COSTELLO V IRELAND AND AN IRISH CONSTITUTIONAL IDENTITY

Abstract: This article interrogates the use of 'constitutional identity' language in the recent Supreme Court decision of Costello v Ireland. It outlines the concept's role in the case, its place in European Union law, and how it fits with prior constitutional interpretation. Important questions should be asked in the wake of this development, such as who will be tasked with defining constitutional identity and how it may be applied. It is argued that introducing this concept into Irish law could cut against the principle of popular sovereignty, previously held by the courts to be the fundamental bedrock of Bunreacht na hÉireann.

Author: Seán Rainford BA, LLB, MA (University of Galway), PhD Researcher at Dublin City University.

Introduction

In the recent Irish Supreme Court case of *Costello v Government of Ireland,*[1] a majority of four judges to three held that the Irish Constitution prohibited Ireland's ratification of the Comprehensive Economic & Trade Agreement ('CETA') between the European Union and Canada. The majority held that the agreement's investor-state dispute settlement mechanism would infringe on Irish juridical sovereignty. In particular, because these investor tribunals' awards would have virtually automatic effect in domestic Irish law without the possibility of appeal to the High Court, a parallel system of justice would be created – abrogating the sovereignty of the judicial branch of government.[2] The case is the Supreme Court's boldest assertion of state sovereignty against an international treaty since *Crotty v An Taoiseach* in 1987[3] and may yet prove to be one of the most consequential decisions – constitutionally and politically – in the court's history.

In a spirit of constitutional cooperation between branches of government, one of the majority judges, Hogan J, did not leave this decision as the final word. His judgment included a proposal for the executive and legislative branches to cure CETA's unconstitutionality without having to call a referendum to amend the Constitution.[4] Since the automatic enforcement of CETA tribunal awards would arise due to Ireland's domestic Arbitration Act 2010 ('the 2010 Act'), he proposed an alteration to this Act that would allow the High Court to stop a tribunal award that threatened Ireland's *constitutional identity*, as well as our obligation to give effect to EU law. Six of seven judges held that this would negate any infringement of juridical sovereignty that CETA presents.

This article seeks to address the implications and consequences of introducing 'constitutional identity' into Irish jurisprudence. It begins by outlining the background of the *Costello* case and the role played by constitutional identity, the concept's place in European Union law, as well theoretical perspectives on constitutional identity generally. It then looks at Irish caselaw and scholarship on an Irish constitutional identity. Although not integral to the overall

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[1] *Patrick Costello v The Government of Ireland and the Attorney General* [2022] IESC 44.
[2] ibid [280] (Dunne J); [227] (Hogan J).
[3] *Crotty v An Taoiseach* [1987] 1 IR 713.
[4] *Costello* (n 1) [233] (Hogan J).

finding of *Costello*, important questions should be asked in the wake of this development. What is Ireland's constitutional identity? Who is tasked with defining it? How is it to be applied? This article argues that there is an inconsistency in the suggestion to amend the Arbitration Act. Since a fundamental *grundnorm* of constitutional jurisprudence has been that 'the People' are sovereign and thus decide what the Constitution consists of through amendment referendums, it must be questioned whether introducing constitutional identity into Irish law – having the practical effect of *avoiding* a referendum – coheres with this principle, especially given the central role that the judiciary would presumably play in defining this identity.

Background of *Costello v Ireland*

CETA and juridical sovereignty

CETA is a trade agreement negotiated between the European Union and Canada designed to remove tariff barriers between these two customs areas and create the conditions for free trade. Similar to many bilateral investment treaties and multilateral trade agreements negotiated during the 2000s and 2010s – such as the (subsequently dropped) Trans-Pacific Partnership ('TPP') – it includes an 'investor-state dispute settlement' mechanism. These investor tribunals are designed to ensure compliance with the terms of the agreement among signatory states towards investors. They would allow investors to take legal action for damages against a host state that infringes the terms of the agreement. The party in question would have a choice of taking legal action through the CETA investor tribunal system or the domestic legal system of the relevant state; they could not do both.[5] This tribunal mechanism was what was at issue in *Costello v Ireland*.

