8 Constitutional identity as a populist notion?

The Council of State and the forging of the Greek constitutional identity through the crisis

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8.1 Introduction

Populism and constitutional identity are both two relatively vague notions presently in fashion. As of late, they have inspired numerous discussions and theoretical debates.[1] In the current European context, they have been associated initially with the recent economic crisis and lately increasingly with the migration/refugee 'crisis'. Correspondingly, European integration, in the sense of a leitmotiv, has been a common denominator and target of both populist waves.[2] This, in fact, could be a first sign that these two concepts are more or less intertwined and can be associated with each other in the current political context. Before explicitly spelling out and elaborating this idea, it is first necessary to go through the main predicates of each concept.

Whereas the exact meaning and the identifying marks of populism are still debated,[3] there is no doubt that right-wing exclusionary populism is on the rise across Europe.[4] This vogue has significant repercussions in constitutional theory as well. It has been argued that a populist constitutional theory

1 Suffice it to mention the extensive literature on both concepts. For an overview of populism, see Cristóbal Rovira Kaltwasser and others (eds.), *The Oxford Handbook of Populism* (Oxford University Press 2017). On the notion of constitutional identity, mention could be made to the following books: Christian Calliess and Gerhard van der Schyff, *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019); Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015); François-Xavier Millet, *L'Union européenne et l'identité constitutionnelle de l'Etat membre* (LGDJ-Lextenso 2013); Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (Intersentia 2013); Laurence Burgorgue-Larsen (ed.), *L'identité constitutionnelle saisie par les juges en Europe* (Pedone 2011).

2 European integration is particularly the target of what Paul Blokker calls 'transnational populism'. Paul Blokker 'Varieties of Populist Constitutionalism: The Transnational Dimension' (2019) 20 German Law Journal 332, 346–347.

3 Cas Mudde calls populism an 'essentially contested concept'. Cas Mudde, 'Populism: An Ideational Approach' in Kaltwasser and others (n 1) 27.

4 Cas Mudde and Cristóbal Rovira Kaltwasser, 'Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America' (2013) 48 Government and Opposition 147–148.

advances three basic claims: 'one claim concerns the nature of constituent power, a second one regards the scope of popular sovereignty and a third claim relates to what constitutional identity entails'.[5] More correctly, populist constitutionalism is most often perceived as a threat to liberal democracy.[6] It attacks the separation of powers, agitating in favour of the 'liberation' of the people from the burdensome effect of checks and balances.[7] It also tries to forcefully undermine the legitimacy of the status quo and the 'establishment' in order to shake off the influence of the governing or technocratic elites. The ultimate goal is to impose the will of the true People, viewed as a uniform and monolithic whole.[8]

On the other hand, the notion of constitutional identity has been a constant reference in the jurisprudence of most national constitutional courts during the past decade.[9] Starting from the renowned declarations of the French *Conseil constitutionnel*[10] and the German *Bunvesverfassungsgericht* (hereafter: BVerfG),[11] through the Italian,[12] Czech[13] and Hungarian Constitutional Courts[14] – just to mention a few – constitutional identity appears to be a palimpsest mirroring the deepest desires of national constitutionalism. It has been mainly used by national courts as a counter-limit to European integration, a way to undermine the principle of the primacy of European Union law[15] and eventually to protest against the new European economic governance.[16]

In the current debate about populism and the need to combat it, courts play a double role: that of the victim of populism and that of the possible obstacle to populism. Indeed, the accrued power that judges possess in modern

5 Luigi Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (2016) 12 European Constitutional Law Review 6, 8.

6 See Stefan Rummens, 'Populism as a Threat to Liberal Democracy' in Kaltwasser and others (n 1), as well as Jan-Werner Müller, *What Is Populism* (University of Pennsylvania Press 2016) 68.

7 Blokker (n 2) 333.

8 Cristóbal Rovira Kaltwasser, 'Populism and the Question of How to Respond to It' in Kaltwasser and others (n 1) 490.

9 Pietro Faraguna, 'Constitutional Identity in the EU – a Shield or a Sword?' (2017) 18 German Law Journal 1617, 1630–1631.

10 Décision no. 92-308 DC du 9 avril 1992 (Maastricht I); décision no. 2006-540 DC du 27 juillet 2006 (Loi relative au droit d'auteur et aux droits voisins dans la société de l'information), para 6.

11 BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 (Lisbon Treaty).

12 Corte Cost., 26 gennaio 2017, n. 24, Foro it. 2017, II, 394 (It.).

13 Czech Constitutional Court, Case Pl. ÚS 5/12 Slovak Pensions XVII, 31 January 2012.

14 Decision 22/2016 (XII. 5.) of the Hungarian Constitutional Court.

15 Understood this way, constitutional identity is used as a 'hard shield' to limit further integration. Faraguna (n 9) 1629.

