

# Constitutional Concepts as Tools for Democratic Backsliding?

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## 1. Introduction

Over the past few years, the EU has been the stage for a wave of politicians who (mis)use constitutional law as a tool to justify non-compliance with EU Law.<sup>1</sup> In his recent essay, Professor Giuseppe Martinico notes that some populist political leaders, both within and outside the EU, have been using constitutional law as a core part of their political strategy to defy democratic values.<sup>2</sup> Focusing on the EU, one of the key features of this strategy is the reference to Article 4(2) of the TEU as a sacred trump card against any EU legislation affecting Member States' so-called constitutional identity, despite the legal provision only referring to national identity.

In this paper we aim to analyse how the merging of these two concepts lacks legal basis and how the concept of constitutional identity (and somehow "constitutional pluralism") is simultaneously dangerous for democracy both within the Member States and to the EU as a whole. Finally, we will take a look at the recent case law of the CJEU and discuss whether, in the current evolution of the European integration, we are witnessing the emergence of a European Constitutional Identity that prevents Member States from invoking the so-called national constitutional identity.

## 2. National identity and/or Constitutional identity?

For the purposes relevant to this paper Article 4(2) TEU provides that the EU respects Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. There has been a long debate among scholars about what this norm actually demands from the EU and whether it acknowledges national constitutional courts' claims regarding the (constitutional) limits on EU Law. From its seemingly clear wording and reading arises a significant discussion regarding the normative content of national identity.<sup>3</sup>

Nonetheless, despite the formal recognition of the EU's duty to respect Member States' national identities, the majority of the discussion focuses around a formally non-existent obligation to respect national constitutional identities. So why do the literature and the national apex courts equate national and

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1 The following abbreviations will be used throughout the text: EU (European Union); TFUE (Treaty on the Functioning of the European Union); CJEU (Court of Justice of the European Union); TUE (Treaty on European Union); AG (Advocate General).

2 MARTINICO (2024), p. 1530.

3 Needless to say, clear in its wording and reading does not mean clarity in its meaning.

constitutional identity? In the lines below we will try to clarify and identify the basis of this (con)fusion.

The “identity clause” as we see it today was introduced with these specific terms in 2009 with the Treaty of Lisbon.<sup>4</sup> In fact, Article 4(2) TEU in its revised wording seems to umbilically connect national identity and Member States’ fundamental structures, *inter alia*, political and constitutional ones.<sup>5</sup> The reference to fundamental constitutional structures has led some scholars to suggest that with the current version of Article 4(2) TEU, the treaty makers wanted to link the concept of national identities to the content of domestic constitutional orders – and therefore to their constitutions.<sup>6</sup> Hence, the identity of national constitutions would define and determine Member States’ national identity.<sup>7</sup> Thus, if it were the role of constitutions to determine Member States’ identity, the only conceivable expression of identity that could emerge from it would solely and logically be a constitutional one.

Similarly, former AG Maduro argued that under Art. 4(2) TUE one of the missions of the EU was to protect Member State’s constitutional identity.<sup>8</sup> Mentions to the safeguard of constitutional identity can also be found in the opinions of other Advocates General, specifically in *Gauweiler* with AG Cruz Villalón’s opinion.<sup>9</sup> Yet, what is particularly noteworthy in his opinion is the fact that Cruz Villalón recalls that was the CJUE that early elaborated the idea that national constitutionalism has served, and still serves, as a source of inspiration for European Law. And this was possible through the concept of “constitutional

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4 It is not our intention to examine the historical evolution of this legal provision, nevertheless we must note that the “identity clause” has undergone two textual revisions. Firstly introduced in 1992 with the Treaty of Maastricht, the article (at the time Article F(1)) stated that “the Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.” With the Treaty of Amsterdam the norm was renumbered as Article 6(3) and establishes that “the Union shall respect the national identities of its Member States.”

5 MILLET (2012), p. 58.

6 See BOGDANDY & SCHILL (2011), p. 1427. FARAGUNA (2019), p. 1620, for his part, sees in Article 4(2) TEU an explicit codification of national constitutional identity as a result of the constitutionalization of the concept of national identity occurred with the Treaty of Lisbon.