Having lost his case in the High Court, Patrick Costello, a Green Party TD, appealed this outcome to the Supreme Court. His argument against CETA was that the investor tribunal mechanism abrogated Irish juridical and legislative sovereignty. It abrogated the former by establishing an alternate or parallel system of justice separate from courts established or permitted by the Constitution, whose awards of damages would be enforceable within the State. It abrogated the latter due to the effect that awards of damages would have on legislation in Ireland, as well as the ability of the CETA Joint Committee to change the agreement's terms. He contended that the practical effect of these tribunals would be to produce a 'regulatory chill' in policy areas like the environment. The threat of a costly award of damages against the State for such regulations may make legislators reluctant to enact them.

While the argument on legislative sovereignty was not accepted by a majority in the Court, four judges out of seven held that this tribunal mechanism would be a violation of juridical sovereignty and would thus be incapable of being ratified under Art 29 of the Constitution. As outlined by Dunne J, the mechanism would create a parallel jurisdiction where a party could choose to pursue legal action through a CETA tribunal which would otherwise be under the jurisdiction of Irish courts. This parallel system would also benefit from virtually automatic enforcement of any award of damages within the State.[6] These two elements taken together amounted to an unacceptable subtraction from the judiciary's jurisdiction under the Constitution.

[5] Article 8.22.1, Consolidated Text of the Comprehensive Economic & Trade Agreement (CETA) (2016).
[6] *Costello* (n 1) [246] (Dunne J).

Both the subject matter and judgment of *Costello* make it a highly significant case in the line of jurisprudence following the *Crotty* case. In that seminal decision, it was held that parts of the Single European Act ('SEA') fettered the executive branch's sovereign ability to conduct foreign policy, which would make ratification without constitutional amendment impossible. Ratification of the SEA (as well as all subsequent major European treaty changes) required constitutional amendment so that the pooling of national sovereignty with European institutions would be compatible with Bunreacht na hÉireann.[7] What *Costello* adds to the *Crotty* legacy is to define the boundaries of Irish juridical sovereignty by excluding the possibility of Investor-State Dispute Settlement (ISDS) tribunals that retain the final appeal on parts of Irish law. It is for this reason that Hogan J asserts that the case 'may yet be regarded as among the most important which this Court has been required to hear and determine in its almost 100-year history.'[8]

Hogan J's proposal

Ireland's dualist approach to international law is laid out in Article 29.6: no international agreement can have domestic legal effect without its terms being transposed into domestic legislation by the Oireachtas.[9] In this context, the automatic enforcement of a CETA tribunal award of damages is due to the fact that, under s. 25 of the Arbitration Act, the High Court would be unable to refuse enforcement of these decisions. Hogan J, a judge in the majority, described the role that s. 25 plays:

> [T]he Act serves as a sort of make-shift pontoon bridge by which a CETA Tribunal award is enabled to cross that legal Rubicon from the realm of international law into an enforceable judgment recognised as such by our own legal system on a more or less automatic basis.[10]

In effect, what Hogan J contends is that it is a piece of *domestic Irish legislation* which would make CETA constitutionally unacceptable. Without legislative changes, the full terms of CETA could not be ratified by the government. With this in mind, what Hogan J proposes to the other branches of government is that in order to 'cure' CETA's unconstitutionality, an amendment could be made to the Arbitration Act as follows:

> While not wishing to be prescriptive, it would be necessary at a minimum to move from the present virtually automatic enforcement procedure to a situation where the High Court, when called upon to give effect to a CETA Tribunal award (as distinct from an ordinary commercial arbitration award) under either the ICSID Convention or New York Convention and s. 25 of the 2010 Act, was expressly empowered by that new legislation to refuse to give effect to that award where it considered that:
>
> (a) the award materially compromised the *constitutional identity of the State or fundamental principles of our constitutional order*, or
> (b) the award materially compromised our obligation (reflected in Article 29.4.4 of the Constitution) to give effect to EU law (including the Charter of

[7] *Crotty* (n 3).
[8] *Costello* (n 1) [9] (Hogan J).
[9] Art 29.6: 'No international agreement shall be part of the domestic law of the State sabe as may be determined by the Oireachtas.'
[10] *Costello* (n 1) [84] (Hogan J).

> Fundamental Rights and Freedoms) and to preserve its coherence and integrity.[11]

Five of Hogan J's six other Supreme Court colleagues accepted that this would remove any question of unconstitutionality from CETA – thus opening the door for the government to ratify the trade agreement without being required to call a referendum to amend the Constitution.[12] Central to this proposal is that the High Court would be tasked with protecting Ireland's 'constitutional identity' and the 'fundamental principles of our constitutional order' in the face of investor tribunals, restoring the final appeal on legal matters which affect the State to domestic Irish courts – a key aspect of sovereignty from the Court's point of view.