16 For a short overview of the developments in the Economic Union during the years of the crisis summed up by the term 'new European economic governance', see Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 195.

constitutional democracies and the ensuing judicialization of public affairs[17] are sometimes presented as a source of discontent, which could account for the rise of populism and the emergence of the bipolar scheme: judicial elite v. the people.[18] Most often, courts are therefore portrayed as the victim of populism. At the same time, judicial intervention is usually described as an antidote to populism or as a means of defence against it.[19] In other words, according to the dominant narrative, courts stand, axiomatically and under almost any circumstances, in contrast to populism, either as its target or as its counterpart. However – and herein lies a paradox – we need to ask ourselves if it is true that within a specific context courts could also succumb to the sirens of populism and claim to be the true representative of the people and last bastion of hope in times of an intense crisis of representation. Would it then be pertinent to speak about 'judicial populist constitutionalism'? What happens, furthermore, when a court flirting with populism and communitarian constitutional ideals and values[20] gets hold of the ambiguous notion of constitutional identity and twists it into a populist notion? Is it even possible that the two are compatible or attracted to each other?

I will argue in this chapter that this in fact has been the case in Greece. In some recent instances, the Greek Council of State (hereafter: CoS) has advanced ideas which echo, if they are not inspired by, communitarian and ethno-nationalist approaches to constitutionalism[21] and which are indeed very suggestive of exclusionary right-wing populist tendencies.[22] Meanwhile, in one of its relevant judgments, explicit reference is made to the notion of constitutional identity. The notion condenses, in the eyes of the Court, the eternal and inalterable hard-wired features of Greek self-identity extracted from the text of the Constitution and enjoying the status of constitutional principles.

What makes things stranger and even more interesting is the fact that Greece has not been one of the 'usual suspects', in the sense that it has not been classified as a populist regime, despite the development of strong populist tendencies during the years of the crisis (*grosso modo* 2010–2018); nor can the Council of State, a court renowned for its independence and liberalism for

17 What Ran Hirschl calls 'juristocracy' in his book *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

18 Andrea Pin, 'The Transnational Drivers of Populist Backlash in Europe: The Role of Courts' (2019) 20 German Law Journal 225, 227.

19 David Prendergast, 'The Judicial Role in Protecting Democracy from Populism' (2019) 20 German Law Journal 245, 261. Tushnet criticizes this belief by pointing to the fact that 'treating efforts to transform the courts as a strong point against populism … may often be a defense of a failed status'. Mark Tushnet, 'Varieties of Populism' (2019) 20 German Law Journal 382, 385.

20 As per the communitarian view of the Constitution, see Camil Ungureanu, 'The European Constitution-Making and the Question of Religion' (2007) EUI Working Papers No. 2007/01, 3–4 https://cadmus.eui.eu/handle/1814/6663 accessed 19 April 2020.

21 Blokker (n 2) 339–340.

22 For the distinction between exclusionary and inclusionary populism, see Mudde and Kaltwasser (n 4) 167–168.

the greater part of its century-long existence,[23] be considered to have been 'captured' by the government. Having said that, the Supreme Administrative Court has played an active role in the past few years during the economic crisis, which has set the stage for its gradual immersion into populist ideas.

Within the context of the crisis, the Court initially adopted what could be schematically called an anti-populist agenda. Following its emblematic judgment on the constitutionality of the first bailout agreement signed by Greece,[24] many other leading cases showed deference to the political branches. The Court placed its 'affirmative stamp of legitimacy'[25] on extremely painful policy choices, which were made to the discontent of a large part of the population. This is why, at this first phase, its attitude towards the crisis has been described as submissive.[26] Gradually, however, as the crisis went on and the policies designed to tackle it embraced even more fields and became more intrusive, the Court's stance began to change. At a second stage, submission gave way to reaction.[27] From that point on, the Court changed its attitude. Following several judgments that blocked particularly anti-popular measures, such as pension and salary cuts,[28] and undergoing a change of leadership as well, the Court appeared in the forefront of the political scene as a guardian of the interests of the people. It thus increasingly claimed the role of the true voice of the people and defender of its eternal consistence and long-lasting values, as opposed to the ephemeral character of the crisis. Given that in the economic field, the ruling elites, the legislature and political parties appeared powerless to impose the will and defend the interests of the People, the Court had to step in and fill the representational void. Its independence was the necessary precondition, so that it would not succumb to the factual pressure of any passing crisis. By taking advantage of its institutional privilege, it would be able to stand up against Europe or the Troika, foreigners or any other 'foe', and thus delineate a space that could be neither invaded nor squeezed by the dictates of 'outsiders'. Its foundational 'populist' judgments appeared in fact during times of widespread populism within Greek society and served as a

23 The Council of State was established as a judicial organ in 1929 with the explicit aim to serve as the basic guarantor of the principle of the rule of law, according to the famous words of its creator Eleftherios Venizelos. Since then, it possesses and frequently exercises the power of judicial review of legislative acts, a power guaranteed even in times of the eclipse of democratic institutions, such as the dictatorship of 1967–1974.

24 CoS Plen 668/2012.

25 This is the famous expression that Charles Black used with regard to the Supreme Court's role in legitimating the New Deal. Charles Black, *The People and the Court: Judicial Review in a Democracy* (The Macmillan Company 1960) 64.

26 Xenophon Contiades and Alkmene Fotiadou, 'On Resilience of Constitutions. What Makes Constitutions Resistant to External Shocks?' (2015) 9 International Constitutional Law Journal 3, 16.

27 Apostolos Vlachogiannis, 'From Submission to Reaction: The Greek Courts' Stance on the Financial Crisis' in Zoltán Szente and Fruszina Gárdos-Orosz (eds.), *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (Routledge 2018).

