

Member States' constitutional identities and their relevance for the legitimacy of the European Union

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CONTENT

ABBREVIATIONS	III
I. INTRODUCTION	1
II. IDENTITY AND CONSTITUTIONALISM	4
II.1. Individual, shared and collective identities	4
II.2. Identity and democracy in the European Union context	5
II.3. Identity and hierarchy	6
II.4. Identity and constitutional law	7
II.5. Constitutional (identity) conflicts in the national and the EU context	8
II.6. Identity and constitutional theory	10
III. THREE LAYERS OF CONSTITUTIONAL IDENTITY IN THE EUROPEAN UNION	13
III.1. Identifying constitutional identity	13
III.2. Member States' common (shared) identity	15
III.3. Sui generis identity of the European Union	16
III.4. Member States' individual constitutional identities	18
IV. IDENTITY CLAUSE – SCOPE AND LEGAL CONSEQUENCES	22
IV.1. Evolution of Art 4(2) TEU	22
IV.2. The question of interpretation	23
IV.3. Case law of the CJEU	25
IV.4. Constitutional identity and the primacy of EU law	27
V. CONCLUSION: A CONSTITUTIONAL COMMITTEE FOR THE EUROPEAN UNION	29
BIBLIOGRAPHY	32

Abbreviations

Abs	Absatz/paragraph
AG	Advocate General
app	application
Art	Article
B-VG	Bundes-Verfassungsgesetz/Austrian Constitution
BVerfG	Bundesverfassungsgericht /German Constitutional Court
cf	confer/compare to
CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CMLRev	Common Market Law Review
Doc	Document
EC	European Community
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
ed(s)	editor(s)
eg	exempli gratia/for example
EJIL	European Journal of International Law
ELJ	European Law Journal
EMU	Economic and Monetary Union
EL	Ergänzungslieferung/delivery
et al	et alii/and others
ETS	European Treaty Series
et seq	et sequentes/and the following
EUConst	European Constitutional Law Review
EUV	Vertrag über die Europäische Union/Treaty on European Union
EuR	Europarecht
fn	footnote
GG	Grundgesetz/German Basic Law
ICON	International Journal of Constitutional Law
ie	id est/that is
JMWP	Jean Monnet Working Paper
lit	litera
No	number
nyr	not yet reported
OJ	Official Journal
para(s)	paragraph(s)
Rs	Rechtsache/Case
Sent	Sentenza
subpara	subparagraph
TECE	Treaty Establishing a Constitution for Europe
TEU	Treaty on European Union

TFEU	Treaty on the Functioning of the European Union
UNC	United Nations Charter
UNTS	United Nations Treaty Series
v	versus
WP	Working Paper
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZÖR	Zeitschrift für Öffentliches Recht

I. Introduction

Apart from the original purpose of European integration, the consolidation of the age old enmity between Germany and France, which has been successfully implemented by means of economic technocracy, there is yet another objective that has become ever more important. As a consequence of the intensity of European cooperation in economic areas, it has been a broader vision of Europe that was required, rooted also in the human and cultural.¹ Even though, as *Weiler* puts it, one of the greatest achievements has been to shift European integration “from something that Europe does to something that Europe is”,² it is the social and cultural togetherness of the European peoples and the objective to create an ever closer union among them, which has turned out to be crucial.

One could argue that the financial crisis could have constituted an opportunity to make people aware of their fateful common bond and the need for solidarity in difficult times.³ It became obvious however that the persistent failure to realize solidarity among European citizens and their lacking identification with the European idea are finally hindering the obviously needed further integration in economic areas. Thus, the limits for economic integration are rooted in a lack of corresponding cultural and social cohesion. There are ongoing and apparently insufficient efforts to implement a feeling of togetherness and solidarity among EU citizens, to establish tolerance, to deepen mutual understanding, to develop a sense of European identity and thus to create a political space that is needed for a working democracy. The core strategy is the implementation of European citizenship with its associated rights, especially those connected to free movement. A broad understanding of these legal concepts is certainly needed to make people identify themselves with the Union. At the same time it is obvious that the current Treaties do neither envisage the establishment of a European people, a *demos*, nor do they provide for an institutional framework that enables effective participation of EU citizens and thus allow for a functioning *sui generis* democratic system. Therefore, today’s Union still largely relies on the democratic resources of its Member States rather than realizing its own.⁴

The ideal of European integration to preserve diversity and thus different national identities within a united Europe is famously reflected by the preamble of the Treaty on European Union (TEU), determining that what should be achieved is an “ever closer union among the peoples of Europe”. Intense cooperation, while at the same time preserving the different national identities of the Member States, entails that citizens still identify themselves with their national constitutions in the first place; this is crucial for the development of a European identity in the sense of enabling identification of the citizens with the Union. The concept of constitutional pluralism that is at the

¹ *Weiler*, Integration through fear – Editorial, 23 EJIL 2012, 1 (2).

² See *Weiler* (supra note 1).

³ In this context of the concept of risk society, *Beck*, German Europe, 2013.

⁴ Speech of Prof *Weiler* on “Democracy and Limits of EU competence” at the European Parliament on 4.10.2012. Outline available at <http://www.europarl.europa.eu/document/activities/cont/201210/20121003ATT52863/20121003ATT52863EN.pdf>, 31 et seq. Of course, there are also institutional reasons for the “democratic deficit” in the EU. On the link between the democratic deficit on the EU level and the lack of a European identity see *Kumm/Ferreres Comella*, The Future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty, JMWP 5/04, 19 et seq.

heart of the Union today, finds its normative expression in the identity clause in Art 4(2) TEU,⁵ according to which the Union has to respect the identity of the Member States “inherent in their fundamental structures, political and constitutional“. Thus, regardless of common stereotypes like the German *Oktoberfest*, the Austrian *Sacher* Cake and Viennese *Waltz*, Belgian Chocolate and Spanish bullfights, at the latest since the Treaty of Lisbon⁶ has substantially reframed the identity clause and subjected it to the jurisdiction of the CJEU, national identity has evolved from a cultural to a legal concept. Whereas the latter has given rise to controversial discussions in the legal literature, it is beyond dispute that the scope of application of Art 4(2) TEU is first and foremost triggered by domestic constitutional law. State constitutions reflect democratically legitimated fundamental choices of a people, express the national identity of a State and form substantial reference points for the identification of its citizens; as such, constitutional identity is prerequisite for democratic participation.

The implementation of free movement – perceived as a means to realize identification of EU citizens with the Union – increasingly conflicts with and undermines the fundamental constitutional choices of the Member States by enabling EU citizens to pick and choose among the various legal systems. This is especially true for fundamental rights. Even though today the Member States are all bound by an increasing number of EU rights, they still have considerable freedom to shape their own systems of fundamental rights protection. Varying policies regarding the legality of abortions, gay marriages, assisted suicides and surrogacies reveal that there is room left for fundamental and different choices of the Member States, reflecting their specific historical and cultural backgrounds and thus their constitutional identities. Given the jurisprudence of the European Court of Human Rights (ECtHR) that – by means of its margin of appreciation doctrine – strives to preserve diversity in human rights protection, it is crucial that the Union safeguards that very diversity too by paying respect to the Member States’ varying preferences regarding the values attached to specific rights. Thus, effective realization of free movement requires a balance between a certain level of uniformity on the one hand and the safeguarding of different national constitutional identities on the other.

The present analysis suggests that it is crucial to understand the preservation of constitutional diversity as an essential feature of the specific form of constitutional pluralism in the European Union. The argument is based on the assumption that the identification of the citizens of a political community is prerequisite for their democratic participation; while such participation does not exist at the Union level, identification persists all the more at the national level. It is typically actuated by a particular and substantive framing of national identity, ie of a particular interpretation of a specific fundamental right in correspondance with the historical and cultural background of a people. Finally, the argument is one of political legitimacy, assuming that the Union’s legitimacy relies still first and foremost on pluralist democratic processes within the Member States. In this context, the potential of the new identity clause is established as a trigger to safeguard this constitutional pluralism by judicial means, while at the same time requiring a rethinking of the role of national constitutional courts on the EU level. Regardless of the general competence of the CJEU to interpret EU law, the case of Art 4(2) TEU – even though obviously part of EU law – is special, as it requires not only an interpretation of EU, but also one of national law. Hence it is an institutionalized dialogue between national and European courts that is proposed. Thereby the identity clause should not be understood

⁵ Art 4(2) TEU; Treaty of Lisbon OJ 2007 C 306, consolidated version in OJ 2012 C 326. In this regard cf *Habermas’* idea of constitutional patriotism, infra II.6.

⁶ OJ 2007 C 306.

as a means to overcome strict primacy of EU law, but rather as one that lowers the degree of normativity of those provisions of EU law that are encroaching on national constitutional identity. This understanding of the provision could strengthen the Union by clarifying its pluralist legal ground and thus unwind the ever-lasting discussions on the Union's democratic deficit, while at the same time ensuring the *effet utile* of EU law. Furthermore, the proposed procedure would address national constitutional identity in a way that could serve both, the Member States and the Union by establishing a new form of dialogue and cooperation among the European and the national judiciary.

To start with, the different meanings of identity and their importance for individuals, States and the European Union are analyzed. Thereby the hierarchical and subsequently constitutional aspects of identity as well as its significance for democratic processes are evaluated. After having established a link between identity and constitutionalism, the objective of the second part is to assess more specifically what should be covered by national constitutional identity in the meaning of Art 4(2) TEU. Given the plurality of constitutional systems in the European Union, it is assumed that there are three relevant layers of (constitutional) identity in place. By taking a closer look at the interrelation among those three layers of identity and the demarcation between them, the concept of Member States' constitutional identity is substantiated. Special attention is paid to the question, to what extent human rights form part of this identity. In this context, the so-called *Günstigkeitsklausel* contained in the Charter of Fundamental Rights of the European Union (CFREU)⁷ and its relation to the identity clause is of particular interest. After having critically described the actual practice of the CJEU on the issue, the third part of the present contribution is devoted to potential legal consequences to be drawn from Art 4(2) TEU, such as procedural aspects and a possible easing of absolute primacy. Giving priority attention to the rulings of the German *Bundesverfassungsgericht* (BVerfG) when compared to those of other national constitutional courts reflects the fact that it was this court that first mentioned the concept of constitutional identity and that it is probably the most critical one. In a final step, a possible procedural solution is presented that could help to exploit the maximum potential of Art 4(2) TEU.

⁷ OJ 2012 C 326/393.

II. Identity and constitutionalism

II.1. Individual, shared and collective identities

Art 4(2) TEU sets forth that „(t)he 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 is far from clear however, what should be regarded constitutive for this identity. For an identification what should be meant by „constitutional identity“, there are three different levels of identity to be described in the following – namely individual, shared and collective identities.

When asking individuals what they associate with the notion identity, the answer typically comprises (at least some of) the following criteria: origin, values, character, faith, family, education, political attitude and profession⁸. Thus, from the perspective of the individual, identity is typically associated with preferences for particular values, specific characteristics and choices that make a person. It is also linked to emotional bonds and experiences, be it with specific people in a familial, a communal or a national context, be it with specific places that are emotionally charged, be it with education or profession. These are criteria specific to each and every single person, positively or negatively imprinting his or her personality and can be subdivided into those that are predetermined and those that are freely selectable.