MacMenamin J's substantive identity

Hogan J was not the only judge to engage in language of constitutional identity. The dissenting judgment of MacMenamin J also employs the concept. While Hogan J believes that changes are required to the 2010 Act in order to give the High Court the final say in enforcement of a tribunal's award, both MacMenamin J and O'Donnell CJ believe that the High Court can *already* refuse enforcement of any decision which threatens the State's constitutional identity. MacMenamin J's judgment is notable for specifying what, to him, this *substantive* identity consists of:

> First, Article 5 of the Constitution is *fundamental to the structure of the State*. It provides that Ireland is a sovereign, independent, democratic state. Second, Article 6, equally significantly, states that all powers of government derive under God from the People. Article 6.2 provides, in terms, that the powers of government are exercisable only by, or on the authority of, the organs of State established by this Constitution. *What is provided in both Articles are part of the constitutional identity of this State*.[13] [14]

He also elaborates on the powers he believes the High Court already enjoys vis-à-vis investor tribunals:

> Were it to be found that some action or actions, or decisions on foot of CETA did offend against fundamental constitutional values or the constitutional identity of the State, *such as judicial independence, or the finality of judgments*, a court, acting under the Constitution, would have no alternative but to refuse to enforce such an award.[15]

Costello is notable for the extent to which both majority and dissenting judgments engage with a theoretical concept not yet entertained by Irish courts explicitly. Both sides of the Court seem to agree: Ireland has a core constitutional identity which ought to be guarded jealously. The disagreement, then, is whether or not the judicial branch already has the power

[11] ibid [233] (Hogan J) (emphasis added).
[12] Dunne and Baker JJ (majority) as well as O'Donnell CJ and MacMenamin and Power JJ (dissenting) agreed with Hogan J's position that amending the Arbitration Act 2010 would remove any question of unconstitutionality from CETA; Charleton J dissented on this point at [53].
[13] *Costello* (n 1) [9], [10] (MacMenamin J) (emphasis added).
[14] Art 5: 'Ireland is a sovereign, independent, democratic state.'; Art 6: 'All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good'.
[15] *Costello* (n 1) [163] (MacMenamin J) (emphasis added).

to guard it – specifically, juridical sovereignty – from the decisions of investment tribunals such as those of CETA.

The Identity Concept
Constitutional identity in EU law

Although 'constitutional identity' is a phrase which has not been used explicitly by Irish courts before,[16] it is a concept which has taken on a life of its own across the European Union since the Treaty of Lisbon. The textual source of the concept is found in what is usually called the 'identity clause' of the Treaty on European Union ('TEU'), first introduced in the Maastricht Treaty and now expressed as follows in 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.'

The motivation for including this guarantee, along with the principle of subsidiarity, is to caveat the project of 'ever closer union', to ensure that European integration cannot override unique national and constitutional arrangements.[17] While it is not inconsistent with the primacy of EU law from a Court of Justice perspective,[18] the identity clause has been used by national judiciaries in furtherance of their general effort to restate the primacy of their own constitutions, as they see it, over EU law. Its most notable and extensive use has been by Germany's Constitutional Court, the *Bundesverfassungsgericht* (BVerfG). The BVerfG has used the eternity clause of the German Basic Law (Article 79.3) as the primary source of Germany's constitutional identity. As Art 79.3 makes the principles in Articles 1 and 20 unamendable (human dignity, federalism, republicanism etc),[19] they constitute the most important values of Germany's constitutional order. Although the Basic Law's core identity is not limited to this, Art 79.3 provides a clear source for the BVerfG to look to when grounding their understanding of Germany's constitutional identity.[20]

The *Solange I* case of 1970 outlined the position of the BVerfG regarding the relationship between the Basic Law and EU. The Court asserted that: 'Article 24 of the Constitution deals with the transfer of sovereign rights to inter-state institutions. This […] does not open the way to amending the *basic structure of the Constitution, which forms the basis of its identity*, without formal amendment to the Constitution.'[21] *Solange I* and *II* articulated the BVerfG's position that EU law enjoys primacy '*so long as*' it is consistent with the principles of the Basic Law, particularly fundamental rights. 'Constitutional identity' took on considerable importance following the *Lisbon* case of 2009, when the BVerfG employed Art 4(2) TEU directly. Since this decision, German courts have held that EU law is subject to an 'identity lock', described in the following way:

> [T]he Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article

[16] Oran Doyle, 'Trojan Horses and Constitutional Identity' *Verfassungsblog,* (23 November 2022) <https://verfassungsblog.de/trojan-horses-and-constitutional-identity/> accessed 09 January 2023.
[17] Diane Fromage and Bruno De Witte, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives' (2021) 27(3) European Public Law 413.
[18] Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015) 279.
[19] Article 79.3: 'Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.' *Grundgesetz für die Bundesrepublik Deutschland* (1949).
[20] Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Hart 2011) 29.
[21] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540, [22].

> 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected […] The identity review makes it possible to examine whether, due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated. This ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect.

The BVerfG's identity jurisprudence has also had considerable influence outside Germany. The approach of grounding constitutional identity in unamendable clauses is also found in the Czech Republic.[22] Article 9.2 of the Czech constitution makes the 'substantive requisites of the democratic, law-abiding State' unamendable. The Czech Constitution Court has thus held that EU law must be consistent with this constitutional identity in order to enjoy primacy.[23] Using similar language, the Italian Constitutional Court has held that EU law primacy can only have effect as long as the 'fundamental principles of our constitutional order or the inalienable rights of man' are respected by EU institutions.[24]

Other national courts have used the identity clause to challenge European integration using more nationalistic interpretations, choosing to defend those aspects of a constitutional system that are *unique* to the given country. In France, for example, national constitutional identity constitutes those aspects of the constitutional order that are distinctive to France.[25] It is also worth mentioning that states like Hungary and Poland have employed the identity clause in ways which have attracted significant political and academic criticism.[26] German identity jurisprudence has been used by courts in these jurisdictions to place their own limits on the powers of EU institutions, and in the context of a 'rule of law crisis' in Europe constitutional identity is a tool which many argue is being used to bolster rising authoritarianism.[27]

Overall, whether national courts choose to ground constitutional identity in unamendable provisions or unique constitutional structures, identity is defined in *substantive* terms – some institutions, values, and principles can be defined as part of this core identity, implicitly placing others outside it. Its application as a concept has been to reassert the interpretive power of national courts vis-à-vis European institutions – in other words, as an assertion of national juridical sovereignty.

Constitutional theory

[22] Decisions Pl. ÚS 19/ 08 and Pl. ÚS 29/ 09; cited in Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021) 120.
[23] Decision Pl. ÚS 50/04; see Craig and De Búrca (n 18) 308.
[24] *Frontini v Ministero della Finanze* [1974] 2 CMLR 372, [21].
[25] Fromage and De Witte (n 17) 417.
[26] See R. Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies 59; Gabór Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43(1) Review of Central and East European Law 23.
[27] R. Daniel Kelemen and others, 'National Courts Cannot Override CJEU Judgments' (26 May 2020) *Verfassungsblog* <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/?utm_source=pocket_reader> accessed 26 January 2023; Suteu (n 22) 121.

From a theoretical point of view, constitutional identity is conceptually close to constitutional entrenchment, the idea of a 'basic structure', and an unchangeable constitutional core.[28] The implication of having a constitutional identity is that some parts of a constitution are more essential to the document's overall coherence than others and should be guarded from change more closely.[29] The possibility of amendment is a persistent problem for those analysing constitutional identity – can a constitutional identity be amended as easily as technical aspects of a constitution, or can it be amended at all? It is perhaps for this reason that entrenchment and/or tiered amendability are seen as expressive of constitutional identity when they appear.[30] As explained by Richard Albert, 'by identifying a constitutional feature of statehood as unamendable, entrenchment signals to citizens just as it does to observers what matters most to the state by fixing the palette of non-negotiable colors in its self-portrait.'[31]

European Union law is not only relevant when discussing this concept; India's 'basic structure doctrine' – a judiciary-initiated doctrine which limits the scope of constitutional amendability – hinges to a significant degree on the idea of a core identity of the Indian Constitution. When the Indian Supreme Court defined the limitations on how far the Constitution could be changed, it articulated these limits by invoking the idea of a constitutional identity that India was endowed with in 1949. Technical aspects of the text could be amended and updated at will by the Indian parliament, but the core identity – or the 'basic structure' of the constitutional order – was beyond the amending scope of this body. As Chandrachud J of the Indian Supreme Court said to parliament in the *Minerva Mills* decision: 'Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore you cannot destroy its identity.'[32]