28 CoS Plen 2192/2014 (declaring the salary cuts of army and police officers unconstitutional); CoS Plen 2287–2290/2015 (declaring pension cuts unconstitutional).

reminder that even when the State is perceived to be financially or otherwise subdued, it is the Court's responsibility to speak for the People and the Nation and defend the primordial components of its identity.

Three sets of cases illustrate this point: those dealing with the law determining the conditions of granting nationality to aliens, those regarding Sunday work and those related to the teaching of religion in schools. The first part of the chapter will explore the relevant case law in order to outline its main features and examine its contribution in the forging of a protean Greek constitutional identity through the crisis. The second part will try to explain how exactly the notion of constitutional identity is shaped (and twisted or abused) in order to serve populist tendencies. The last part will attempt to draw some lessons from the Greek case regarding the relation of courts, European integration and populism.

8.2 The forging of the Greek constitutional identity through the crisis

The notion of constitutional identity has not been a complete stranger to the jurisprudence of the CoS, even before the crisis. In fact, in one of the few cases originating from Greece where the Court of Justice of the European Union (CJUE) was presented with the opportunity to elaborate and shed light on this cryptic notion, it was thanks to the initiative of the CoS.[29] In the so-called 'main shareholder' case, the CoS had to rule on the conformity of the recently amended Article 14, para 9 of the Constitution regulating the ownership, financial standing and means of financing of the media with Council Directive 93/37/EEC.[30] While the first judgment on this case seemed to be an act of defiance against European Union law,[31] the final judgment exploited the method of interpreting the national Constitution 'in light of the European Union law' and thus avoided a potential conflict.[32] In the meantime, after a request for a preliminary judgment,[33] the Advocate General Maduro had presented his thoughts on the possible (mis)uses of the notion of constitutional identity as the following:

> If respect for the constitutional identity of the Member States can thus constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, it can all the more be relied upon by a Member State to justify its assessment of constitutional

29 Case C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* [2008] I-09999 (*Michaniki*).

30 Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1993] OJ L199/54 (Directive 93/37), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 [1997] OJ L328/1.

31 CoS 3242/2004 (4th Chamber), especially para 18.

32 CoS Plen 3470/2011.

33 CoS Plen 3670/2006.

> measures which must supplement Community legislation in order to ensure observance, on its territory, of the principles and rules laid down by or underlying that legislation. It is, nevertheless, necessary to point out that that respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules. Were that the case, national constitutions could become instruments allowing Member States to avoid Community law in given fields. … Furthermore, it could lead to discrimination between Member States based on the contents of their respective national constitutions. Just as Community law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the Community legal order.[34]

What is noteworthy, in view of this judicial saga, is the fact that the CoS did not mention or make use of the notion of constitutional identity, even though it obviously had the chance. It would have been a clear-cut evocation pointing to the debated subject of the primacy of EU law and its relation with national constitutions. This is, in fact, how the notion has been mainly put to use by other national constitutional courts, such as the German or the French one, especially after the ratification of EU Treaties.[35] However, the CoS did not choose to do so and follow the same path. Instead, it decided to delve into the notion of constitutional identity in a radically different context and background, with a view to defending a dissimilar set of values.

The case law of the CoS relating to the notion of constitutional identity emerged in the context of the crisis and contains primarily three Plenary Session judgments pertaining to three thorny societal issues: nationality, Sunday laws and compulsory religious education. All these judgments received widespread publicity and have had considerable impact on public opinion. Before examining them, it would be useful to cite the constitutional provisions serving as their main legal basis:

> Art 1 para 3: All powers derive from the People and exist for the People and the Nation; they shall be exercised as specified by the Constitution.
>
> Art 3 para 1: The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ.
>
> Art 16 para 2: Education constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious consciousness and at their formation as free and responsible citizens.[36]

34 *Michaniki* (n 29), Opinion of AG Maduro, para 31.

35 See n 10 and n 11.

36 Official translation in English of the Greek Constitution https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf accessed 19 April 2020.

As a general outline, all three sets of judgments employ highly creative and loose methods of interpretation of the constitutional text. By these means, they succeed in offering a coherent – at least from the point of view of the majority of the Court – set of metaphysical values and principles that form the blueprint of the Greek constitutional identity. The two judgments on nationality (4th Chamber and Plenary Session[37]) establish the constitutional obligation to defend and preserve the ethnic character of the State; whereas the two judgments on Sunday work (Suspension Committee and Plenary Session[38]) and the two on religious education (both Plenary Session[39]) present the Greek Orthodox religion as a central component of Greek constitutional identity. As the Court openly admits, the common denominator of these judgments is safeguarding the ethnic and religious character of the Greek State; a concept which translates the ethnic and religious unity of the Greek People into legal/constitutional terms.[40]

The first two judgments on nationality invalidated sections of law 3838/2010 (Nationality Act) which reformed, in a progressive way, the conditions required for granting nationality to second-generation immigrants born or raised in Greece. The Chamber judgment was bold in its formulation of the constitutional obligation to preserve the continuity of the Nation throughout the centuries and to prevent its disintegration through massive naturalizations.[41] The Court stressed the importance over time of *jus sanguinis* laws in the Greek legal order and the need for those who seek citizenship to prove that they have *a genuine individual link* to the Greek nation. In its own words, Greek nationality law should not:

> allow foreign people to enter the popular community (people) without having an essential genuine link with it – especially by prescribing massive naturalizations – in a way that the composite element of the State (people) and its supreme organ (people-electoral body) would be constituted arbitrarily and in the end, the notion of the Nation would be disintegrated.[42]

By contrast, the Plenary Session judgment played down the 'blood rhetoric',[43] all the while staying faithful to a romantic approach to the Nation[44]

37 CoS 350/2011 (4th Chamb); CoS Plen 460/2013.
38 CoS Susp Com 307/2014; CoS Plen 100/2017.
39 CoS Plen 660/2018; CoS Plen 1749/2019.
40 In this sense, the approach of the CoS has striking analogies to Central and Eastern European populism. For the latter, see Gábor Halmai, 'Populism, Authoritarianism and Constitutionalism' (2019) 20 German Law Journal 269, 307.
41 CoS 350/2011 (4th Chamb), para 9.
42 Ibid., paras 10 and 13.
43 Giorgos Katrougalos, 'Ethnos, laos kai dikaiomata stin apofasi StE Ol 460/2013' (2013) 1 Theoria kai Praxi Dioikitikou Dikaiou 31, 32.
44 Ioannis Koutsoukos, 'I ithageneia, to Ethnos kai to kratos dikaiou' (2011) Efimerida Dioikitikou Dikaiou 77–78.

and a subsequently phobic approach to the phenomenon of migrant integration.[45] It declared in a similar vein to the Chamber judgment, and even more emphatically:

> the minimum condition and limit of relevant legislative provisions for the granting of Greek nationality is the existence of a genuine link of the foreigner to the Greek State and Greek society, which are not spineless organisms and ephemeral creations, but represent unity over time with a specific cultural background, a community with relatively stable mores and customs, a common language with a long tradition, elements that are bequeathed from generation to generation with the help of smaller community entities (family) and organized state entities (education).[46]

What is interesting from an interpretative point of view is the fact that both majority opinions compile every concrete reference to the word 'Nation' in the constitutional text, however related to the case at hand, in order to deduce a highly abstract constitutional principle. By means of this holistic approach, which could also be treated as an interpretative manoeuvre, the Court imposed on the legislature a very high level of scrutiny, contrary to the established interpretation of the Article 4 para 3[47] drafters' intention.[48] As a consequence, the judge becomes the *porte-parole* of the Nation,[49] the voice of national consciousness and the main defender of its continuity throughout the centuries, in spite of the troubles of history. Additionally, on this occasion, the CoS invoked, for the first time ever, the notion of constitutional identity in the Plenary Session judgment of 2013. It is worth highlighting the fact that the Court avoided evoking the notion of constitution identity when confronted with issues of national sovereignty and the constitutionality of the bailout agreements signed with the Troika.[50] It had recourse to the notion only when dealing with issues of nationality. Concretely, it stated that

> the Greek State was established and continues to exist as a national state with a specific history and this character is guaranteed by art. 1 para 3 of the Constitution in force.

Immediately after this, it pointed to the fact that the Greek State

45 Panagiotis Mantzoufas, *Oikonomiki krisi kai to Syntagma* (Sakkoulas 2014) 198–199.

46 CoS Plen 460/2013, para 6.

47 All persons possessing the qualifications for citizenship as specified by law are Greek citizens. Withdrawal of Greek citizenship shall be permitted only in case of voluntary acquisition of another citizenship or of undertaking service contrary to national interests in a foreign country, under the conditions and procedures more specifically provided by law.

48 Christos Papastylianos, 'Ta syntagmatika oria tou nomotheti os pros tin ktisi tis ithageneias kai ta politika dikaiomata ton allodapon' (2011) Efimerida Dioikitikou Dikaiou 71.

49 Koutsoukos (n 44) 83.

50 Cf CoS Plen 668/2012.

> is integrated in a supranational community of Nation-states with similar constitutional traditions (European Union) which according to article 4 paragraph 2 of the Treaty on European Union respects their national identity, inherent in their fundamental structures, political and constitutional.[51]

By means of this citation, it also insinuated and subtly put forward the argument that the ethnic character of the State is not a Greek peculiarity, but instead a common element of the European constitutional tradition.

In the Sunday law judgment, the Court invalidated, in plenary session, on formal grounds (unconstitutional delegation of powers) a ministerial decision regulating commerce on Sundays.[52] Beforehand, it had granted interim measures suspending the implementation of the ministerial decision, on the grounds that the plaintiffs' right to leisure and its common enjoyment with their family during the common Sunday holiday, as well as their right to exercise their religion, would be severely and irreparably injured.[53]

Although the plenary session reasoning omits any reference to free exercise of religion, the perceived violation of this right appears to have strongly motivated the judgment. As the subsequent judgments on religious education confirm, there is in fact a strong religious justification of the decision. The Court refers to a BVerfG judgment protecting the status of Sunday as a religious holiday,[54] and the Suspension Committee judgment explicitly mentions free exercise of religion as a justifying ground of the judgment.[55] It is not without relevance that both were hailed as landmark judgments by commentators, for the reason, among others, that they safeguarded the exercise of religious rights.[56] Significantly enough, this measure was also part of the bailout agreement signed with the Troika,[57] hence it constitutes a point of contact (or of breach) between the economic crisis and constitutional identity. It marks an attempt to limit the predominant effects of economic considerations in policy making and to favour non-material/spiritual ones.[58]