The capture of the collective identity of a political community, be it a State or an international organization, seems even more intelligible and multifaceted. On the one hand, there is a common or shared identity of the constitutive parts of a community that serves as a foundation for the development of a collective identity of the political community as such on the other hand. There are several ways to categorize the different understandings of identity, like the differentiation between an objectivist and a subjectivist understanding;⁹ *Martí* for instance differentiates between the identity of the constitution and the identity of the people by at the same time admitting that in modern constitutional democracies there is no easy demarcation possible.¹⁰ *Dänzer* identifies four meanings of the notion: (i) identity of a community in its self-understanding, (ii) a collective or individual identity as objectively including the traits of an identity in the sense of its self-understanding, (iii) identity as the identification of citizens with a political community and (iv) the identity of a community as perceived from outside.¹¹ What obviously underlies all understandings of that notion is that it refers to the choices made by a people, by a constituency that has thereby agreed on a specific form of living together. The values expressed by those choices are shared by the citizens and, as a consequence, imprinting the collective identity. Values are not easily capable of fitting into legal categories however; they are too difficult to capture and to define.¹² The link between common/shared and collective identities, which underlies the present analysis,

⁸ Based on a questionnaire and the replies of 50 randomly selected participants.

⁹ *Von Bogdandy/Schill*, Overcoming absolute Primacy: Respect for national Identity under the Lisbon Treaty, CMLRev 2011, 1417 (1428 et seq).

¹⁰ *Martí*, Two different ideas of Constitutional Identity, in Saiz Arnaiz/Alcoberro Llivina (eds), National Constitutional Identity and European Integration, 2013, 17 (19 et seq).

¹¹ *Dänzer*, Values and identity of the European Union, in Besson/Cheneval/Levrat (eds), Des valeurs pour l'Europe? Values for Europe? 2008, 53 (54).

¹² For a definition of the notion *values* cf *Calliess*, Europe as Transnational Law – The Transnationalization of Values by European Law, German Law Journal, 1367 et seq.

presupposes that the common identity of the people is inherent in the identity of the constitution, which reflects the collective identity of a community.

Of course, national identity does not necessarily equate State identity, as there might be several different nations and thus different national identities coexisting within one State. The identity of the State as such is built upon the shared identity of its people and thus shaped by factors such as culture, history and religion, evolving from the togetherness of a collectivity of individuals over time. There are also cases however, where a collective identity is created artificially; due to the lack of a foundational common identity, the collective identity is imposed on the people and will in most cases not be a strong one.

II.2. Identity and democracy in the European Union context

The present paper suggests that constitutional identity is essential for a working national democracy as well as for a transnational democratic system; it is therefore one of political legitimacy and more specifically of process legitimacy.¹³ In a democracy, the values of a specific population do imprint the work of the legislative branch that has to translate those very values into law. Therefore, the individual has to be understood as the smallest and most essential unit imprinting that identity by means of his/her participation in the democratic process.¹⁴ The individuals as the bearer of values stand *vis-à-vis* the political community as the creator of norms and the agent who acts for the political community as a sovereign on the international plane.¹⁵ Hence, law serves as an expression of values and thus of national identity, the latter being prerequisite for the democratic process; if there is no sense of identification of individuals with a community, there will be no political participation and thus a deficit in process legitimacy.

It follows for the EU context, that from the perspective of the Member States, the endeavor to safeguard their individual identities can be seen as an effort to compensate for the seemingly lost struggle to preserve sovereignty, resulting – among others – from the absolute primacy doctrine of the CJEU;¹⁶ furthermore, the respect for national identity claimed for by Art 4(2) TEU should be seen as a possible way to preserve the democratic legitimacy of the Member States as well as that of the Union.¹⁷ The then European Community (EC) for a long time derived its legitimacy from delivering the results; after having (at least in part) successfully delivered these results, the focus has substantially

¹³ *Weiler*, Editorial – Fateful Elections? Investing in the Future Fear, EJIL 25/2014, 361.

¹⁴ In this context see *Besson/Utzinger*, Toward European Citizenship, Journal of Social Philosophy 2008, 185 (188), according to whom a stable collective identity partly results from citizenship.

¹⁵ On the distinction between values and norms *Dänzer* (supra note 11) 59 et seq, who refers to the concepts of *Habermas* and *Ferry*.

¹⁶ According to *Toniatti* the sovereignty of the Member States when acceding the EU, is “partially transformed into a power (indeed, a right) of participation”, *Toniatti*, Sovereignty Lost, Constitutional Identity Regained, in Saiz Arnaiz/Alcoberro Llivina (supra note 10) 49 (55 et seq).

¹⁷ According to *López Bofill*, „any loss of the Member States’ constitutional power is conceived as a loss of democratic legitimacy“, *López Bofill*, What is not Constitutional Pluralism in the EU: National Constitutional Identity in the German *Lisbon* Judgment, in Saiz Arnaiz/Alcoberro Llivina (supra note 10) 221 (222). *Besson* states that, when a State is bound by a norm of international law, the duties imposed on that State constitute direct or indirect burdens for individuals; therefore, the “autonomy of (S)tates and its ability to bind and be bound depends on its constituency’s autonomy and hence on its ability to represent the latter”; *Besson* in response to *Waldron* (*Waldron*, Are Sovereigns Entitled to the Benefit of the International Rule of Law? Public Law & Legal Theory Research Paper Series WP No 09-01), *Besson*, Sovereignty, International Law and Democracy, EJIL 2011, 373 (378).

shifted from output to process legitimacy. This shift corresponds to the progressive jurisprudence of the CJEU, who, from the 1960s onwards continuously strived to place the individual – alongside the Member States – at the core of the project. It was also the CJEU that consistently held that European citizenship is destined to be the fundamental status of the nationals of the Member States, a status that as such gives specific rights to the people.¹⁸ Since then the individual has been perceived as a subject of rights (and duties), whose participation has to be ensured. As a consequence, there was an increasing effort to establish participative and direct democratic elements on the EU level, expecting that European citizens would understand themselves as a European people, a European demos.

Therefore, direct elections to the European Parliament¹⁹ were introduced in 1979, followed by the incorporation of the concept of European citizenship into the Treaties in 1992. As the past has shown however, citizens are not willing to actually participate and thus contribute to the emergence of a European political space. This becomes evident not least by the steadily decreasing turnout in elections to the European Parliament and the success of Eurosceptic parties in several States. At least some sort of collective identity of a people is essential for the establishment of real citizenship and thus indispensable for a working democracy. This is not only valid in the State context but holds likewise – and is crucially true – for the European Union.²⁰ The malfunctioning democratic process results in a lack of process legitimacy that has to be compensated by drawing on the legitimacy resources of the Member States. After having established a link between democratic processes and identity, the subsequent section is devoted to hierarchical aspects of identity.

II.3. Identity and hierarchy

Democratically legitimized by the people, the *pouvoir constituant*, national constitutions reveal what is at the core of a Member State's identity. Undermining this very identity would in turn weaken the legitimacy of the Union, which is reliant on the Member States and their capability to take even unpopular measures without their existence hardly ever being called into question.²¹ As a matter of fact, not all elements constitutive for the identity of a specific entity, be it an individual, a State or an international organization, are of the same importance. There are specific criteria that form a fundamental part of an identity, the preferences that cannot be replaced easily without making the entity as a whole exchangeable with any other of its kind. Hence, there is a hierarchical structure inherent in identity. This is true for the individual; traumatic experiences during childhood will lastingly coin the identity of a person. This is likewise true for States; one may look for example at the significance of WWII on today's Germany, that has immensely shaped its culture, its understanding of the self and the other, that has lastingly coined its values and that is inseparably linked to the identity of that State. There are other criteria however, that are part of the respective identity, but that at the same time do not constitute an indispensable part of it and that can be subject to changes over time. This is again true for the individual, if one thinks of the external appearance of a person, which is part of the identity but at the same time subject to fundamental changes. Even though

¹⁸ See eg Case C-135/08, *Janko Rottmann*, ECR 2010, I-1449, para 43 with further references.

¹⁹ Act concerning the election of the representatives of the European Parliament by direct universal suffrage annexed to Decision 76/787/ECSC, EEC, Euratom, OJ 1976 L 278/1, as amended by Decision 2002/772/EC, Euratom, OJ 2001 L 283/1.

²⁰ See *Besson*, Europe as a demo-i-crat-ic polity, *Retfaerd – Nordisk Juridisk Tidsskrift* 2007, 3.

²¹ *Weiler* (supra note 4); In this context *Petit*, Dispelling a Myth? The Fathers of Europe and the Construction of a Euro-Identity, *ELJ* 2006, 661.

collective identities are less dynamic than that of individuals, there are parts of their identities that can be regarded less fundamental, too. Here currency may be mentioned; even though the *Schilling* was obviously part of the Austrian identity, the introduction of the Euro revealed that it is not an indispensable part of it. While for one State secularism may serve as fundamental part of its identity, for another State – even if it is likewise a secular State – it may be seen as a less identity-forming hallmark. This shows that the actual importance of a specific element constitutive for identity has to be assessed on a case-by-case basis.

Thus, the deeply heterogeneous and broad understanding of what has to be attributed to the identity of a specific entity and what is essential for it is left to subjective assessment. If identity is to become a legal concept however, this inconceivability can turn out to be highly problematic. This is revealed by the identity clause in Art 4(2) TEU that has been incorporated into primary EU law more than ten years ago;²² since the Treaty of Lisbon²³ has subjected it to the jurisdiction of the CJEU, the provision has dramatically gained in importance however.

II.4. Identity and constitutional law

Since the BVerfG first referred to national identity in the context of fundamental rights in *Solange I*,²⁴ the legal understanding of identity has been steadily narrowed down to a constitutional dimension. Having identified the hierarchical aspects of identity in the previous section, what is analysed in the present chapter, is its constitutional dimension. Furthermore, it is assessed whether or not one can speak of “constitutional identity” also within the EU context.

In a first step the functions of constitutional law in a national as well as in an international context are analyzed. Coexistence and cooperation of one or more peoples within the framework of a political community require a set of commonly agreed foundational rules, whatever they are called. As a consequence, a certain form of legal hierarchy is needed in order to impose certain constraints on the legislative branch, as well as to ensure stability, flexibility and efficiency at the same time. This is true for the national as well as for the transnational level. In the national context, the constitution as a foundational document expressing the basic choices of a constituency has to guarantee these choices in a stable and consistent way and thus to safeguard them from politics.²⁵ Constitutional language is increasingly used also within the context of international law, where constitutionality is typically ascribed to hierarchical superior *ius cogens* or the Charter of the United Nations.²⁶ Apart from that it is the founding treaties of international organizations that typically assume that

²² Consolidated version in OJ 1992 C 224.

²³ OJ 2007 C 306.

²⁴ BVerfG 37, 271, 29.5.1974, *Solange I*.

²⁵ See the debate between *Matthias Kumm* and *Nico Krisch* on *EJIL* talk, at <http://www.ejiltalk.org/cosmopolitan-constitutionalism-a-response-to-nico-krisch/> and <http://www.ejiltalk.org/the-dream-of-reason-a-response-to-mattias-kumm/>.