7 See BESSELINK (2010), p. 47.

8 Opinion of Advocate General POIARES MADURO of 20 September 2005, *Marrosu and Sardino*, C-53/04, EU:C:2006:517, paragraph 40. Nevertheless, later in *Michaniki* case he recalls 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.” Opinion of Advocate General POIARES MADURO of 8 October 2008, *Michaniki*, C-213/07, EU:C:2008:544, paragraph 33. In this regard, AG BOT considered that even a fundamental right enshrined in the constitution is not sufficient *per se* to trigger the application of Article 4(2) TEU, cf. Opinion of Advocate General BOT of 2 October 2012, *Melloni*, C-399/11, EU:C:2012:600, paragraph 142.

9 Opinion of Advocate General CRUZ VILLALÓN of 14 January 2015, *Gauweiler*, C-62/14, EU:C:2015:7, paragraphs 58-61.

traditions common” to the Member States which was developed by the CJEU.<sup>10</sup> Thus, national constitutional claims on central identity issues (e.g., protection of fundamental rights) are not so distant from the EU legal sphere and its objectives.

As will be seen below, there is a rich constitutional jurisprudence on these matters that typically approaches Article 4(2) TEU from the perspective that Member States have on the primacy of EU Law *vis-à-vis* national constitutional law. And, to that extent, there is a widespread tendency to associate national identity with cultural identity.<sup>11</sup>

Nevertheless, we adopt a different understanding.

First of all, it is necessary to underly that “national identity” is a legal term. And like so many other legal concepts in Law, national identity is a relatively vague notion that demands for a careful, legally-sustained and well contextualized approach of the interpreter.<sup>12</sup> Using Elke Cloot’s words, with its indeterminacy the basis to ascertain the meaning of the identity clause must lie in its underlying value and merit.<sup>13</sup>

We hold that the “identity clause” did not (and does not) have as its primary objective an express or implied reference to national constitutional architectures nor does it intend to address the concerns over the safeguard of Member States’ *norma normarum*. Against this background, we contend that Article 4(2) TEU was not established to serve as a nuance or *controlimiti*<sup>14</sup> to the principle of EU law primacy as foundationally preached in *Costa v. ENEL* ruling<sup>15</sup> and gradually reinforced and expanded to national constitutional law in *Internationale Handelsgesellschaft* ruling.<sup>16</sup> In this respect, some scholars argue that this “pluralistic vision” of the provision would regulate and settle potential conflicts between coexisting constitutional orders (and courts).<sup>17</sup> Yet, even if this provision can be seen as a competence principle regulating conflicts between two (constitutional)

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10 CASSESE (2017), pp. 940-4, sees in Article 6(3) TEU, with the codified concept of “constitutional traditions common to the Member States, a recognition to national identities in the limited sphere of the protection of fundamental rights.

11 ANITA SCHNETTGER (2019), p. 16. To this scholar “(...) national identity summarises the entirety of values and structures, ideas of order and fairness, and particularities and peculiarities from different areas of society that form the necessary parts of the collective perception of the people of a state.” p. 14.

12 Although not directly mentioning “national identity”, see CRAIG & DE BURCA (2023), p. 341, where the Authors consider that under Article 4(2) TEU even the notion of national constitutional identity remains vague.

13 CLOOTS (2016), p. 86.

14 CARTABIA (1990), p. 182.

15 Case C-6/64.

16 Case C-11/70. As it will be seen below, this ruling triggered the constitutional tension between the CJEU and national constitutional courts, mainly with the *Bundesverfassungsgericht* (German Federal Constitutional Court).

17 BOGDANDY & SCHILL (2011), p. 1419.

legal orders, a contextualized approach to this legal provision will demonstrate that this conflict is merely apparent.

First and foremost, Article 4(2) TEU and its legal concepts are EU Law.<sup>18</sup> As such, from the standpoint of the EU law, national identity must be interpreted within the EU framework and taking into account its systemic insertion. To this sense, the fundamental values referred to in Article 2 TEU will shape and somehow limit what Member States trace as being their national identity.<sup>19</sup> Claims to respect traits of a State considered part of its identity, whether enshrined in the constitutions or not, that bluntly contradict the founding values of Article 2 TEU could only be conceived within a different political organization, i.e., within a new EU.<sup>20</sup> In this regard, there can be no space in the European legal system for Member States to hide behind the EU's duty to respect the identity clause and perpetuate systematic attacks on judicial independence and minorities' rights, for example.