What is, however, implicitly stated in the Sunday law judgment becomes manifest in the following two Plenary Session judgments about the teaching

51 CoS Plen 460/2013, para 6.
52 CoS Plen 100/2017.
53 CoS Susp Com 307/2014, para 7.
54 BverfG – BvR 2857 and 2858/07 – 1.12.2009, especially chap B, II (cited by CoS Plen 100/2017, para 10).
55 CoS Susp Com 307/2014, para 7.
56 Panos Lazaratos, 'I Kyriaki os syntagmatiki arhi' (2014) Theoria kai Praxi Dioikitikou Dikaiou 862; Panos Lazaratos, 'To dikaioma ston elefthero hrono tis Kyriakis' (2017) Theoria kai Praxi Dioikitikou Dikaiou 307.
57 Law 4254/2014, which contains the delegation clause, was voted in order to implement law 4046/2012 ratifying the second bailout agreement between Greece and its lenders (Memorandum II). It is in fact entitled 'Measures to Support the Greek Economy Within the Framework of the Implementation of Law 4046/2012 and Other Provisions'.
58 Spyros Vlahopoulos, 'I zoi den einai mono oikonomia – To dikaioma sti sylllogiki evdomadiaia argia' [in Greek] (2017) Theoria kai Praxi Dioikitikou Dikaiou 313.

of religion in schools. The issue of religion has always been a very heated subject, stirring debate and sowing conflict within Greek society.[59] In the past, state practice in the realm of religion had led the European Court of Human Rights (ECtHR) to issue several judgments ruling against Greece for violation of the European Convention on Human Rights (ECHR) and in particular Article 9.[60] That said, especially in the past two decades, the CoS has been a principal force for promoting religious tolerance. Against this background, we have witnessed, nonetheless, retrogression during the years of the crisis.

In the path-breaking judgment of 2018, the CoS reactivated the 'prevailing religion' clause of Article 3 of the Constitution, which had previously lain dormant. Notwithstanding the dominant interpretation of the clause, which insists that it is a purely declaratory clause,[61] it yields full normative power to it. It evokes as a further argument the phrase of the Preamble of the Constitution which states: 'In the name of the Holy and Consubstantial and Indivisible Trinity'. The invocation of the Preamble as a guiding principle of constitutional interpretation recalls the 'aspirational interpretation' of the Preamble of the US Constitution preached by Justice Brennan.[62] In our case, however, the 'transformative purpose of the text'[63] has been turned on its head, in order to justify not the extension but the restriction of fundamental rights, despite the Court's own rhetoric. Using this twist, the Court then reads these religious references into the 'religious consciousness' clause of Article 16, para 2 and draws the logical conclusions. More precisely, the Court is adamant when declaring that according to its systematic and holistic interpretation of the text, there is a constitutional obligation of the legislature to safeguard and develop not just the religious consciousness of children, in abstract terms, but concretely their Greek Orthodox consciousness. This obligation is linked to the uncontested fact that the Greek state is extremely religiously homogenous. Therefore, parents and their children have a right to be taught their religion in school. This right is further

59 We should bear in mind that according to Weiler's classification, Greece constitutes one pole of the pendulum regarding Church-State relations in Europe, the other being France, the most fervent proponent of State religious neutrality. Joseph Weiler, *Un'Europa Cristiana. Un saggio esplorativo* (2nd ed. Biblioteca Univ Rizzoli 2003) 70–73, cited by Ungureanu (n 20) 5.

60 See for instance *Kokkinakis v Greece* (1993) Series A no 263; *Thlimmenos v Greece* 1997-IV 2000; more recently, *Papageorgiou and Others v Greece* App no 4762/18 and 6140/18 (ECtHR, 31 October 2019). Yannakopoulos argues more precisely that religion has served in the past as a counter-limit to the application of the ECtHR. Constantin Yannakopoulos, *I epidrasi tou dikaiou tis Evropaikis Enosis ston dikastiko elegho tis syntagmatikotitas ton nomon* (Sakkoulas 2013) 415.

61 Giorgos Stavropoulos, 'To mathima ton thriskeftikon ypo to fos tis prosfatis 660/2018 apofasis tou Symvouliou tis Epikrateias' (2018) Theoria kai Praxi Dioikitikou Dikaiou 358.

62 William J. Brennan, 'The Constitution of the United States: Contemporary Ratification' (1986) 27 South Texas Law Review 433.

63 Ibid. 438.

guaranteed by Article 2 of Protocol No 1 to the ECHR.[64] Lawmakers, as well as the administration, are hence instructed to provide schoolchildren with a complete and elaborate knowledge of the Orthodox dogma and instil in them the moral values and traditions of the Eastern Orthodox Church.[65]

In general, the Court's interpretative approach to the aforementioned clauses is quite anachronistic and revives militant ideas about the relation of Church and State, which more or less lead to the fusion of the two.[66] What is even more surprising is the way that the Court gives new meaning not only to constitutional clauses, but also to articles of the ECHR. Based on the interpretation of the Court, instead of protecting the rights of minorities, the ECHR supposedly guarantees and imposes majoritarian beliefs. Moreover, at some point, which is extremely important, the Court makes a detour and binds all previous judgments together by citing them as a whole: just as the term 'development of national consciousness' means preserving the ethnic character of the State, the term 'development of religious consciousness' means preserving the Orthodox identity of the State.[67] It follows that Greek constitutional identity, as sketched out by the Court, is based on a two-fold constitutional tradition: ethnic and religious. Tradition and identity are blended together, and, at the final stage, constitutional status is attributed to both of them.