This type of identity jurisprudence was qualitatively different from that seen in Germany; it was based on judicial initiative rather than looking to an textual source in the Constitution – India has no eternity clause.[33] In the tense political climate of the 1970s, the Supreme Court took it upon itself to limit how far Parliament could alter the Constitution. This has been a core feature of India's political and constitutional culture ever since.[34]

Constitutional identity in Ireland

While some constitutions explicitly state which parts make up its core identity, often through eternity clauses or scaled thresholds for amendment, Bunreacht na hÉireann does not. In lieu of this, constitutional academics and experts may speculate that this or that feature is more important than another – e.g., that the legislative role of the Oireachtas might be more important than the length of the President's term of office. But this kind of assessment is, in the end, subjective. One analyst will value one institution or practice more than another given his/her own beliefs. Defining the substance of Ireland's constitutional identity – whether

[28] The *Solange I* case from the BVerfG treats 'basic structure' and 'constitutional identity' as almost synonymous, with one being the basis of the other (n 22). See also Gary J. Jacobsohn, 'An unconstitutional constitution? A comparative perspective' (2006) 4(3) International Journal of Constitutional Law 460, 480.
[29] Jacobsohn (n 28) 476.
[30] Suteu (n 22) 101-102.
[31] Richard Albert, 'Constitutional Handcuffs' (2010) 42 Arizona State Law Journal 663, 700.
[32] *Minerva Mills Ltd. v Union of India*, AIR 1980 SC (Chandrachud J at 1798); quoted from Jacobsohn (n 28) 476.
[33] Art 368.1: 'Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.' *Constitution of India* (1949) [2022].
[34] See Rory O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' (1999) 4 Journal of Civil Liberties 46-73.

that is parliamentary democracy, fundamental rights, or the finality of judicial decisions – is a subjective, value-driven exercise in the absence of any textual definition.

To date, the Irish courts have rejected the route taken by superior courts in other countries to define unchanging substantive constitutional principles. Rather than finding there to be an unamendable basic structure to Bunreacht na hÉireann, they have reiterated on numerous occasions that any part of the Constitution can be changed, replaced, or jettisoned as the people see fit through referendum. Even throughout the courts' historic oscillation between legal positivism and belief in the supremacy of natural law,[35] they have never challenged the validity of an amendment which was properly enacted through national referendum. Indeed, they have upheld the sovereign right of the people to amend the Constitution in any way they wish.[36] Such a right was, according to Hamilton CJ, 'sacrosanct'.[37] In the words of Barrington J, '[t]here can be no question of a constitutional amendment properly before the people and approved by them being itself unconstitutional.'[38]

Numerous constitutional scholars have remarked on the quasi-religious significance that this principle holds for Irish courts.[39] The principle that the Constitution can be changed in any way is seen by the courts as the highest expression of popular sovereignty, taking precedence over any substantive aspect of the Constitution – express or implied. Even those rights explicitly described in natural law terms are, for the courts, secondary to the overriding right of the constituent power to do away with them.[40] Any aspect can be amended, even the State's sovereignty itself. As Walsh J explained regarding Title III of the SEA in *Crotty*:

> If it is now desired to qualify, curtail or inhibit the existing sovereign power to formulate and to pursue such foreign policies […] it is not within the power of the Government itself to do so […] To acquire the power to do so would, in my opinion, require a recourse to the people "whose right it is" in the words of Article 6 "...in final appeal, to decide all questions of national policy, according to the requirements of the common good." In the last analysis it is the people themselves who are the guardians of the Constitution. In my view, the assent of the people is a necessary prerequisite to the ratification of so much of the Single European Act as consists of title III thereof.[41]

In the course of his *Costello* judgment, Hogan J echoes Walsh J in asserting this central constitutional philosophy:

> [A]t all relevant stages the Irish People have assented to this sharing and pooling of sovereignty [with other EU member states] in a series of constitutional amendments from 1972 onwards. If, however, there is to be any further material transfer of that sovereignty, it is essential to our system