Notwithstanding, national identity in Article 4(2) TEU is directly linked to Member States and their fundamental structures, and for that reason, the normative content of that term cannot be ascertained without reflecting on its subjects. Therefore, we will have to combine both the European dimension as seen before, with the national dimension that derives from the fundamental structures of the Member States. Thus, the normative content of the identity clause (*Verbundnorm*) results as well from the EU's openness to the normative content of the national legal orders (shared normativity).<sup>21</sup> This results from the fact that "(...) the ECJ cannot determine the content of the notion of national identity in Article 4(2) TEU in an autonomous manner as it is able to with other provisions of EU law".<sup>22</sup>

Just as we are mirrors of our own identity, national legal orders will also serve as reflectors of States' national identity, with the difference that, for the latter, this mirror must also reflect their condition as Members of the EU.

That being said, whenever EU law conflicts with Member States' national identity, Article 4 (2) TEU must be considered to test whether the EU legal act or provision complies with the identity clause's requirements. Since the existing subsidiarity and proportionality principles are blind to the individual and specific

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18 ANITA SCHNETTGER (2019), p. 16.

19 See BOGDANDY & SCHILL (2011), p. 1430, brilliantly writing that "(...) reliance on national identity under Article 4(2) will not allow a Member State to diverge from the fundamental values contained in Article 2 TEU."

20 NINET (2025), p. 102.

21 See in detail ANITA SCHNETTGER (2019), pp. 10-16.

22 BOGDANDY & SCHILL (2011), p. 1448. This Authors do not exclude the possibility that constitutional courts may submit their own interpretation of national identity to the CJEU, through the governments of the Member States.

particularities of a given State, compliance with Member States' national identity through the general principles of EU competence (Article 5(3) TEU) falls outside its scope of application.<sup>23</sup> As a specific dimension of those principles – substantively composing them and giving them a deeper control on these matters – the identity clause would then protect those fundamental values that form a Member State's identity.<sup>24</sup>

Thus, a correct interpretation of the normative content of Article 4(2) TEU that fully absorbs the very identity of a Member State would position the judicial scrutiny of identity issues as conflicts within one legal order, i.e., the EU law.

However, rather than a scape from the absolute primacy of EU Law and a break of the jurisprudence on that matter as argued elsewhere, we believe that Article 4(2) TEU served and serves other purpose, namely the protection of legitimacy and authority of the EU as a whole.<sup>25</sup> In this matter we follow closely one of the key arguments presented in the academic literature by Elke Cloots.

This Author highlights the fact that in a multinational polity like the EU it is of vital importance for its legitimacy and maintenance that individuals from national communities, i.e., the Member States, feel their nation respected at a supranational level.<sup>26</sup> In this light, and analogically considering the EU as a car, we cannot reasonably expect it to work and move if we do not pay the needed attention and respect to its worn tires. Thus, attention and respect must be paid to the small components (Member States/tires) that compose the full package (EU/car), because we must not forget that at the end of the day "(...) the member states are the partners coming together in what is now called the EU."<sup>27</sup>

According to Cloots what is protected by Article 4(2) TEU is what distinguishes and individualizes one community from another: its history, language, values, traditions. Whether those are incorporated in the Constitution is irrelevant for the purposes of that provision since that not all fundamental norms constitute a State's national identity and therefore cannot be invoked under Article 4 (2) TEU.<sup>28, 29</sup>

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23 See ANITA SCHNETTGER (2019), p. 28 and CRAIG & DE BÚRCA (2023), pp. 133-4.

24 See ANITA SCHNETTGER (2019), p. 28.

25 BESSELINK (2010), p. 48.

26 CLOOTS (2016), p. 86.

27 BESSELINK (2010), p. 37.

28 See CLOOTS (2016), pp. 90-1.

29 See JÓZWICKI, Władysław, "Ultra vires and constitutional identity control – apples and oranges or two drops of water?", *Verfassungsblog on Constitutional Matters*, June 15, 2020, available at [www.verfassungsblog.de](http://www.verfassungsblog.de)