8.3 Understanding the Court's use of the notion of constitutional identity

Right after the entry into force of the Lisbon Treaty, and especially during the recent economic crisis, the notion of constitutional identity has been seen as the new means of limiting and certainly, up to a point, challenging European integration. By referring to the dynamics of a notion consecrated by the European Treaties themselves,[68] national constitutional courts have tended to it in order to prevent further loss of national sovereignty. Through the lenses of a conflictual and no longer dialogical approach to the relation of European Union law and national constitutional orders, the demand to respect national constitutional identity has become the trademark of a

64 No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

65 CoS Plen 660/2018, para 14.

66 Stavropoulos (n 61) 359.

67 CoS Plen 660/2018, para 14.

68 Article 4 (2) TEU: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. 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.

jurisprudence of doubt towards more integration. In this light, the widespread use of the notion marks the rise of a new form of 'judicial constitutional patriotism'.[69]

The notion of constitutional identity lends itself, nevertheless, to various interpretations. The BVerfG proceeds in a dogmatic construction of the notion which corresponds, according to its reasoning, to the essence of national sovereignty and the core elements of the theory of State.[70] However, when the CoS evokes the notion, it does not consider the eternity clause of the Greek Constitution,[71] as its German counterpart does, nor the common founding constitutional principles of all member states. By contrast, it focuses on identity as difference, i.e. a condensation of constitutionally protected national particularities.[72] It is all about constitutional selfness and distinguishing it from the homogenizing effect of European integration and/or globalization. Let us be reminded here that the French *Conseil Constitutionnel* has also indirectly interpreted the notion of constitutional identity in a similar vein. The official commentary of the Constitutional Treaty for Europe decision[73] has cited in particular the principle of *laïcité* as an example of a principle not subject to European interference. Such an interference would indeed amount to running contrary to a principle 'inherent in the constitutional order of France'.[74]

It is obvious that the sights of the Court are set on the past and on the traditions of the country, understood as pre-political components of national selfhood. Its approach is based on what we could qualify, recalling and paraphrasing Walter Benjamin, as a strand of constitutional historicism. By contrast to progressivism, as well as redemptivism, constitutional historicism requires looking backwards in order to find meaning. It seeks faith in the values and practices developed in the past and grants priority to intergenerational consensus.[75] As a result, these values and ideals are truly important in the present and for the future. Their preservation is in fact of critical importance for the

69 In a sense completely different than the constitutional patriotism preached by Müller. See Jan-Werner Müller, *Constitutional patriotism* (Princeton University Press 2007).

70 Monica Claes and Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) 16 German Law Journal 917, 923-27. This could in fact mean that the BVerfG protects not only the identity of the German State, but, in theory, the identity of any member state.

71 Contained in art 110 para 1 of the Constitution.

72 For a more detailed analysis of the distinction between constitutional identity as difference and constitutional identity despite difference (i.e. the approach adopted by the BVerfG), see Faraguna (n 9) 1622.

73 Décision no. 2004-505 DC du 19 novembre 2004 (Traité établissant une Constitution pour l'Europe). For the commentary of the decision, see https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2004505dc/ccc_2004505dc.pdf accessed 25 April 2020.

74 Décision no. 2006-540 DC du 27 juillet 2006 (n 10), para 6.

75 For Benjamin's notion of historicism, see Walter Benjamin, *Über den Begriff der Geschichte* in *Gesammelte Schriften*, vol. I-2 (Suhrkamp 1980) 702. For the notion of constitutional historicism, inspired by Benjamin, see Amy Kapzcynski, 'Historicism, Progress, and the Redemptive Constitution' (2005) 26 Cardozo Law Review 1041, 1044–1045.

subsistence of the Nation in question. When they are under threat, either from globalization or European technocrats or migrants, the Court considers it to be its duty to act and protect what keeps the People together, what makes the People unique. By guaranteeing these values and ideals, the Court feels that it is guaranteeing a future to the Nation. Constitutional identity is no longer a purely legal notion, but, more importantly, it is an expression of the true self of the Nation and no less than an existential condition for its survival. These would indeed be considered things worth protecting and fighting for. From this point of view, it follows that tradition and constitutional identity are considered to be something more than an account of the past: they enjoy normative status and therefore *ought* to be preserved.[76]

To see matters clearly, the judgment on nationality adopts a nativist approach and constitutes a form of 'judicial activism in the service of the Nation under conditions of economic crisis'.[77] The link between economic and migration/refugee crisis perceived as common threats against the ethnic character of the State underlies the reasoning of the judgment. Equally, preserving the religious identity of the State is associated with the ideal of religious homogeneity, which could be under threat by recent migration/refugee flows. These arguments have been advanced by countries such as Hungary[78] and Poland[79] and constitute a topos of right-wing populist rhetoric.[80] Extending this point, it could be argued that the Court has treated religion and its own understanding of Church-State relations as an integral part of the 'material Constitution', viewed as an 'ordering force standing in internal relation with the formal constitutional settlement'.[81] In light of this view, whatever the written provisions' true meaning, the protection of religion should always be a driving force of constitutional interpretation.