²⁶ Art 103 UNC (1 UNTS XVI); see for instance *Schwarzenberger*, *International Jus Cogens?* 43 *Texas Law Review* 1964/1965, 455; *Kumm* refers to domestic constitutionalism as “big C” constitutionalism and with regard to international law as “small c” constitutionalism; *Kumm*, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in Dunoff/Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance*, 2009, 258 (259 et seq).

Weiler, *Prologue: global and pluralist constitutionalism – some doubts*, in Weiler/De Búrca (eds), *The Worlds of European Constitutionalism*, 2012, 8 (10); *Halberstam*, *Local, global and plural constitutionalism: Europe meets the world*, in Weiler/De Búrca (supra) 150 (159).

“constitutional” function, what *Peters* defines as micro-constitutionalization²⁷. Even though there are fundamental differences regarding the concept of constitutionalism in the national and international sphere in terms of content, consistency, responsibility, pluralism, hierarchy and the *pouvoir constituant*, the notion is increasingly used in international legal theory. While not formally referred to as a constitution like it is mostly the case in the State context, it is indeed comparable in various aspects – procedurally and substantively. One may just think of the qualified procedures set in place for the amendment of such statutes that regularly require unanimity and the ratification by all participating States. Given the content of statutes that typically include foundational principles, provisions regarding the confinement of public power and attribution of competences,²⁸ there is also comparability in substantive terms. As recourse to constitutionalism seems basically acceptable, the European Union legal system is widely considered to be a constitutional system.

The fundamental values of a polity are typically encapsulated within a constitution, that reflects the collective identity, which is further framed as a Nation, a State or a Union. Thus constitutions typically define collective identities of a people in a way that ensures reliability, stability, protection and togetherness.²⁹ Not only do constitutions determine the rules for democratic processes, but they also serve as an indispensable basis for the establishment of effective and real citizenship by defining the collective identity of a people.³⁰ This means, in turn, that democracy needs some sort of constitutional identity. Furthermore, a collective identity is required to achieve several other objectives like the reduction of social conflicts, solidarity, trust, redistribution and the willingness to cooperate.³¹ Conversely, it is argued that national identity is likely to be reinforced by governments as an artificial construct instrumental for the abovementioned reasons. From a universalist perspective, this is problematic for minorities and cosmopolitans and bars the way to the development of a global consciousness.³²

II.5. Constitutional (identity) conflicts in the national and the EU context

In federal systems³³ there is often more than just one source of constitutional law and therefore several constitutional identities in place. While in the State context, there is typically the federal constitution and those of the constituent States, the EU legal system comprises a greater plurality of constitutional norms: fundamental (constitutional) norms of EU law coexist with the constitutional law of 28 (in part again federally organized) Member States. Furthermore there are fundamental rules of international law that have an increasing impact on the national as well as on the EU legal

²⁷ *Peters* (supra note 57) 593 et seq; also *Kumm* (supra note 26) 259.

²⁸ According to *Besson*, the “main and common claim” of constitutionalism, even though it can take different forms, “is that political and legal power should be exercised only within the limits of a constitution, such as the separation of powers, checks and balances, the rule of law, democracy and fundamental rights” *Besson*, *The Truth about Legal Pluralism*, *EuConst* 2012, 354 (358).

²⁹ Cf *Weiler*, *Federalism and Constitutionalism: Europe’s Sonderweg*, *JMWP* 10/00; also *Weiler*, *Ein christliches Europa. Erkundungsgänge*, 2004, 38 et seq.

³⁰ This corresponds to some authors’ understanding of the new identity clause to the effect that national constitutions are shaping and constituting national identity; *Von Bogdandy/Schill*, Art 4 Abs 2 EUV in *Grabitz/Hilf/Nettesheim* (eds), *Das Recht der Europäischen Union*, 50. EL, para 3.

³¹ *Miller/Ali*, *Testing the national identity argument*, *European Political Science Review* 2014, 237 (237 et seq).

³² *Miller/Ali* (supra note 31) 234 et seq.

³³ Cf *Halberstam’s* definition of a federal system as „the coexistence within a compound polity of multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority“, *Halberstam*, *Federalism: Theory, Policy, Law*, 2012, 580.

orders.³⁴ In both contexts, national and EU, constitutional norms flowing from different sources are typically complementing one another and thus incongruent in substance; this is confirmed *inter alia* by the principle of conferral laid down in Art 5(2) TEU, according to which the Union acts only within the limits of the competences conferred upon it by the Member States. Even if this principal difference in substance may limit potential incompatibilities, it does not exclude them however.

Federal systems usually provide for some sort of predetermined hierarchy in order to solve conflicts among constitutional norms. This does not hold for the Union however, where the legal hierarchy is far less clear than in most federal States. Constitutional conflicts arising within (multilevel) constitutional systems are typically subject to judicial review. While this task usually falls within the competence of the federal constitutional court in the national context, it is the CJEU who decides on the EU level. In absence of a Treaty provision explicitly determining the relation of the constitutional norms at issue, the European Court of Justice (ECJ) has acknowledged direct effect and primacy of then EC law. Since then, in principle any constitutional conflict among EU law and domestic law of the Member States has to be resolved by means of these doctrines.³⁵ Even though the CJEU's rulings are consistently based on the assumption of absolute primacy of EU law, the Member States' constitutional courts consistently strive to protect their constitutional core.

As a matter of fact, the resolution of conflicts between different sources of constitutional law is less problematic with regard to constitutional provisions that are relatively precise and predominantly technical in character. When it comes to more indefinite and politically sensitive issues however – especially where constitutional norms at stake express constitutional identity – there are several factors that make conflict resolution more complex on the EU than on the national level. First, there will hardly be as severe differences in the constitutional identities within the legal system of a single State than on the transnational European Union level where 28 different constitutional identities coexist with the constitutional identity of the Union. Second, there is a difference in the democratic legitimacy of national constitutions and the fundamental norms of the EU law. While the former – on the federal as well as on the State level – typically derive their legitimacy from “we the people” as a constituency, the foundational Treaties of the Union do not enjoy a comparable degree of legitimacy. Here the will of the people is first and foremost represented by the Member States; as a consequence, primacy of EU law over national law „however framed“³⁶ seems more problematic than in the national context, when *eg* federal constitutions pre-empt constitutions of constituent States. Finally, there is the question of judicial competence. It is well known that it was the CJEU who has developed the absolute primacy doctrine and thus subordinated national (constitutional and therefore also identity related) in relation to EU law. Therefore it comes as no surprise that the latter Court is perceived as the „engine of European integration“ and thus as being mostly in favor of

³⁴ See Case T-315/01, *Kadi v Council and Commission*, ECR 2005, II-3649; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, ECR 2008, I-6351. According to Besson the „three autonomous layers of the European legal order *lato sensu* ought to be considered at the same time when assessing the articulation between any two of them“; Besson, *European Legal Pluralism after Kadi*, *EuConst* 2009, 237 (239).

³⁵ Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECR 1963, 1, 2. See De Witte, *The European Union as an international legal experiment*, in Weiler/De Búrca (supra note 26) 19 (42 et seq).

³⁶ Case 11/70, *Internationale Handelsgesellschaft*, ECR 1970, 112, para 3, where the CJEU held that “the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question”.

deepening European integration rather than an independent judicial institution. National constitutional courts on the contrary, above all the German BVerfG, are consistently striving to protect national sovereignty and identity,³⁷ even though to date they have widely accepted the supremacy of EU law. This acceptance is supposed to endure as long as the Union respects the limits to primacy that were famously imposed by the BVerfG, namely the fundamental rights-reservation in *Solange*, the *ultra-vires*-reservation introduced in *Maastricht* and finally the identity review introduced in *Lisbon*.³⁸ The conflicting interests of national constitutional courts obviously weaken the authority of the CJEU and therefore constitute a risk for the uniform application of EU law.³⁹ So what about Art 4(2) TEU in this context? Certainly, when compared to the fundamental rights-reservation and the *ultra-vires* reservation, the scope of application of the identity-reservation seems a lot more comprehensive; it is at least capable of covering fundamental rights and competence related issues alike. The objective of preserving national identity is a much more heterogenic and indeterminate issue that poses fundamental questions concerning the status of the Member States as such within a united Europe. The question to be answered is if Art 4(2) TEU should be understood as neutralizing primacy of EU law in cases where EU law stands *vis-à-vis* the national constitutional identity of a State or if it simply lowers the degree of normativity of EU law in such cases. For being able to answer these questions, it is necessary to first establish what should be covered by national constitutional identity in the sense of Art 4(2) TEU.

II.6. Identity and constitutional theory

Art 4(2) TEU obviously demands a discussion about how the different constitutional systems in the EU should be related to and demarcated against one another. Thus, it is not only the determination what should be understood as national constitutional identities that is relevant in this context, but also their coexistence and preservation in relation to the identity of the Union; in sum, Art 4(2) TEU questions the Union's constitutional arrangement.

First, it is decisive to differentiate two different links between individuals and their respective political communities; there is the predominantly ethnic and cultural way of identification on the one hand and the predominantly civic (or political) identification on the other hand. The former refers to a cultural bond, a common language, race, religion, social mores, a common history, common traditions and common descent. It is the civic understanding in contrast that is linked to the constitution itself, to the respect for the State and its institutions.⁴⁰ The latter is – so to say – a less

³⁷ For instance BVerfG 37, 271, 29.5.1974, *Solange I*; BVerfG 1993, 89, 155, 12.10.1993, *Maastricht*; Corte Costituzionale, Sent 183/73, 18.12.1973, *Frontini Franco*; Conseil Constitutionnel, 92-308 DC, 9.4.1992, *Traité sur l'Union européenne/Maastricht*; Danish Hojesteret, I 361/1997, 6.4.1998, *Maastricht*.

³⁸ Cf supra note 37. *Guastaferrro*, Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause, JMWP 01/2012, 10; *Halberstam/Möllers*, The German Constitutional Court says „Ja Zu Deutschland!“, German Law Journal 2009, 1241; *Thym*, In the Name of Sovereign Statehood: A critical Introduction to the Lisbon Judgment of the German Constitutional Court, CMLRev 2009, 1795; *Tomuschat*, The Defence of National Identity by the German Constitutional Court, in Saiz Arnaiz/Alcoberro Llivina (supra note 10) 205. On the “adoption” of the “German model” by other constitutional courts, cf *Rideau*, The Case-law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the ‘German Model’, in Saiz Arnaiz/Alcoberro Llivina (supra note 10) 243 (250 et seq).

³⁹ On „relative supremacy“ see *Schütze*, European Constitutional Law, 2012, 358 et seq.

⁴⁰ *Gamberale*, National Identities and Citizenship in the European Union, European Public Law 1995, 633 (639 et seq); *Miller/Ali* (supra note 31) 247; *Peters*, A new look at ‘National Identity’. How should we think about

emotional and more rational and pragmatic conception, which is much more inclusive than the ethnic model that is more restrictive and exclusionist.⁴¹ As examples, it is typically referred to the German *Volk* as a community of blood and territory and therefore predominantly ethnic in nature, while the French nation serves as an example for a predominantly civic understanding in the sense of adherence to a political community.⁴² At this point the question arises, how the EU constitutional arrangement as a whole should be designed to allow for the preservation of so many different constitutional identities.