[35] *State (Ryan) v Lennon* [1934] (Kennedy CJ); *McGee v Attorney General* [1974] IR 284, [310].
[36] Eoin Daly, 'Translating Popular Sovereignty as Unfettered Constitutional Amendability' (2019) 15(4) European Constitutional Law Review 619, 625.
[37] *Hanafin v Minister for the Environment* [1996] 2 ILRM 61.
[38] *Riordan v An Taoiseach (No 1)* [1999] 4 IR 321, at 330.
[39] Colm O'Cinneide, 'The people are the masters: the paradox of constitutionalism and the uncertain status of popular sovereignty within the Irish constitutional order' (2012) 48 Irish Jurist 249, 256; Eoin Daly, 'Constitutional Identity in Ireland: National and Popular Sovereignty as Checks on European Integration' in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (2019 Cambridge University Press) 183; Jacobsohn (n 28) 469.
[40] *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] 1 IR 1 (Hamilton CJ at [38]).
[41] *Crotty* (n 3) [62] (Walsh J).

> of constitutional democracy that the further consent of the Irish People is obtained.[42]

Summing this position, he says '[a]s Article 5, Article 6 and Article 47 all in their own way demonstrate, this, at any rate, is *the theory upon which the Constitution is founded*.'[43] In other words, procedural popular sovereignty, embodied in unfettered amendability through referendum, is Ireland's *grundnorm*. If this line of judicial interpretation is followed to its logical conclusion, it seems reasonable to say that this philosophy is a leading candidate for Ireland's constitutional identity. Indeed, it has been the one relied upon by the courts whenever cases to do with involvement in supranational organisations or treaties have arisen.[44] Importantly, as Daly has explained in his exegesis of constitutional identity in the Irish context, this is a *procedural* identity only; the courts have resisted attempts to define a substantive identity made up of specific principles or institutions as other jurisdictions have.[45]

The shift in Irish social and religious values from 1937 to today is well-known. When Bunreacht na hÉireann was adopted, consensus would have arguably held that Ireland's substantive constitutional values were aligned with Roman Catholicism and Irish nationalism. Indeed, grounds for that Catholic-nationalist identity can be seen in the text of the Constitution to this day. However, as these influences have weakened, our Constitution has developed to track shifting values.[46] It is for this reason that Jacobsohn – a leading scholar on constitutional identity – argued that Ireland's constitutional identity lies in the idea of *expressiveness*,[47] that the Constitution articulates society's changing norms and values. This expressive quality has allowed the judiciary to interpret the Constitution as a 'living document' which can develop with the changing needs of the society it serves.[48]

An important reiteration of this constitutional philosophy came from O'Donnell J (as he then was) in a 2017 lecture. Speaking on the topic of judicial activism and social change, he argued that innovative judicial interpretation that tried to change the meaning of the Constitution from the bench may usurp the power of the people to democratically amend their Constitution through Article 47.[49] He warned that '[t]he power of amendment is the power of the People and interpreting the Constitution to reshape the Constitution in an innovative way and *to avoid the need for amendment* is arguably to *encroach upon the People's prerogative*.'[50]

The consequences of *Costello*

With the foregoing in mind and remembering O'Donnell J's warning, it must be considered whether the proposed cure to CETA's unconstitutionality, by introducing constitutional

[42] *Costello* (n 1) [60] (Hogan J).
[43] ibid [61] (Hogan J) (emphasis added).
[44] See *Crotty* (n 3) [62] (Walsh J).
[45] Daly (n 39) 185-186.
[46] Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart 2018) 212.
[47] Gary J. Jacobsohn, 'The Formation of Constitutional Identities' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 129, 130; quoted from Suteu (n 22) 93.
[48] Walsh J: 'no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.' *McGee* (n 35) 319 (Walsh J); *Sinnott v Minister for Education* [2001] 2 IR 505 [664] (Denham J); *NECI v Labour Court* [2021] IESC 36 [69] (MacMenamin J).
[49] Art 47.1: 'Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law.'
[50] Donal O'Donnell, 'The Sleep of Reason' (2017) 40(2) Dublin University Law Journal 191, 211 [emphasis added].

identity as part of a solution to *avoid* the need for a referendum on CETA, 'encroaches upon the People's prerogative.' The crux of Hogan J's proposal is that the acute reason for CETA's unconstitutionality is a piece of domestic legislation, the Arbitration Act 2010; updating this to fit the needs of CETA would be more straightforward than the ordeal of holding a referendum on the issue. His proposal to the other branches of government is that the 2010 Act be changed to allow the High Court to stop the enforcement of an investor tribunal decision that violated the 'constitutional identity of the State'.