It follows from this that the CoS embraces a version of constitutional identity linked to populism. It is by no accident that the former President of the CoS, who presided during most of these judgments, made the point, in a statement to the press, that the Court should be in touch with public

76 Corrias (n 5) 23.

77 Mantzoufas (n 45) 198–199.

78 Suffice it to cite a statement by Prime Minister Viktor Orbán on February 2017: 'I find the preservation of ethnic homogeneity very important'. Cited by Gabor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43 Review of Central and East European Law 23, 36.

79 Regarding the argument of ethnic homogeneity, see the remarks made by Poland, contained in the observations of the Court, in Joined Cases C-643 and C-647/15 *Slovak Republic et al v Council of the European Union* [2017] ECLI:EU:C:2017:631, para 302. For a broader view of the approach of the Polish Government on this matter, see also The Chancellery of the Prime Minister, *White Paper on the Reform of the Polish Judiciary*, Warsaw, 7 March 2018, especially paras 169–176 https://www.premier.gov.pl/files/files/white_paper_en_full.pdf accessed 19 April 2020.

80 Blokker (n 2) 340.

81 Marco Goldoni and Michael A. Wilkinson, 'The Material Constitution' (2018) 81 MLR 567, 595.

opinion when deciding hard cases. He specifically said in front of journalists that:

> [the case at hand] is important and equally important cases are pending before the Court and there are [cases dealing with] salaries, pensions; there is the crisis of Greek society. Our duty as judges is to stay in touch with Greek society. We have to stand united in order to face the great challenges.[82]

This statement provoked the ire of his predecessor as President of the CoS, who retorted in a predictable anti-populist judicial style that a judge must never be influenced by circumstances which shape public opinion at a specific moment of time.[83]

Populism and constitutional identity are hence intertwined in the Court's rhetoric. Identity becomes a slogan used in a populist exclusionary fashion to stress what makes the 'true Greek people' different from others, i.e. national conscience and adherence to the Greek Orthodox Christian dogma. Accordingly, it comes to no surprise that the Court sees itself as the original and true voice of the Greek nation. What is even more crucial is the fact that this case law, which revives decades-old doctrinal debates and concepts, materializes within the context of the economic crisis and what is perceived by parts of the electorate to be a 'loss of sovereignty' as a result of the financial aid programs and the engagements accompanying them. In fact, these judgments could also be understood and explained as a form of resistance to the emerging new European economic governance and its technocratic asphyxiation of member states' vital political space in the field of economic and fiscal policy.

Through this instrumental and deeply ideological use of the notion of constitutional identity, which has striking analogies with the use of self-identity by the Hungarian Constitutional Court,[84] the CoS supposedly strikes back at the Troika and European institutions, at Greece's lenders and all perceived 'foes' of the Nation, establishing a direct line of contact with the silent mass of the population, the People itself. Through its unavoidable vagueness, the

82 'Aixmes Sakellariou kai yposheseis Tsipra, meta ton "seismo" sto StE' *Kathinerini* (Athens, 6 October 2016) https://www.kathimerini.gr/877891/article/epikairothta/politikh/aixmes-sakellarioy-kai-yposxeseis-tsipra-meta-to-seismo-sto-ste accessed 19 April 2020.

83 Konstantinos Zoulas, 'Pikrammenos: O dikastis den epireazetai apo ti sygkyria' *Kathimerini* (Athens, 14 October 2016) https://www.kathimerini.gr/879131/article/epikairothta/ellada/pikrammenos-o-dikasths-den-ephreazetai-apo-th-sygkyria accessed 19 April 2020.

84 See Decision 22/2016. (XII. 5.) of the Hungarian Constitutional Court. See also the amended Section (4) of Article R of the Hungarian Constitution, which states that 'The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State'.

notion of constitutional identity turns into a populist notion and shows its inherently explosive content.[85]

8.4 Lessons to be drawn from the Greek experience

It is now time to ask ourselves what lessons can be drawn from the Greek judicial experience regarding the convergence of populism and constitutional identity. First of all, I think that it has been shown so far that courts are not, axiomatically, immune to populism and cannot in all circumstances be treated as the definite stronghold against populism. The idea of a populist court is not a contradiction *per se*. Let us remind ourselves here of the Supreme Court Justice William O. Douglas (of Western origin and a fervent New Dealer) who, paraphrasing the Preamble of the US Constitution, chose as the title of one his books the following: *We the Judges*.[86] There should be no doubt that courts have an important role to play when democracy and rule of law are under threat. It is their duty to defend liberal democracy through their power of judicial review exercised in a John Hart Ely vein of representation-reinforcing theory.[87] They can indeed provide, up to a certain point and at the initial stages, a check on governments who, speaking in the name of the 'People', seek to silence any dissenters. However, when populism gains ground, there is a need for a more comprehensive institutional strategy in order to combat it. It would be futile and even dangerous to mistakenly believe that courts can win the war singlehandedly. Most of all, we have to bear in mind that populism needs to be primarily combatted politically, not judicially. Otherwise, the populist propaganda pointing to the elites as a barrier against the execution of the will of the People tends to become a self-fulfilling prophecy.