The concept of constitutional patriotism, substantially coined by *Habermas*, is based on the civic model of identification,⁴³ to the effect that the “political culture of a country crystallizes around its constitution”. Even though certain constitutional principles are embodied in more than just one constitution, the specific interpretation of those very principles is what underlies the concept of constitutional patriotism.⁴⁴ Within the context of the European Union, it is ideally constitutional patriotism that should take the place that was originally occupied by nationalism⁴⁵ and thereby enable the realization of implementing the credo of “united in diversity”.⁴⁶ *Weiler* on the contrary argues that the idea of constitutional patriotism is sort of exclusive and defensive in nature and he infers that patriotism would invite people to defend their constitutions. His concept of constitutional tolerance is based on the voluntary acceptance of constitutional discipline, even without a constitutional *demos*. The latter concept is likewise based on a civic understanding of national identity, focusing primarily on the tolerance *vis-à-vis* the other. According to *Weiler*, constitutional tolerance is pervading the idea of European integration, as, regardless of how close the Union gets, it has to remain a Union “among distinct peoples, distinct political identities, distinct political communities”.⁴⁷ The respect for and the preservation of “the other” and thus the maintenance of different (constitutional) identities instead of equating them, is what underlies the European idea. This applies equally for the horizontal relation among the Member States, as well as for the vertical relation between the Union and its Member States.

What *Weiler* calls “constitutional tolerance” is not only revealed in the preambles to the TEU and the TFEU that are referring to the objective of an “ever closer union among the peoples of Europe”, but has now found its normative expression in the identity clause.⁴⁸ The European ideal is a plurality of mutually tolerating national constitutional systems, each of them legitimated by a people, by means of a democratic process. Hence, there is a plurality of political spaces and democracies that are shaping constitutional choices that have to be respected by the respective other constitutional

‘collective’ or ‘national identities’? Are there two types of national identities? Does Germany have an ethnic identity, and is it different? *European Journal of Sociology* 2002, 3 (3 et seq).

⁴¹ *Ius sanguinis* is often linked to the more inclusive ethnic/cultural model, while *ius loci* is usually linked to the more multicultural civic/political model; *Gamberale* (supra note 40) 637 et seq; *Peters* (supra note 40) 6 et seq.

⁴² *Gamberale* (supra note 40) 639; *Peters* (supra note 40) 6.

⁴³ *Peters* (supra note 40) 19 et seq.

⁴⁴ *Habermas*, *The European Nation-State: On the Past and Future of Sovereignty and Citizenship*, in Cronin/De Greiff (eds), *The Inclusion of the Other. Studies in Political Theory*, 2000, 105 (118). Similar *Krisch*, who suggests that constitutionalism has to be seen as a tool to strengthen tradition, *Krisch*, *The case for pluralism in postnational law*, in *Weiler/De Búrca* (supra note 26) 203 (207 et seq).

⁴⁵ *Habermas* (supra note 44) 118.

⁴⁶ While patriotism typically includes a statement about national pride, nationalism includes one about unconditional support; see *Miller/Ali* (supra note 31) 245.

⁴⁷ *Weiler* (supra note 29); *Weiler* (supra note 26) 12 et seq.

⁴⁸ *Infra V*.

regimes. For the democratic processes and thus the legitimation of those constitutions, some sort of identification of the respective peoples is essential. As claimed by the principle of constitutional tolerance, it is also the different forms of identification that have to be respected, no matter if Germany's ethnic/cultural identification or France's civic form of identification is concerned.

Here, constitutional pluralism is referred to as a theory that, in *Maduro's* words "focuses on the legitimacy of European constitutionalism and its model of organizing power".⁴⁹ The Union as a derivative subject of international law derives its legitimacy from a plurality of interrelating constitutional sources. This finds its perfect expression in the identity clause that imposes the obligation upon the Union to respect the constitutional differences of the Member States. Thus the provision frames one of the bedrocks of the Union's legitimacy. Constitutional pluralism in the European Union context is therefore a juxtaposition of different sources of constitutional law, national, European and also international, where no ultimate source of hierarchy exists.⁵⁰ There is the opinion that the concept of constitutional pluralism would misconstrue the nature of the constitutional by privileging the pluralist asset over the hierarchical.⁵¹ This is exactly the point – hierarchy takes a backseat EU constitutional pluralism. There is a constant demarcation, balancing, argumentation, cooperation, mutual inspiration and therefore a consistent process of constitutionalization as suggested by *Shaw*⁵², where different constitutional systems revealing different values and identities are steadily confronted with one another. Once this process comes to an end, the fundamental idea the Union has been created upon, ceases to exist and so does today's Union. This would be the case if there would be a real European Constitution, establishing a formal hierarchy among the different constitutional systems by setting in place an ultimate authority. The result would be a dramatic weakening of the pluralist element that is so essential for the legal concept the EU is built upon. Of course, one can argue that by developing the doctrines of direct effect and supremacy and its actual acceptance – even though in most cases just implicitly – by national constitutional courts, the CJEU has succeeded in establishing a de facto hierarchy. While from the Union's side the superiority of EU law seems uncontested, from the side of the Member States it is another story that has been told. When it comes to the core of national constitutional law and thus to the norms expressing the very identity of a State, by uncompromisingly sticking to the absolute primacy doctrine,⁵³ the Union will face a legitimacy problem on the long run. The form of constitutional pluralism in place on the EU level hampers the evolution of a collective European identity however, as people tend to stick to their national constitutions; as already stated, this European identity would be needed in order to ensure democratic legitimacy. And at this point we have come full circle, because due to the lack of process and result legitimacy, the Union has to rely

⁴⁹ *Maduro*, The Promise of Constitutional Pluralism, Paper presented at the Colloquium "Rethinking Law in a Global Context: Rethinking the National/International Divide", Wissenschaftszentrum Berlin für Sozialforschung, on 15.5.2012, available at <http://www.wzb.eu/sites/default/files/veranstaltungen/miguelmadurothreeclaimsofconstitutionalpluralismhucollmay152012.pdf>.

⁵⁰ See *Besson*, (supra note 28) 358; *Sabel/Gerstenberg*, Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order, *ELJ* 2010, 511 (543).

⁵¹ According to *Weiler*, constitutional orders „inherently contain hierarchical and pluralist features“, *Weiler* (supra note 26) 14 et 17; *Shaw* (supra note 52) 588.

⁵² *Shaw*, Postnational Constitutionalism in the European Union, *Journal of European Public Policy* 1999, 579 (588); see also *Comtesse*, La culture politique comme métavaleur européenne, in *Besson/Cheneval/Levrat* (supra note 11) 41 (50 et seq), who defines the political discourse as such as *métavaleur européenne*.

⁵³ Supra note 36.

on the legitimacy resources of the Member States.⁵⁴ Weakening those very resources by encroaching on their core constitutional identities would as a result weaken the Union itself. So the question arises of how to establish a balance between national and EU interests.

It is well known that the European project is determined to be an open ended and dynamic process, an ever closer union among the peoples of Europe. But where are the limits in order to safeguard that the objective remains the establishment of a union among the peoples rather than a Union of the European people? How to preserve the particularities of the different Member States and thus avoid the absorption of their identities in one single European compromise of values? Are the Member States running risk of losing their own identities while at the same time undertaking huge efforts to define and strengthen the Union as a *sui generis* construct? The identity clause, serving as a normative expression of constitutional pluralism, has the potential to address these questions in a way that legitimizes the coexistence and tolerance among constitutional systems in the EU. Thus, the actual interpretation of the identity clause will be crucial for the future of the European idea.

III. Three layers of constitutional identity in the European Union

III.1. Identifying constitutional identity

For a definition of what should be respected under Art 4(2) TEU, it is necessary to identify the different types of constitutional identities that coexist within the European Union. It is suggested that there are three different categories of identity involved;⁵⁵ first there is the shared identity of the Union and its Member States that serves as the foundation of the Union; second, it is evaluated, whether there is a part of the Union's identity as a *sui generis* international organization which has emancipated from the shared identity of its Member States; finally there must be a part of the Member States' identity that is not connected to their EU membership and that is characteristic for every single State, making it stand out among others. Due to the depth European integration has achieved today, the three levels of identity are mutually reinforcing and inspiring each other and thus cannot be definitely separated from one another.

To start with, this section evaluates the different ways of how constitutional identity should be identified and argues that, even though it is only core aspects of identity that are supposed to be respected by Art 4(2) TEU, its scope of application is not limited to constitutional norms. The different answers to be found in the literature regarding the question of how to assess constitutional identity,⁵⁶ largely depend on the particular perspective; thus in pursuing a legal, a political, a sociological, a theological or an economic approach, one might come up with five different responses on how constitutional identity should be defined. Even though all subjects are interrelated and it is not possible to focus on one discipline while completely isolating the others, the main focus here lies on the development of a legal reasoning. Obviously, there are legal systems where societal regulations are in place, that even though formally not enforceable, are more authoritative than the

⁵⁴ Cf *Weiler* (supra note 4).

⁵⁵ Similar *Rodin*, National Identity and Market Freedoms after the Treaty of Lisbon, *Croatian Yearbook of European Law and Policy* 2011, 11 (14 et seq).

⁵⁶ For instance *Grewe*, Methods of Identification of National Constitutional Identity, in Saiz Arnaiz/Alcoberro Llivina (supra note 10) 37.

law itself. The focus of the present analysis is placed on positive law however and its understanding of identity.

As mentioned, there are numerous ways to define identity; the obvious narrowing down to normative constitutional aspects of identity in Art 4(2) TEU however, suggests taking constitutionality as a point of departure for the further evaluation. Even though constitutional identity forms a concept of EU law, when assessing the actual content of national constitutional identity, one unavoidably has to encroach on the domestic sphere. Several defining factors are decisive for the constitutional character of a set of legal norms. Usually, a constitution is enshrined in one or several written documents, it determines the powers of the institutions of a polity and there is a certain stability of the norms that form the superior law of a State.⁵⁷

One of the most obvious indicators is procedural. The notion *constitutional* is normally used for a legal norm, whose adoption or amendment is subject to qualified procedural requirements.⁵⁸ Procedural requirements for the adoption and amendment may be even more restrictive for specific constitutional norms like the fundamental principles (*Baugesetze* or *Grundprinzipien*) of the Austrian Constitution, whose amendment requires an obligatory referendum.⁵⁹ In some States, there are even constitutional provisions in place that are unalterable, like the so-called *eternity clause* of the German Basic Law.⁶⁰ Norms of the latter kind typically serve as a legal benchmark for “normal” constitutional law and of course, constitutional law of constituent states in a federation and single statutory law have to be in compliance with them. Furthermore, the definition of the notion could also be linked to the formal designation of a provision as constitutional,⁶¹ to the publication within a prescribed publication organ or to the institutions competent to adopt it or that are competent to decide on its validity.