Whenever sovereign powers are delegated/pooled with/given to supranational institutions, the superior courts have consistently held that such delegations are acceptable to the extent that such constitutional changes are approved by way of referendum. Thus, the delegation of sovereign powers is approved by the constituent power (the people) in which, the courts maintain, ultimate sovereignty lies. Other values are important – whether they are our parliamentary system, the protection of fundamental rights by judicial review, or judicial independence. But each of these values is, as has been held by the courts, secondary to the fact that any aspect of the Constitution can be amended or removed by this sovereign authority if it so wills. Notwithstanding the logical and theoretical problems that this position can present,[51] this is the position the courts have come to.

On the one hand, it is clear why Hogan J's suggestion won the support of most of his Supreme Court colleagues, both those in the majority and dissenting on the main question of the case. The vital piece of the jigsaw is an Irish statute, the Arbitration Act 2010. Pointing out this fact to the government and Oireachtas could be seen as a polite course of action by a member of the judiciary. The core idea in his proposal – providing for a final appeal to the High Court – is, of course, unproblematic from a constitutional point of view. The problem, however, is that introducing language of 'constitutional identity' alongside it mandates a consideration of what that identity consists of. A core component – perhaps, it is submitted, *the* core component – of this identity is the role of the people in amending the Constitution by referendum. Submitting this solution as a method of *avoiding* a referendum on the role of these investor tribunals runs contrary to this.

It should also be questioned whether the addition of this solution to CETA's unconstitutionality was strictly necessary or even in keeping with the separation of powers. If the government read the majority judgments of this case, the crucial role being played by the 2010 Act in this decision should be clear. If they then wished to amend the Act along lines which they believed would fix their problem, they could do so. The explicit proposal laid out to amend the Act seems to pre-empt the present government's political reluctance to hold a referendum on CETA.

Judicial empowerment

The practical consequences of this proposal, if implemented, should also be considered carefully. If s. 25 of the Arbitration Act were amended along the lines of Hogan J's suggestion, the High Court would determine whether to implement an arbitral tribunal's decision on the basis of whether it offends (among other things) Ireland's constitutional identity. Implicit in this proposal is that the power to define our constitutional identity would be left with the superior courts. The possibility exists that a CETA tribunal decision which

[51] For critiques of this position, see: Daly (n 36); Tom Hickey and Eoin Daly, *The Political Theory of the Irish Constitution* (Manchester University Press 2015); Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd edn, Clarus Press 2018) 95-103.

only *partially* infringes the Constitution could be implemented, presumably in a way which is not significant enough to violate Irish constitutional identity. Some parts of the Constitution would be held as more important than others, and the body which defines this would not be the people through referendum but the judiciary.

Of course, the immediate scope of the High Court's interpretation of constitutional identity would extend to CETA investor tribunals and other arbitration mechanisms covered by the 2010 Act; it is possible that the concept may never be used beyond this. As well as this, it is important to state that none of this is to suggest that any of the current members of the Supreme Court wish to overturn Ireland's unrestricted scope of amendability or the centrality of popular sovereignty through referendums. Nothing in Hogan J's judgment gives this impression – as already seen, he forcefully asserts the principle. Nor should it suggest that the judges who accept this solution necessarily wish for the concept to be applied outside of the High Court's dealings with CETA investor tribunals. Their concern is with safeguarding Ireland's juridical sovereignty which the majority holds is threatened by this agreement's tribunal system.

However, although Irish courts have consistently rejected the notion of an unamendable constitutional core, by inserting constitutional identity into Irish jurisprudence Hogan J may have given the tools to a future court to interpret the Constitution in this way. 'Constitutional identity,' 'essential features', and 'basic structure' are phrases which have been used by judiciaries around the world to limit the scope of amendment. Courts invoking constitutional identity is unproblematic in itself. But if done in a way which is designed to 1) avoid the necessity of a referendum and 2) empower the judiciary to define this identity, it could cut against constitutional precedent in Ireland up until now.