### 3. National and Supranational case-law on Article 4(2) TEU

A brief reference must be made to the first case where the CJEU had to deal with the identity clause in her post Lisbon's version. In *Sayn-Wittgenstein* ruling, concerning the Austrian Law on the abolition of nobility and its refusal to recognize a nobility title acquired in another Member State, the Kirchberg's judges considered to be included in the identity clause the protection of the status of the State as a republic.<sup>30</sup> Yet, the CJEU approached Article 4(2) in a merely evocative way, considering it as an "(...) additional criterion for assessing the proportionality of the Austrian Measure."<sup>31</sup> We must bear in mind that this was a free movement case, which seems to explain, in our view, the consideration of the protection of national identity as a justification on the grounds of public policy, i.e., within the EU framework of fundamental freedoms.<sup>32</sup>

On the one hand, if the CJEU has been quite sparing in its interpretation of Article 4(2) TEU, on the other hand, some national constitutional courts, particularly the German Federal Constitutional Court, have developed significant case law addressing Article 4(2) TEU. The latter interpretation on this provision can be seen in the Lisbon Judgment, returning, however, to the concept of national constitutional identity.<sup>33</sup> To that Court there are certain areas that cannot be transferred to the EU's competence, i.e., those that constitute the very constitutional identity of Germany. Thus, "(...) acceptance of the primacy of EU law is subject to the latter's compliance with constitutional identity."<sup>34</sup> Although it has not declared the Lisbon Treaty unconstitutional and, thus, a violation of the German Constitutional Identity, the truth is that the concept of national identity developed by the Karlsruhe's judges revolves around a particular "(...) assertion of State sovereignty."<sup>35</sup> In our view, interpreting Article 4(2) TEU through the lens of Sovereignism helps explain why national constitutional courts often provide a different normative content of that norm, a purely constitutional one. After all, there is no greater expression of sovereignty than the defence of one's own constitution.

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30 Judgment of 22 December 2010, *Sayn-Wittgenstein*, C-208/09, EU:C:2010:806, paragraph 92.

31 See VILLOTTI (2015), p. 498.

32 See ANITA SCHNETTGER (2019), pp. 34-35, criticizing the Court's reasoning in this case for not considering the identity clause as an autonomous ground of justification

33 Bundesverfassungsgericht, 2 BvE 2/08, 30 June 2009, paragraph 339.

34 See CLOOTS (2016), p. 92.

35 See CLOOTS (2016), p. 93.

## 4. National identity: inherent or expressed in the constitutions?

Is national identity an *anterior* reality to constitutions or does it emanate from them? For the Hungarian Constitutional Court, in the interchangeable use of the well-known concepts of national/constitutional identity, national identity is “(...) not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law.”<sup>36</sup>

We tend to believe that national identity is a living reality that can be partially or fully expressed in the constitution.<sup>37</sup> In this sense, we find it hard to conceive that the identity of a State could be entirely determined by the founding fathers of its constitution.<sup>38</sup> We perceive national identity as an objective *quid*, yet not static and not dependent on political assessment.

Constitutions are not expected to be codified documents that would perfectly and integrally translate States’ national identity – they do not, and Constitutional Theory teaches us that.<sup>39</sup> It is very naïve to consider that following this literature autocrats in power would not amend or completely revise<sup>40</sup> their own constitutions, implementing one-party views on the (re)new(ed) constitutions. Against this background one can genuinely ask: does the new Hungarian Constitution reveal the real identity of the Hungarian people or the identity of the political branch of government, i.e., the one of The Fiedsz Party?<sup>41</sup>

And this is the impetus for the next Chapter. Why are constitutional law, constitutions and constitutional concepts being used to threaten Democratic Constitutionalism? Are constitutional concepts, such as constitutional identity, being abusively used or are they dangerous *per se*?

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36 Decision 22/2016 of the Hungarian Constitutional Court, paragraph 67.

37 The German text of the Treaty implies that conclusion; cf. BOGDANDY & SCHILL (2011), p.1427.

38 See BOGDANDY & SCHILL (2011), p. 1428 and BESSELINK (2010), p. 47.

39 In this respect see, *mutatis mutandis*, BOTELHO (2017), p. 6, holding that “(...) hardly a written text can fully absorb the entirety and the immeasurable richness of constitutional experience.” (our own translation).

40 Hungary’s case.

41 Fidesz is Viktor Órban’s right-wing party which in the 2022 won the fourth consecutive mandate. Despite this hegemony, international observers considered these elections (and the previous ones) unfair, cf. <https://www.politico.eu/article/hungary-election-level-playing-field-fair-observer/>.