The differentiation between the diachronic and synchronic meaning of the notion identity, as defined by *Reestman*, is another possibility for the identification of constitutional norms that are to be qualified as an expression of the identity of a political community. While the former meaning concerns the “permanence through time or continuity”, the latter concerns the characteristics that make one entity different by comparison to another.⁶² If a norm has been widely accepted by the population and has been in place for a certain period of time and at the same time differentiates an entity from others, it is likely to form an expression of constitutional identity. The synchronic meaning of constitutional identity, *ie* its differentiating effect, is often relativized however. There may be elements constitutive for the collective identity of a community that are at the same time part of the identity of another. Language may serve as an example here; even though shared by others, it is still constitutive for the identity of every single State. Thus, identity can be either understood in the sense of differentiating one community *vis-à-vis* the other, or in an inclusive way, in the sense of comprising all elements that are constitutive for identity, including those that are

⁵⁷ See also *Peters*, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, *Leiden Journal of International Law* 2006, 579 (584 et seq).

⁵⁸ For instance *Craig*, *Constitutions, Constitutionalism, and the European Union*, *ELJ* 2001, 125 (126 et seq).

⁵⁹ Art 44(3) B-VG.

⁶⁰ Art 79(3) GG.

⁶¹ *Eg* Art 44(1) B-VG determining that constitutional provisions have to be expressly designated as *constitutional* by adding the prefix *Verfassungs-* (constitutional-).

⁶² *Reestman*, *The Lissabon-Urteil: The Franco-German Constitutional Divide*, *EuConst* 2009, 374 (377).

shared by other communities.⁶³ What follows from the subsequent differentiation between three layers of constitutional identity on the EU level⁶⁴ is that Art 4(2) TEU suggests a predominantly exclusionist approach by understanding constitutional identity as being first and foremost triggered by differences *vis-à-vis* the other.⁶⁵

Given the heterogeneity of constitutional law within 28 Member States, none of the abovementioned criteria in itself suffices to define constitutional identity however;⁶⁶ it is rather a combination of the different factors that is decisive. Therefore, it has to be evaluated on a case by case basis, whether or not a specific provision is standing out among the rest of the body of law, if it is continuously imprinting the whole legal order and substantively reflecting fundamental principles and values inherent in a particular legal regime. Especially the judgments of national courts have to be taken into account, whenever they interpret national constitutional law in a way that is likely to shape constitutional identity. While not every constitutional norm automatically serves as an expression of the identity of a State in the sense of Art 4(2) TEU⁶⁷ for this would result in a discrimination of Member States with less substantial constitutions,⁶⁸ the expression and specification of constitutional identity is not limited to constitutional law. Thus, given they specify fundamental choices of a people, it is judicial and legislative acts that have to be considered when assessing, if a specific norm forms part of the constitutional identity of a State.⁶⁹ Given the static character of constitutional law by owed to qualified procedural requirements, the inclusion of the latter acts is essential for the consideration of sociopolitical dynamics within the limits of constitutional law. A mere formal or procedural assessment is therefore not appropriate, nor is an evaluation limited to the content of a norm.

III.2. Member States' common (shared) identity

According to Art 2 TEU the Union “is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (...)”; since those values are “common to the Member States”, the respect for those values serves as a prerequisite for future accessions. In the context of the Union’s external action, Art 21 TEU replicates these values that are shared by most liberal-democratic systems – similar values are found in various constitutions and statutes, solemnly proclaimed, in different wording though. Especially the respect for human rights has acquired the status of an almost universal value. Therefore, from an exclusionist point of view, these values are not suitable to coin the shared identity of the Member States to the effect of differentiating them and making them stand out from other forms of cooperation. But if shared by so many other States and international organizations, if contained in numerous constitutions and

⁶³ See in this context the differentiation between *similarity* and *singularity* in *Grewe*, *Methods of Identification of National Constitutional Identity*, in Saiz Arnaiz/Alcoberro Llivina (supra note 10) 37 (37 et seq) with further references.

⁶⁴ Infra III.

⁶⁵ Similar *Besselink*, *National and constitutional identity before and after Lisbon*, *Utrecht Law Review* 2010, 36 (47).

⁶⁶ See the detailed analysis of constitutional (case) law in the Member States, *Grewe* (supra note 56) 40 et seq.

⁶⁷ According to *Von Bogdandy/Schill*, not every provision of domestic constitutional law has to be regarded as part of a Member State’s constitutional identity; in their opinion, Art 4(2) TEU covers the basic domestic constitutional features only; *Von Bogdandy/Schill* (supra note 9) 1431 et seq.

⁶⁸ See the Opinion of AG Maduro in Case C-213/07, *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, ECR 2008, I-9999, para 33.

⁶⁹ More restrictive *Von Bogdandy/Schill* (supra note 9) 1430.

preambles of international agreements – if they are all respecting human rights, democracy and the rule of law, what constitutes the material difference in substance of the identity of a particular entity? Here, it is what *Habermas* associates with constitutional patriotism, namely the specific interpretation of those principles⁷⁰ and values within a specific legal order what is decisive and what makes people feel attached to their constitutions.

Even though in principle the values are shared, there is discretion left for their implementation within a particular historical, cultural and social context. What the six founding States shared back in the 1950s was their common past in a war torn continent, their lessons learnt from the carnage of the Second World War and their hunger for peace. Against this background, the founding States decided to translate their common values into a legal document that to this day has significantly increased in substance. The common identity of the Member States of the Union, as it stands today, is not only revealed by the explicitly enumerated values and their corresponding interpretation by the national constitutional courts, but also by the ideas of solidarity and peace, as well as the constitutional tolerance among the States, the willingness to accept compromises and the readiness to comply with decisions that were taken by a majority of States on some occasions even against one's own will for a peaceful common future. This common identity of the Member States constitutes the fundament on which the European construct is built upon and therefore it serves also as a starting point for the development of the Union's own identity.

III.3. Sui generis identity of the European Union

While in the 1950s the identity of the European project was essentially reflecting the common set of values and the core constitutional principles of the founding States,⁷¹ the question arises, whether the identity of the Union continues to be an amalgam of the 28 different identities of the Member States or if to date some sort of collective identity has emerged. Is *Delanty* right, when he determines that European identity would not have existed prior to its definition and codification? He qualifies it as a "doubtful construct (...) given the apparent irresolvable conflict of national cultures and oppositional collective identities."⁷² Is it a lack of identity that results in a lack of identification by the citizens?

It is uncontested that the Member States have to respect the Union with all it entails. When it was created by means of international treaties, it was unpredictable that this project would turn out to be a *sui generis* subject of international law, different from all other international organizations hitherto. The primary objective was to establish long-term peace by means of factual technocratic cooperation in economic areas. In the course of the deepening of European integration, the importance of the project grew and soon the focus was not only on the question how this construct should function and be perceived from within, but also how it should be positioned on the international plane *vis-à-vis* the international community. What is this *sui generis* player in international relations, what are the values it stands for, what ideal does it represent, how to define its identity?

⁷⁰ See *Habermas* (supra note 44).

⁷¹ *Calliess* (supra note 12) 1377 et seq.

⁷² *Delanty*, *Inventing Europe. Idea, Identity, Reality*, 1995, 3; *Fleurant*, *L'identité européenne: Un débat qui met en lumière les difficultés conceptuelles de l'identité*, *Horizons philosophiques* 2001, 58 (64).

Explicit references to the identity of the Union in the Treaties are rare and can be found only within the context of the Common Foreign and Security Policy (CFSP).⁷³ This is remarkable, as it seems that the authors of the Treaties are primarily concerned with the objective of strengthening the Union's identity for the assertion of its role as a strong international player.⁷⁴ Nevertheless, the whole body of EU law is informed by the objective of shaping and strengthening the identity of the organization; as such it requires commitment and respect from the Member States. They have to respect the obligatory jurisdiction of a powerful and proactive European Court that has developed several legal doctrines whose impact on the Member States' sovereignty is immense, be it direct effect, supremacy or state liability, all destined to safeguard a uniform and effective application and implementation of EU law; they have to accept the independent role of the European Commission and its powerful status in terms of legislative initiative; they have to consider their duty to act coherently on the international plane and to consider the interest of the Union, instead of acting exclusively in their own interest; they have to respect the binding character of decisions taken by a majority of States, even if they themselves disagree. In line with the principle of sincere cooperation,⁷⁵ Member States not only have to respect, but they also have to actively contribute to the realization of the objectives of the Treaties by implementing legal acts into their domestic legal order, even though they were adopted by procedures are not in line with the democratic standards that are taken for granted on the domestic level. It seems that mere endless respectfulness and strenuous efforts from the Member State's side were required in order to create, shape and strengthen the identity of a unique and ever evolving construct, whose final aim is still to be defined. Of course, in the globalized world of today, in a post-national environment, the overcoming of States' borders and the steadily increasing interdependence, intensified cooperation among States is essential and therefore unexceptionable. The benefits are undisputed. But still, the depth of cooperation and the efforts required to create and strengthen the Union and to build its identity has never been seen before in international relations. It requires not only an incredible amount of respect, subjection, tolerance and trust among the participating States, but also the support from the citizens that have to stand firm behind the project.

Due to the fact that the driving impetus for the cooperation was to establish long-term peace in Europe, peace is likely to be referred to as one of the dominant values expressed by the European project. Since nowadays peace is taken for granted, the original objective has taken a backseat, while economic cooperation has evolved from a means to realize this very objective to the actual driving impetus for integration. Whereas peace as one of the most fundamental values of European integration is not explicitly referred to as a value of the Union in Art 2 TEU, the promotion of peace in its external dimension is still one of the primary concerns of the Union however.⁷⁶ Another value that pervades the whole European project and that serves as a founding principle is tolerance. As referred to by the principle of constitutional tolerance coined by *Weiler*,⁷⁷ what is required is tolerance for

⁷³ The explicit reference to the identity of the Union within the context of the CFSP as provided for by ex-Art 2 and Art 27a(1) TEU (Nice version of the Treaties; consolidated text in OJ 2002 C 325) was eliminated. In the current version of the Treaties, it is only the Preamble of the TEU that mentions the identity of the Union, according to which a CFSP including a common defence policy should be implemented, "thereby reinforcing the European identity".

⁷⁴ See also Art B(1) TEU (Maastricht version).

⁷⁵ *Millet* sees that the reciprocal dimension of the principle was reinforced by the Treaty of Lisbon, *Millet, L'Union Européenne et l'Identité Constitutionnelle des États Membres*, 2013, 83 et seq.

⁷⁶ See Art 3(1) and (5) TEU, Art 8(1) TEU, Art 21(2) lit c TEU.

⁷⁷ *Supra* note 29.

decisions taken by other States having a huge impact on oneself. Not enough, there is the specific meaning of solidarity,⁷⁸ mutual trust, respect for linguistic diversity, the Union's particular understanding of democracy and the system of constitutional pluralism that coin the identity of the Union. Apart from that, the meaning of the free movement rules and the principle of non-discrimination constitute other essential features coining the sui generis identity of the Union.⁷⁹ Even though contained in all Member States' legal orders, non-discrimination has outstanding significance in the EU and is awarded with a fundamental status in the jurisdiction of the CJEU.

