle przemian kulturowych (National identity in the light of cultural changes)*, „Prace Naukowe Akademii im. Jana Długosza in Częstochowa”, vol. XX/2011, p. 120.

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