## 5. Constitutional Concepts as Tools for Democratic Backsliding?

Democracies in Europe, as we acknowledge them today, were built on the ghosts of dictatorial regimes that plagued the European Continent in the past.<sup>42</sup> In some countries (e.g., Portugal and Spain), the transition and consolidation to democracy was made whilst a project for economic integration was being matured.<sup>43</sup> Looking at the European countries in general, and to the Member States of the EU in specifically, it is easy to assert that most of them are based on a similar architectural design: a constitution that ensures separation of powers and fundamental limits and checks and balances on government's powers; the respect for human dignity and human rights; the safeguard of the Rule of Law and the protection of minorities.

It is tempting to consider Democracy as an eternal achievement and backslide-proof. But just as nothing in life is guaranteed, neither is democracy. To this extend, is particularly worrying that international agencies have observed serious concerns regarding Democratic Backsliding within the EU.<sup>44</sup> "Hungary ranks first among all 42 ongoing episodes of autocratization [and] remains an electoral autocracy as of 2023. Poland is another case of a liberal democracy autocratizing substantially."<sup>45</sup>

What is even more worrying is the way the erosion of liberal democracies is being conducted by populist leaders. As brilliantly described by KIM LANE SCHEPPELE, "some constitutional democracies are being deliberately hijacked by a set of legally clever autocrats, who use constitutionalism and democracy to destroy both."<sup>46</sup> The reason they do so is not because populist leaders have a particularly interest in Constitutional Law but rather because they try to legitimize themselves before the constitution, hence before the "People" its constitution represents.<sup>47</sup> This explains why there is also a significant interest from autocrats in (hijack) Constitutional Courts. This body as the guardian of the Constitution

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42 BOTELHO (2019), p. 3031.

43 The second Mediterranean enlargement in 1986, when Portugal and Spain become Member States of the EU, was shortly after these two countries had both emerged from dictatorial regimes – Portugal in 1974 with the fall of Salazar's regime, and Spain in 1975 with the fall of the Franco dictatorship.

44 Along with Laurent Pech and Kim Lane Scheppele, we understand Democratic Backsliding as meaning that a "(...) a country was once better, and then regressed," cf. PECH, Laurent & SCHEPPELE, Kim Lane, "What is Rule of Law Backsliding," *Verfassungsblog on Constitutional Matters*, March 2, 2018, available at [www.verfassungsblog.de](http://www.verfassungsblog.de)

45 See "Democracy Report 2024: Democracy Winning and Losing at the Ballot", *V-Dem Institute* (2024): 24-25, available at: [https://v-dem.net/documents/44/v-dem\\_dr2024\\_highres.pdf](https://v-dem.net/documents/44/v-dem_dr2024_highres.pdf)

46 See SCHEPPELE (2018), p. 547.

47 MARTINICO (2021): pp. 16-17. The Author labels this as "mimetism".

once controlled can secure a free avenue to populists in power thus again legitimizing its actions before the “People”.

One might observe that we are witnessing an attack on democratic values from within, i.e., grounding on the constitution, or to be precise on the *approach* that populist leaders have towards constitutions and constitutional law. However, even if we also think that populists are using and misusing constitutional law and thought for political and personal benefits, it seems to us that things should be seen in a different perspective.

Perhaps we should question if some theories/concepts advanced in the literature are not hinging the waves of populism in Europe. In the following lines we seek to demonstrate that constitutional concepts such as “constitutional identity” and “constitutional pluralism” are not serving the purposes that they were created for and should be taken away from the democratic constitutional sphere.<sup>48</sup>

Constitutional pluralism<sup>49</sup> was a theory developed within a context of constitutional complexity following the *Costa/Enel* case. It sought “[...] to resolve the conflict between the Court of Justice of the European Union (“CJEU”) and some national constitutional courts (...) concerning whether the CJEU or national constitutional courts had the ultimate authority to rule in cases concerning the boundaries of EU’s Legal competence.”<sup>50</sup> Against this background, the coexisted constitutional orders (EU/Member States) would be based on heterarchical relations and the questions of *Kompetenz-Kompetenz* would be resolved in the grounds of “ongoing dialogue, self-restraint, and mutual accommodation.”<sup>51</sup> A pluralist approach would then allow Member States disobey EU legislation that affects its “constitutional identity”.