Against the background of the Union's wide ranging competences paired with its proactive and powerful Court, it seems that today, after more than 60 years of integration, it is no longer first and foremost the Member States coining the identity of the Union, but rather the Union coining the identity of the Member States. While for a long time it was the respect and the tolerance from the Member States that was decisive for shaping the EU in the first place, by the incorporation of a judicially enforceable identity clause, it is now the Member States' turn to claim respect for their most fundamental constitutional choices.

III.4. Member States' individual constitutional identities

Given the set of values common to the Member States, it is again the specific interpretation of those values, the political choices by the peoples and subsequently of national legislators within a particular legal system that is constitutive for its identity.⁸⁰ Thus, what is identity creating is not the proclamation and prescription of ever replicated principles, but their interpretation and implementation. The specific understanding is the product of historical, cultural, religious and social impetus. One may just look at Austria and Switzerland; they are both States with well-established democratic structures. Hence, it is not democracy as such, but the particular Swiss understanding of democracy that is constitutive for the very identity of that State. Another typical element essential for the identity of a State is its language regime,⁸¹ which is in most cases established constitutionally.

National courts do not follow a strictly exclusionist approach to constitutional identity in the sense that it is only the differentiating elements that count; according to them, what belongs to constitutional identity, is *inter alia* the statehood of the Member States, the key requirements of the rule of law, the principle of democracy and if applicable the federalist principle.⁸² Given the big share of commonalities in the identities of the Member States and the fact that the Union is built upon those common constitutional values, for identity in the sense of Art 4(2) TEU it is certainly the

⁷⁸ *Keating* describes Europe as "a symbol of postwar prosperity and the consumer society but also a place of social solidarity, distinguishing from the US precisely on this", *Keating*, National and Regional Identities in Europe, Contemporary European History 2007, 407 (410).

⁷⁹ *Sarmiento* identifies "three normative ideals", namely democracy, rights and solidarity that would "comprise at its most abstract level all the values and principles enshrined in the Treaties"; *Sarmiento*, The EU's Constitutional Core, in Saiz Arnaiz/Alcoberro Llivina (supra note 10) 177 (179 et seq).

⁸⁰ Cf *Habermas* on constitutional patriotism (supra note 44).

⁸¹ See the final report of Working Group V on Complementary Competencies of the European Convention, 4.11.2002, Doc CONV 375/1/02 REV 1, 10 (11); Opinion of AG *Maduro* in Case C-160/03, *Kingdom of Spain v Eurojust*, ECR 2005, I-2077, para 35, according to whom the respect for linguistic diversity, being of fundamental importance, is an aspect of the respect, the Union owes to the national identities of the Member States.

⁸² *Von Bogdandy/Schill* (supra note 9) 1435 et seq.

differentiating characteristics that are more decisive however. This becomes evident with regard to the national systems of fundamental rights protection.

It is undisputed that the core of fundamental rights enshrined within domestic constitutions and their specific interpretations by national courts are constitutive for national constitutional identity, since they reveal most essential and sensitive choices of a people. Their importance has been accepted by the CJEU at an early stage, since the BVerfG in *Solange I* held that fundamental rights are at the core of national identity.⁸³ The consequence drawn by the CJEU from this ruling was that since then fundamental rights could be invoked as justifications for violations of EU law. Today, membership to the ECHR serves as a precondition for accession to the Union and thus, all Member States – and in the foreseeable future even the Union itself – are parties to that Convention. Furthermore, as EU law currently stands, there are other sources of EU fundamental rights, whose scope of application seems to be consistently broadened by the CJEU;⁸⁴ there is the CFREU and unwritten general principles of law including the rights as provided for by the ECHR – all of them enjoying primacy over national law. So what remains for the substance of Member States' fundamental rights apart from the mainstream pulp of ever replicated similar rights and principles? Indeed, fundamental rights guarantees flowing from different sources are mostly interrelated, congruent or at least similarly framed; thus it is again first and foremost the interpretation and legal specification of these very rights that is substantially varying from one Member State to the other. One may just think of the freedom of/from religion constituting a fundamental right under the ECHR and the CFREU and the still existing different constitutional arrangements with regard to the separation of church and State in some States. Even though all Member States have incorporated similar principles in their national legal orders, it is the interpretation of those principles that allows for different arrangements regarding sensitive issues like gay marriage, abortion, assisted suicide and surrogacy in the Member States.⁸⁵

The ECtHR, whose judgments are decisively imprinting the actual interpretation of EU fundamental rights, allows for this diversity by means of its margin of appreciation doctrine. The Grand Chamber's decision in *Lautsi*, a case concerned with the presence of crucifixes in classrooms and its compatibility with the freedom of/from religion, may serve as an example here. Following an intervention by *Weiler*, who represented the intervening States and who insisted on the importance of tolerance for diversity within the European arrangement, the Chamber decision was turned down. By taking into account of „the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development“, the Court took the view that the decision whether or not to perpetuate a tradition „falls in principle within the

⁸³ BVerfG 37, 271, 29.5.1974, *Solange I*; see *Torres Pérez* for the jurisprudence of other national constitutional courts, *Torres Pérez*, *Constitutional Identity and Fundamental Rights: the Intersection between Art 4(2) TEU and 53 Charter*, in Saiz Arnaiz/Alcoberro Llivina (supra note 10) 141 (143 et seq).

⁸⁴ Case C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG*, ECR, 2010, I-365; Case C-144/04, *Werner Mangold v Rüdiger Helm*, ECR 2005, I-9981; Case C-115/08, *Land Oberösterreich v ČEZ*; ECR 2009, I-10265. See for instance *De Mol*, *Küçükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law: Court of Justice of the European Union (Grand Chamber) Judgment of 19 January 2010, Case C-555/07, Seda Küçükdeveci v. Swedex GmbH & Co. KG.*, *EuConst* 2010, 293; *Seifert*, *Mangold und kein Ende: die Entscheidung der Großen Kammer des EuGH v. 19.1.2010 in der Rechtssache Küçükdeveci*, *EuR* 2010, 802; *Obwexer*, *Der Schutz der Grundrechte durch den Gerichtshof der EU nach Lissabon. Auslegung und Anwendung der Grundrechte-Charta gegenüber EU-Organen, den Mitgliedstaaten und dem allgemeinen Völkerrecht*, *ZÖR* 2013, 487.

⁸⁵ On the different types of Member States' constitutional identities, *Millet* (supra note 75) 106 et seq.

margin of appreciation of the respondent State“.⁸⁶ In *ABC v Ireland*, where Irish abortion law was at stake, the ECtHR held that the prohibition in Ireland of abortion for health and well-being reasons was based „on the profound moral views of the Irish people as to the nature of life (...) and (...) the consequent protection to be accorded to the right to life of the unborn“ and as such does not exceed the margin of appreciation accorded to the Irish State.⁸⁷ Looking at cases such as *Schmidberger* and *Omega*, one will observe that there is a similarity in the tone of the CJEU, when it holds that the need for, and proportionality of a national provision intended to ensure a specific standard of fundamental rights protection is not excluded “merely because one Member State has chosen a system of protection different from that adopted by another State” and in conclusion gave precedence to fundamental rights in relation to conflicting market freedoms after balancing the interests against one another.⁸⁸ Of course, there are major differences between the ECHR fundamental rights arrangement and that of the EU, not least that unlike the EU Treaties the ECHR does not explicitly claim respect for national identity; it is rather implicitly that national peculiarities are considered by the Convention system, when *eg* Art 26(4) ECHR determines that in specific cases, national judges can or have to be appointed *ex-officio* members to the bench.⁸⁹ Nevertheless, the idea that due to their expertise national authorities are better suited to assess the importance of State specific peculiarities, is equally true for the EU; in the latter case, respect for national identities is claimed not only by the TEU, but additionally referred to in the context of fundamental rights. The preamble of the Charter stresses the need to preserve and develop common values and at the same time claims that the Union has to respect “the diversity of the cultures and traditions of the peoples of Europe as well as their national identities”. Apart from that, the *Günstigkeitsklausel* in Art 53 CFREU is intended to protect the specific levels of fundamental rights protection provided for in Member States’ constitutions, by determining that nothing in the Charter “shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁹⁰ and by the Member States’ constitutions“.⁹¹

It is one of the essential benefits of federal systems – on the EU level guaranteed by the effective implementation of free movement – that mobile citizens are enabled “to move from one jurisdiction to another, sorting themselves into the various jurisdictions that best satisfy their individual preferences“, in short: to vote by their feet.⁹² They can pick and choose among the different fundamental rights arrangements in the EU and thereby escape certain democratic choices reflected by the specific interpretation of fundamental rights within the legal orders of their Member States of

⁸⁶ *Lautsi v Italy*, App No 30814/06. See for instance *Weiler*, Lautsi: A reply, ICON 2013, 230.

⁸⁷ *ABC v Ireland*, App No 25579/06, para 241.

⁸⁸ Case C-112/09, *Schmidberger v Republik Österreich*, ECR 2003, I-5659; Case C-36/02, *Omega Spielhallen- und Automaten Aufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, ECR 2004, I-9609, para 38.

⁸⁹ See *López Guerra*, National Identity and the European Convention on Human Rights, in Saiz Arnaiz/Alcoberro Llivina (eds), *National Constitutional Identity and European Integration*, 2013, 305 (305 et seq); also *Brehms*, *Human Rights: Universality and Diversity*, 2001, 341 et seq; *Schokkenbroek*, *The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, *Human Rights Law Journal* 1998, 30.

⁹⁰ ETS No 3.

⁹¹ See for instance *Lindner*, *Grundrechtsschutz in Europa – System einer Kollisionsdogmatik*, *EuR* 2007, 160 (168).

⁹² *Halberstam* (supra note 33) 586; *Halberstam*, *Federalism: A Critical Guide*, *Public Law and Legal Theory WP Series* 251/2011, 14.

origin. Here, absolute primacy and the fundamental importance that the CJEU consistently attaches to the free movement rights give rise to conflicts, some of them touching upon the core of national constitutional identity. This is all the more true the deeper European integration gets – especially in the fundamental rights context. Potential recipes to solve these conflicts are laid down in Art 4(2) TEU and Art 53 CFREU, both of them being now subject to judicial review.

One could take the view that in relation to Art 4(2) TEU, which contains a general link to the constitutional identities of the Member States, Art 53 CFREU constitutes a *lex specialis* specifically applicable to fundamental rights. This cannot be followed; neither is the scope of application of the *Günstigkeitsklausel* limited to core fundamental rights enshrined in the Member States' constitutions, nor is it linked to national identity. Admittedly, there is a presumption that fundamental rights and their specific interpretation constitute part of national constitutional identity;⁹³ this does not necessarily hold for all fundamental rights however. The intention of Art 53 CFREU is to rule out a sort of race to the bottom in fundamental rights protection by undermining higher standards already in place within the Member States. As a consequence, the provision applies in cases where different levels of fundamental rights protection are provided for – *inter alia* – by domestic constitutions;⁹⁴ the identity clause on the contrary, applies in cases where EU law stands *vis-à-vis* a constitutionally guaranteed fundamental right and/or its specific interpretation forming an expression of the very identity of a Member State.⁹⁵ Whereas the application of Art 4(2) TEU is triggered first and foremost by differences in the Member States' constitutional identities, for Art 53 CFREU it is “only” a higher standard of fundamental rights protection what counts and it is therefore absolutely irrelevant if other Member States provide for similar standards.