Secondly, populist constitutionalism is usually associated with constituent power and often pursues the creation of a new Constitution.[88] However, a populist leader or government need not necessarily put into play the constituent power. Instead, courts 'tainted' by populist rhetoric can easily instrumentalize the Constitution, reshape existing concepts, twist the meaning of constitutional provisions and create new constitutional principles in order to back or further a populist agenda. Conceptual instruments such as general will, popular and national sovereignty, nation and religion are most of the time already contained in the constitutional text or underlie it. The meaning of these clauses is produced under the guise of 'interpretation'. What courts

85 Daniel Kelemen and Laurent Pech, 'Why autocrats love constitutional identity and constitutional pluralism: Lessons from Hungary and Poland' (2018) RECONNECT Working Paper No. 2 – September 2018, 5–6 and 9–10 https://www.reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf accessed 19 April 2020.

86 William O. Douglas, *We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukherjea* (Doubleday & Company Inc 1956).

87 Prendergast (n 19) 246–247. See also John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

88 Corrias (n 5) 8.

really do, when 'searching' for their hidden meaning, is to create constitutional constructions that flesh out and implement the constitutional text and its underlying principles.[89] An illiberal reading is often more than enough to produce the desired outcome. The interpretation by the CoS of Article 2 of Protocol No 1 to the ECHR regarding the right to education and the respect of parents' religious and philosophical convictions suffices to prove the point.

Last but not least, in the case of Greece, populist reaction and the subsequent evocation of the notion of constitutional identity were initially fuelled by the economic crisis. The main target was undoubtedly surveillance mechanisms established by the European institutions and linked to financial assistance programs; indirectly, the target was also European integration in the economic and fiscal field. However, things have changed and now the main cause of reaction seems to be the migration/refugee issue. What is even more troubling is that European integration in the field of asylum policy, external border control and relocation/integration policy concerning refugees can still remain a target for populists. A possible deadlock and resistance to relevant European policies is already at play.[90] Combining communitarian ideals, voluntaristic conceptions of national and popular sovereignty as well as denouncement of Brussels' technocratic government is a cocktail that has seduced even national constitutional courts – though one has to say in more elaborate form – let alone parts of the electorate. One could venture to say that the notion of national or constitutional identity, originating from the European Treaties themselves, will be used more and more in this direction in the immediate future.

8.5 Epilogue

During the past few years, the CoS has elaborated through several judgments a protean conception of the Greek constitutional identity. The notion was shaped under very stressful circumstances for the country and seemingly as a reaction to a variety of different perceived threats to the existence of the Nation. This has allowed for the notion of constitutional identity to be entangled with the widespread populist tendencies within the exact same period. In this light, the 'affair' between populism and constitutional identity in Greece, through the medium of the courts, could in fact be regarded as a passing product of the crisis.

Indeed, after almost a decade, the period of the crisis seems to be over both for the country and the Court. In fact, it can be argued that the Greek CoS, luckily enough, after a short ambivalent period, has shied away from populism. All the judgments commented on in this chapter, on nationality, Sunday laws and religious education, appear in many respects distanced in time, a parenthesis soon to be forgotten. The dynamic of the Court is now

89 Jack Balkin, *Living Originalism* (Harvard University Press 2011) 14–15.

90 See, for instance, the recent ECJ judgment on refugee relocation. Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Republic of Poland and Others* [2020] ECLI:EU:C:2020:257.

different, and it hardly seems possible that the notion of constitutional identity will be further developed in this direction in the near future.

Having said that, although this may well be the case as far as the general outline of the course of the Court is concerned, caution is still necessary. The Court's relevant case law has not been reversed;[91] for the most part, it is still standing and has even been reaffirmed so as to become settled, as the recent decision in 2019 about the teaching of religion in schools shows. As a consequence, the notion of constitutional identity has been engraved in the Greek constitutional order and can be reactivated when the circumstances change and a similar representational void to the one produced during the past years of the economic crisis emerges.

This is why the CoS needs to intervene and produce a brand-new conception of the notion of constitutional identity. Hopefully, the Court will go on and elaborate a different understanding of this contested notion that will replace the introverted one sketched out in this chapter. Along this direction, it has to create an identity-less phobic towards modern-day challenges and more open to liberal ideals and to European integration. Through this path, it should be guided by Article 28 of the Constitution and especially its interpretative declaration,[92] which, according to its dominant interpretation, serves as a 'portal' through which EU goals are integrated into the national legal order.[93] Otherwise, the relic of a constitutional identity stressing religious and ethnic particularities might come to haunt us again in the future.

91 The only exception to the rule being the Sunday law judgments, which could be qualified as the 'weakest link' of the constitutional identity jurisprudence. In judgment 18/2019, the 4th Chamber of the CoS implicitly, though not expressly, reversed its previous judgments and ruled in favour of the constitutionality of a new ministerial decision, which essentially had the same content as the previous one, but which, in the Court's opinion, was better documented, hence justified. In his concurring opinion, the Chamber's President asked for the explicit reversal of the Sunday laws precedent on the ground that such a limitation of the legislature's power conveys a paternalistic approach which would be incompatible with the liberal character of the Constitution (para 12).

92 Article 28 constitutes the foundation for the participation of the country in the European integration process.

93 Lina Papadopoulou, *National Constitution and Community Law: The Question of Primacy* (A.N. Sakkoulas 2009) 443–446, where also all relevant citations to other writers can be found.