Some scholars however note that this cooperation based on judicial dialogue is no longer viable once some judges are unlawfully appointed and courts are captured by autocrats. Therefore, constitutional pluralism should be “replaced with a more traditional understanding of the primacy of EU law.”<sup>52</sup> Differently, JULIAN SCHOLTES argues that its desirable to blame agents than concepts. For the latter, those concepts should not be dismissed because of its abuses since the problem are not the concepts *in se* but rather “the emerging reality of illiberal constitutionalism across Europe.”<sup>53</sup> This Author suggests that the solution to overstep these misappropriations of concepts is to identify them as “abuses of

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48 See generally, KELEMEN & PECH (2019), pp. 59-74.

49 See generally, MADURO (2011), pp. 67-84.

50 KELEMEN & PECH (2019), p. 59.

51 KELEMEN & PECH (2019), p. 60.

52 KELEMEN & PECH (2019), p. 62.

53 SCHOLTES (2021), pp. 549-550.

concept”. He then advances three possibly forms of abuse: substantive, generative and relational.<sup>54</sup>

Along with DANIEL KELEMEN and LAURENT PECH, we believe that these theories are “inherently dangerous” and autocratic leaders “are simply carrying arguments about constitutional identity to their logical conclusions.”<sup>55</sup> Firstly, constitutional pluralism lacks any legal certainty since that constitutional identity could easily be defined according to the interpretation of captured courts and/or governments. This uncertainty enables populist leaders to play with these concepts according to what most captures the People’s attention at a given time (e.g., security concerns). Furthermore, allowing them to disapply EU Law whenever they rule that EU institutions step onto their “constitutional identity” would leave EU citizens in a position of uncertainty and would violate the EU law principle of Equality.<sup>56</sup>

Obviously, as scholars, we tend to approach these issues from a more theoretical and technical perspective – either by proposing new theories or rethinking existing ones. The truth is that these problems are not merely academic or confined to the realm of ideas – they affect real people, of flesh and blood, particularly European citizens. Therefore, any theory that is developed and proves to be manifestly detrimental to European citizens should be immediately discarded.

## **6. Is there such a thing as national constitutional identity? – final remarks**

Within the current Constitutional framework in the EU, is there still room left for a national constitutional identity concept? Or has it become an obsolete term due to the large convergence of (constitutional) identities between the EU and its Member States? Have reached the point where, as stated by former AG Cruz Villalón in 2015, there is a “(...) basic convergence between constitutional identity of the Union and that of each of the Member States?”<sup>57</sup>

What begin to be a purely economic project of integration has evolved into a “Union of democracies”<sup>58</sup> where the protection and safeguard of democratic values are seen has essential. Most of these values are enshrined in Article 2 TEU whose prominent placement at the beginning of the treaty highlights their

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54 SCHOLTES (2021), pp. 550-555.

55 KELEMEN & PECH (2019), pp. 62-67.

56 KELEMEN & PECH (2019), p. 64.

57 Opinion of Advocate General CRUZ VILLALÓN of 14 January 2015, *Gauweiler*, C-62/14, EU:C:2015:7, paragraph 61.

58 KELEMEN & PECH (2019), p. 65.

foundational importance. It can thus be concluded that these values serve as a key source of legitimacy for the actions of both the Union and its Member States.

If we look at the recent case law of CJEU concerning Rule of Law matters, it seems to the best of our understanding, that the Luxembourg's judges are starting to build over the values enshrined in Article 2 TEU – that all Member States agreed on (!) – an embryonic concept of European constitutional identity.

In Case C-619/18, concerning the independence of the Polish Supreme Court, the CJEU affirmed that “(...) the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them.”<sup>59</sup> However, we consider that was in Case C-156/21 that the CJEU started to build the grounds to a promising concept of “European constitutional identity.” Here the Court notably stated that the values referred to in Article 2 TEU “define the very identity of the European Union as a common legal order.”<sup>60</sup>

If we conceive, as WOJCIECH SADURSKI<sup>61</sup> does, that constitutional identity emerges from the set of values and principles that are observed in day-to-day politics, and if the CJEU argues that those values such as the respect for human dignity and the Rule of Law constitutes the identity of EU's legal order, there may be a viable path to begin developing the concept of European constitutional identity.

For these reasons, and for the ones outlined above, we must consider that national constitutional identity should be discarded.

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