There might be cases however, where a specific fundamental right constitutes an expression of national constitutional identity and at the same time provides for a higher standard of fundamental rights protection; as there are obvious overlaps in the scopes of application of the two provisions, a joint operation of Art 4(2) TEU and Art 53 CFREU is conceivable. First, according to Art 6(1) TEU, the TEU and the Charter have the same legal status and there is no argument for a privileged status of either provision; second, even though the political significance of the two provisions might differ substantially, the subsequent section will show that the legal consequences flowing from Art 4(2) TEU are compatible with what the CJEU ruled with regard to Art 53 CFREU.

⁹³ Similar *Torres Pérez* (supra note 83) 144 with further references.

⁹⁴ For a detailed analysis of the scope of application of Art 53 CFREU, *Sarmiento*, Who is afraid of the Charter? The Court of Justice, national Courts and the new Framework of Fundamental Rights Protection in Europe, CMLRev 2013, 1267 (1287 et seq).

⁹⁵ See Opinion of AG Bot in Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, 2.10.2012, nyr, para 142, according to whom “a concept demanding protection for fundamental rights must not be confused with an attack on the (...) constitutional identity of a Member State”.

IV. Identity clause – scope and legal consequences

IV.1. Evolution of Art 4(2) TEU

When the identity clause was incorporated into the Treaties, then Art F TEU determined that “(t)he Union shall respect the national identities of its Member States, whose systems of government are based on the principles of democracy”.⁹⁶ Against the background of the accession of three new States, whose democratic structures had been established only recently and the fall of the Iron Curtain, the link to the democratic systems of the Member States was understood as an implicit precondition for accession.⁹⁷ With the subsequent Treaty revision in 1997, the link to democratic principles was dropped however.⁹⁸ A rephrased and more differentiated version of the provision was later contained in the draft Treaty establishing a Constitution for Europe (TECE)⁹⁹, which was – after the failure of the TECE – maintained by the Treaty of Lisbon. Thus, the current Art 4(2) TEU determines that

“(t)he 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 reference to “fundamental structures, political and constitutional” constitutes a shift from a predominantly cultural and linguistic to a constitutional understanding of identity, in line with the interpretation of the notion by national constitutional courts.¹⁰⁰ This is confirmed by the fact that the duty to respect the cultural diversity of the Member States can be found at another occasion in the Treaties, namely among the objectives of the Union set out in Art 3(3) subpara 4 TEU. Constitutional identity has therefore somehow emancipated from national identity.¹⁰¹ Regarding fundamental structures and essential functions of the Member States, the Working Group of the European Convention exemplarily related to questions of national citizenship, territory, the legal status of churches and religious societies, national defense and the organization of armed forces as well as to the choice of languages. According to the final report of this Working Group, the insertion of the identity clause was intended to be a symbolic gesture in the direction of the citizens and at the same time to provide for a guideline for the Union’s institutions when fulfilling their tasks.¹⁰²

⁹⁶ According to *Ritleng*, the ECJ implicitly respected the Member States’ constitutional identities, when it acknowledged unwritten general principles of law inspired by the common constitutional traditions of the Member States; *Ritleng*, *De l’utilité du principe de primauté du droit de l’Union*, RTDE 2009, 677.

⁹⁷ See *Claes*, *National Identity: Trump Card or Up for Negotiation?* in Saiz Arnaiz/Alcoberro Llivina (supra note 10) 109 (116 et seq).

⁹⁸ See Art 6(3) TEU (Amsterdam version; consolidated text in OJ 1997 C 340) and Art 6(3) TEU (Nice version).

⁹⁹ Art I-5 TECE; OJ 2004 C 310.

¹⁰⁰ *Von Bogdandy/Schill*, *Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag. Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs*, ZaöRV 2010, 701 (711). AG *Maduro* is of the opinion, that when the versions of the provision prior to Lisbon referred to “national identities”, this included *constitutional* identity; Opinion of AG *Maduro* in Case C-213/07, *Michaniki*, ECR 2008, I-9999, para 31.

¹⁰¹ *Besselink* (supra note 65) 44.

¹⁰² Final report Working Group V (supra note 81) 11; the provision was named *Christophersen clause*, after the chair of the working group; for a comprehensive analysis on the *travaux préparatoires*, see *Guastafarro* (supra note 38) 13 et seq.

A major difference between the TECE and the Treaty of Lisbon is that in the former Treaty, the identity clause had to be read in combination with the supremacy clause. This may explain the detachment of the constitutional from the cultural and linguistic identities in the TECE; the determination that the Union has to respect the core constitutional provisions relevant for the identity of a Member State may have allowed for the codification of primacy. As is well known, the wording of Art I-5 TECE was maintained by the Treaty of Lisbon, while Art I-6 TECE on the primacy of EU law was not. Is the identity clause now quoted out of context, as the primacy clause was dropped? Or does the retention of the clause imply a possible relativization of absolute primacy? This issue is to be addressed after having determined, who is competent to interpret Art 4(2) TEU.

IV.2. The question of interpretation

In contrast to the *Günstigkeitsklausel*, which is obviously to be interpreted by the CJEU, it is far less clear, who should have the ultimate authority to define what is covered by the notion of national constitutional identity in the sense of Art 4(2) TEU. Even though it was the BVerfG who first used the concept and even though the provision definitely requires an interpretation of national law, this does not automatically imply that it is for the national courts to interpret it. By its codification, the concept of constitutional identity has become a concept of EU law and its interpretation is therefore within the sole competence of the CJEU; thus, when Art I-5 TECE was drafted by the European Convention, it was the CJEU who was supposed to be the ultimate interpreter of the provision.¹⁰³ This view is supported by Art 19 TEU, which sets forth that it is for the CJEU to ensure “that in the interpretation and application of the Treaties the law is observed”; furthermore, it is only for the CJEU to interpret the Treaties and to assess the validity and interpretation of secondary legislation by means of preliminary rulings. In the light of ensuring uniform application of EU law it is therefore obligatory for national courts, at least for those against whose decisions there is no judicial remedy under domestic law, to refer questions regarding the interpretation EU law – including that of Art 4(2) TEU – to the CJEU. On the other hand it does certainly not live up to the objective of provision if there was a central and standardized interpretation by a supranational Court of what should be regarded constitutive for 28 individual national constitutional identities.

It seems that here the BVerfG in its Lisbon decision found an acceptable middle ground, when it took the opportunity to demarcate the competences to interpret constitutional identity between the CJEU and national courts, even before the CJEU had a possibility to do so. It obviously understands constitutional identity as a national constitutional concept on the one hand, where the exercise of the review power is rooted in domestic constitutional law and as a concept of EU law on the other hand, whose interpretation remains within the sole competence of the CJEU. It thereby leaves the interpretation of Art 4(2) TEU to the CJEU but at the same time reserves the interpretation of constitutional identity as a national constitutional concept to itself and thus to national constitutional courts in general. The reasoning is simple; what cannot be conferred to the Union can in no case be subject to interpretation by the CJEU. Unlike other constitutional courts, it clearly indicates what constitutes the “inviolable core content of the constitutional identity” in the case of Germany by referring to the so called “eternity clause”¹⁰⁴, which is clearly “not open to integration”.¹⁰⁵ By

¹⁰³ Final report of Working Group V (supra note 81) 11.

¹⁰⁴ Art 79(3) GG.

¹⁰⁵ BVerfG 2 BvE 2/08, 30.6.2009, *Lisbon*, paras 239 et seq (English). For the vague jurisprudence of other constitutional courts on national identity, see *Von Bogdandy/Schill* (supra note 9) 1435 et seq.

emphasizing that the exercise of the review power will be based on the principle of *Europarechtsfreundlichkeit* (the openness towards EU law) of the *Grundgesetz*, and by stating that the two concepts of constitutional identity should “go hand in hand in the European legal area”, the BVerfG implicitly invites the CJEU to cooperate. The fact that the BVerfG limits the national concept of constitutional identity to its inviolable core content as protected by the eternity clause could be understood – at least at the first sight – as a restrictive interpretation, per se based on the principle of openness towards EU law; the subsequent broad understanding of what this core content entails, conveys a different impression however and has rightly been subject to criticism in the legal literature. *Von Bogdandy/Schill* for instance state that “(i)t is not convincing (...) to understand national identity as an absolute barrier and to interpret it as broadly” as the BVerfG indicated in *Lisbon*.¹⁰⁶

Whereas the current case law on Art 4(2) TEU reveals a tendency of the Member States to inflationary invoke constitutional identity, an expedient understanding of the provision obviously requires a “less is more” approach. This comes clear from the wording of the provision that is establishing a link to constitutional aspects of identity; it is typically referred to constitutions as sources of legal norms determining the most fundamental rules underlying a specific legal arrangement, like for example the form of government, the official language or the specific interpretation of certain fundamental rights. While the specification of those fundamental democratic choices of a constituency, be it judicially or legislatively, should be covered by the identity clause, in substantive terms its application should be limited to a constitutional core. At this point, it is worth to have a cursory and comparative view on two occasions, where the CJEU strived to protect the essence of fundamental provisions of EU law. First, there is the essential elements doctrine developed in the citizenship context. When the CJEU determines that “citizenship of the Union is intended to be the fundamental status of nationals of the Member States”, it should likewise concede that national constitutional identity is fundamental for the preservation of the individuality and legitimacy of the Member States; while Art 20 TFEU “precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”, Art 4(2) TEU should be understood as precluding Union measures which have the effect of depriving the Member States and their citizens of the genuine enjoyment of the substance of rights that are constitutive for their constitutional identity.¹⁰⁷ Second, in a recent judgment the CJEU has applied its essential elements doctrine to fundamental rights, when it held that “any limitation on the exercise of the rights and freedoms laid down by the Charter must be provided for by law, respect their essence and, subject to the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”.¹⁰⁸ A similar understanding would be advisable when interpreting the EU concept of national constitutional identity.

Thus, what national courts should claim for as being protected under Art 4(2) TEU, should be limited to the most essential elements of constitutional identity¹⁰⁹ and this constitutional core should be

¹⁰⁶ *Von Bogdandy/Schill* (supra note 9) 1446. The *Lisbon* decision was later relativized in *Honeywell*, BVerfG 2 BvR 2661/06, 6.7.2010, *Honeywell*.

¹⁰⁷ Case C-34/09, Gerardo Ruiz Zambrano v Office national de l’emploi, ECR 2011, I-1177, para 41.

¹⁰⁸ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland et al*, nyr, para 38.

¹⁰⁹ Similar *Von Bogdandy/Schill* (supra note 9) 1435 et seq.

taken all the more serious by the Union. Against the background of the principle of sincere cooperation, national as well as European courts need to be aware of the sensitivity of the issue and of the potential benefits and risks this provision brings about for European integration. Then – and only then – the full potential of the identity clause can be realized to the extent that it strengthens the Unions legitimacy and at the same time allows the Member States to preserve their national identities.