It may be that Ireland's deep involvement in the EU project necessitates an engagement with the identity clause expressed in Article 4(2) TEU in order to protect our unique approach to constitutional governance. But the notion that our courts should be the sole branch of government to define this is arguably more important to consider. Doyle has suggested that *Costello*'s introduction of constitutional identity language into Irish caselaw may be motivated by a desire to engage in future dialogue with the European Court of Justice of the European Union on the limits of EU integration akin to the BVerfG.[52] However, a core difference, as noted earlier, would be that the essence of Germany's substantive constitutional identity was textually defined by its eternity clause in 1949. In Ireland, there is no textual definition – defining our constitutional identity would thus be left to judges.

A *substantive* constitutional identity?

If it is accepted that Ireland has a constitutional identity, concepts like sovereignty, democracy, judicial independence, and fundamental rights could all be accurately described as part of it. These are principles of substance which entail moral and political values, and Bunreacht na hÉireann contains many such principles. However, as the theoretical considerations above should illustrate, labelling one principle or value as part of a substantive constitutional identity entails an implicit hierarchy of values, with some as part of this identity and some not. Until now, the Irish judiciary has been clear: a procedural principle – popular sovereignty as expressed in the referendum – is highest. If a substantive principle is to sit atop this hierarchy, the judiciary should not be the sole institution to define it. In other words, a decision to enshrine some values or institutions as part of our constitutional identity akin

[52] Doyle (n 16).

to Germany should be done not through judicial interpretation but through democratic deliberation.

The procedural approach to constitutional identity in Ireland also has advantages when it comes to European integration compared to substantive approaches. As Suteu points out, it is questionable whether any large steps taken by Germany towards closer EU integration would be constitutional given the BVerfG's approach, especially in the wake of its *Lisbon* decision.[53] The Court's grounding of German constitutional identity in unalterable principles means that any move to a more federal European Union is probably ruled out as long as the Basic Law is in effect (and perhaps even after this). This is not the case in Ireland. If the people vote for such an arrangement through a legitimately enacted referendum, there is no substantive principle standing in its way. The political arguments for and against this would take place in the political arena rather than a courtroom.

Identity jurisprudence across Europe has been defined by judicial limitation on the scope of European policymaking. The 2020 BVerfG decision to stop the proposed 'Eurobond' scheme in the wake of the Covid-19 financial crisis by invoking the identity clause is a prime example of this.[54] Following this decision, politicians from Hungary and Poland – both noted for their recent experience of 'democratic backsliding' – applauded the decision, opening the door for states to invalidate whichever European Union laws they find unacceptable.[55] Constitutional identity is a tool for judiciaries which can be used in a variety of ways. How the Irish judiciary chooses to wield it is something that only time will tell.

Conclusion

In the wake of the judgment, the government will be understandably keen to carefully consider the proposed cure to CETA's unconstitutionality. The exact wording of an amendment to the Arbitration Act 2010 may differ from that found in the judgment. It may be that the Government's proposal would be more specific in listing the circumstances in which the High Court could refuse to enforce a decision of an arbitral tribunal. Perhaps the phrase 'constitutional identity' will be omitted in favour of more concrete and specific criteria: this may include tribunal decisions which threaten the legislative and juridical sovereignty of the State, or perhaps it may simply allow the Court to refuse enforcement of a decision which 'violates the Constitution' in general.

It must be questioned whether the consequences of Hogan J's proposal are worth the relative ease it will provide in avoiding a referendum. Leaving the power of defining our constitutional identity to the judiciary is something that should be avoided if we are to adhere to the democratic constitutional approach which has developed in Ireland until now. Perhaps the best course of action on foot of the *Costello* decision is that which the appellant, Mr Costello TD, has publicly advocated: a referendum on CETA.[56] Such a route may, ironically, be the best method of protecting Ireland's unique constitutional identity.

[53] Suteu (n 22) 118.
[54] Judgment of 5 May 2020 - 2 BvR 859/15.
[55] Federico Fabbrini and R. Daniel Kelemen, 'With one court decision, Germany may be plunging Europe into a constitutional crisis' *Washington Post* (7 May 2020) <https://www.washingtonpost.com/politics/2020/05/07/germany-may-be-plunging-europe-into-constitutional-crisis> accessed 26 January 2023.
[56] Daniel Murray, 'Ceta referendum is important for 'constitutional integrity', Costello says' *Business Post* (Dublin, 12 Nov 2022) <https://www.businesspost.ie/politics/ceta-referendum-is-important-for-constitutional-integrity-costello-says/> accessed 09 January 2023.