IV.3. Case law of the CJEU

Since the identity clause has become judicially enforceable by the end of 2009, constitutional identity was invoked at several occasions before the CJEU.¹¹⁰ The first case was *Sayn-Wittgenstein*, a preliminary reference initiated by the Austrian *Verwaltungsgerichtshof* concerning Art 21 TFEU and the non-recognition of a nobility title acquired in Germany.¹¹¹ The Austrian Law on abolition of the nobility, which has constitutional status, constitutes an implementation of the general principle of equal treatment and prohibits the acquisition, possession or use by its citizens of noble titles or status.¹¹² According to the Austrian Government, this rule is intended to protect the constitutional identity of the Republic; being a fundamental decision in favor of formal equality, an expression of the history of Austria as an empire and its fundamental values, any restriction on the right to free movement would be justified.¹¹³ First the Court determined that the Austrian measure constitutes a restriction on the freedoms conferred by Art 21 TFEU.¹¹⁴ While AG *Sharpston* did not even mention national identity,¹¹⁵ the ECJ finally referred to Art 4(2) TEU when examining possible grounds for justification. It determined, in line with the observations submitted by the Commission,¹¹⁶ that the status of a State as a Republic belongs to its national identity that as such has to be respected by the Union.¹¹⁷

The judgment suggests that the CJEU is not willing to engage in a substantive discussion on the identity clause; there is no further argument on the applicability and the effects of Art 4(2) TEU. It seems that the Court is not willing to attach as much importance to constitutional identity as it was expected to do by clearly subordinating it to free movement, which – as is well known – enjoys

¹¹⁰ For reasons of space a more detailed analysis of the Court's case law is omitted here and the focus is placed on post-Lisbon cases; for a more detailed analysis of the case law see *Burgogue-Larsen*, *Un Huron au Plateau de Kirchberg ou quelques réflexions naïves sur l'identité constitutionnelle dans la jurisprudence du juge de l'Union européenne*, in Levrat/Besson (eds), *(Dés)ordres juridiques européens – European Legal (Dis)orders*, 2012, 185.

¹¹¹ *Besselink*, Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Judgment of the Court (Second Chamber) of 22 December 2010, nyr, CMLRev 2012, 671; *Di Salvatore*, *Il Caso Sayn-Wittgenstein: ordine pubblico e identità costituzionale dello Stato membro*, Quaderni costituzionali 2011, 435; *Jastrzebska Beata*, *Le principe de l'identité nationale des États membres – signification incertaine d'une disposition ambiteuse*, in Besson/Pichonnaz (eds), *Les principes en droit européen. Principes in European Law*, 2011, 163 (176 et seq); *Kröll*, *Der EuGH als "Hüter" des republikanischen Grundprinzips der österreichischen Bundesverfassung? Anmerkungen zum Urteil des EuGH vom 22. Dezember 2010 in der Rs. Sayn-Wittgenstein*, in *Jahrbuch Öffentliches Recht* 2011, 313; *Von Bogdandy/Schill* (supra note 9) 1423 et seq.

¹¹² Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, ECR 2010, I-13693, para 88.

¹¹³ Case C-208/09, *Sayn-Wittgenstein*, ECR 2010, I-13693, paras 74 et seq.

¹¹⁴ Case C-208/09, *Sayn-Wittgenstein*, ECR 2010, I-13693, para 71.

¹¹⁵ Opinion of AG *Sharpston* in Case C-208/09, *Sayn-Wittgenstein*, ECR 2010, I-13693.

¹¹⁶ Case C-208/09, *Sayn-Wittgenstein*, ECR 2010, I-13693, para 80.

¹¹⁷ Case C-208/09, *Sayn-Wittgenstein*, ECR 2010, I-13693, para 92.

fundamental status in EU law¹¹⁸. It is rather *en passant*, while assessing the proportionality of the measure justified on grounds of public policy, when the Court cursorily mentions it. Thus, unlike in earlier judgments, where the CJEU stated that “the preservation of the Member States’ national identities is a legitimate aim respected by the Community legal order”¹¹⁹, in the present case the Court does not explicitly regard the identity clause as a possible ground for justification comparable to what it accepted for fundamental rights.¹²⁰ Here it seems that the Court merely refers to national identity as an additional criterion for assessing the proportionality of the Austrian measure. It becomes clear however that the constitutional organization of a State falls within the scope of Art 4(2) TEU.¹²¹ It remains open though, whether the identity clause is applicable due to the special interpretation by the Austrian Constitution, following from the State’s history as an empire or if it generally applies to the different constitutional arrangements provided for by the Member States. The fact that the republican form of government constitutes a part of the constitutional identity of a State in itself confirms the argument that Art 4(2) TEU is triggered also by constitutional principles that are shared with other Member States and their specific interpretation in the particular Member State.¹²²

In two other free movement cases concerning linguistic diversity, *Runevič-Vardyn*¹²³ and *Las*¹²⁴, the CJEU – again when examining a possible justification – determined that the respect for national identity claimed by Art 4(2) TEU includes the protection of a State’s official national language, by at the same time referring to Art 3(3) TEU and Art 22 CFREU.¹²⁵ Recently the CJEU was concerned with a case concerning the access to the profession of a lawyer, more specifically with the question, whether or not a provision of secondary EU law should be held invalid due to its incompatibility with a constitutional provision under which access to that profession is dependent on having passed a State examination. The directive at issue implements the right to establishment for lawyers,¹²⁶ allowing them to practice in other Member States under the professional title obtained in the Member State of origin. After determining that the directive does not allow for a circumvention of the constitutional rule, the CJEU concludes that the provision of the directive “in so far as it enables nationals of a Member State who obtain the professional title of lawyer in another Member State to practice the profession of lawyer in the State of which they are nationals under the professional title obtained in the home Member State, is not, in any event, capable of affecting either the fundamental political and constitutional structures or the essential functions of the host Member State within the meaning of Article 4(2) TEU”.¹²⁷

¹¹⁸ For instance Case C-51/08, *Commission v Luxembourg*, ECR 2011, I-4231, paras 77 et seq, where the CJEU qualified the freedom of establishment as one of the fundamental provisions of EU law that has to be interpreted broadly.

¹¹⁹ Case C-473/93, *Commission v Luxembourg*, ECR 1996, I-3207, para 35.

¹²⁰ Cf Case C-36/02, *Omega*, ECR 2004, I-9609, para 35.

¹²¹ In this context *Von Bogdandy/Schill* (supra note 9) 1424 et seq.

¹²² Supra III.

¹²³ Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and others*, ECR 2011, I-3787, para 86; in this regard see the Opinion of AG Maduro in Case C-160/03, *Spain v Eurojust*, ECR 2005, I-2077, para 35.

¹²⁴ Case C-202/11, *Anton Las v PSA Antwerp NV*, 16.4.2013, nyr, para 26.

¹²⁵ See also Case C-51/08, *European Commission v Grand Duchy of Luxembourg*, ECR 2011, I-4231, para 124.

¹²⁶ Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ 1998 L 77/36.

¹²⁷ Joined Cases C-58/13 and C-59/13, *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell’Ordine degli Avvocati di Macerata*, 17.7.2014, nyr, paras 53 et seq.

It is striking that the Court first examines, whether or not the provision of the directive allows for a circumvention of the respective constitutional provision, and only in a second step determines that there is no capability of that provision to affect Art 4(2) TEU. The access to a profession, even if it is constitutionally determined, is under no circumstances constitutive for the constitutional identity of a State. This is all the more true, as a lawyer typically does not exercise any sort of public authority. Welcomingly, in *O’Brian*, the CJEU comes more straight to the point. In response to the Latvian government, according to which the application of EU law to the judiciary, more precisely on the remuneration of part-time judges, would as such be contrary to Art 4(2) TEU, the Court simply held that this “cannot have any effect on national identity”.¹²⁸

IV.4. Constitutional identity and the primacy of EU law

Since the BVerfG first referred to national identity in the fundamental rights context in 1974, fundamental rights have been consistently accepted as a constitutive part of national constitutional identity.¹²⁹ In this regard, the CJEU has held that different standards of fundamental rights protection do as such not preclude the proportionality of a national provision intended to ensure a specific standard of fundamental rights protection.¹³⁰ Even though the Court has given priority to fundamental rights at several occasions, their applicability is likewise examined “only” within the context of a possible justification and the proportionality of the measure at issue and not on equal footing with the fundamental market freedoms.

When in *Melloni* the CJEU had the first opportunity to interpret the *Günstigkeitsklausel* of the CFREU, which has been subject to judicial review since the entering into force of the Treaty of Lisbon only, the Court gave a clear rebuff to the idea of a possible neutralization of the primacy doctrine as discussed in the legal literature.¹³¹ The referring court envisaged an interpretation of Art 53 CFREU to the extent that Member States, whose constitutions provide for a higher standard than that provided for by the Charter are generally authorized to apply their standards; this interpretation, according to the Court, would undermine the principle of primacy of EU law and cannot be accepted. Thus, Art 53 CFREU allows for the application of higher fundamental rights standards only if „the primacy, unity and effectiveness of EU law are not thereby compromised“. ¹³² By generally placing the necessity to preserve the *effet utile* of EU law above the interest of the Member States to preserve their specific interpretations of certain fundamental rights, the Court makes clear that it not willing to ease its strict policy in terms of absolute primacy; this is all the more significant, as with fundamental rights an area is concerned that has been widely accepted as being at the core of national (constitutional) identity.¹³³ *Melloni*, a case not concerned with constitutional identity, comes as no surprise however; allowing for limitations to absolute primacy in one case, would open Pandora’s box. Thus, if the Court would have allowed for domestic fundamental rights to exempt primacy, then this must have also

¹²⁸ Case C-393/10, *Dermod Patrick O’Brien v Ministry of Justice*, 1.3.2012, nyr, para 49.

¹²⁹ *Besselink* (supra note 111) 684.

¹³⁰ Case C-36/02, *Omega*, ECR 2004, I-9609, para 38.

¹³¹ In this regard cf *Sarmiento* (supra note 94) with further references in fn 89; also *Besselink*, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, CMLRev 1998, 629 et seq.

¹³² Case C-399/11, *Melloni*, 26.2.2013, nyr, paras 56 et seq.

¹³³ See the decision of the BVerfG in *Solange I* (BVerfG 37, 271, 29.5.1974) and the *Schmidberger* case law, Case C-112/09, *Schmidberger*, ECR 2003, I-5659; also Case C-36/02, *Omega*, ECR 2004, I-9609.

applied to all other sources referred to in Art 53 CFREU, such as human rights recognized in international agreements concluded by the Union or the Member States.

Even though after the failure of the Constitutional Treaty, the supremacy clause was dropped, primacy still constitutes an unwritten structural element of EU law, at least fortified by a legally non-binding declaration attached to the Treaties.¹³⁴ According to *Von Bogdandy/Schill*, the identity clause should be understood as enabling national constitutional courts in exceptional cases to invoke limits to the principle of primacy.¹³⁵ *Besselink*'s argument goes in the same direction, stating that identity-related exceptions to the primacy of EU law should be restricted to constitutional provisions that are fundamental and contributing to the very identity of a Member State's constitution.¹³⁶ And so do *Kumm/Ferreres Comella* who, with respect to the identity clause of the TECE read in conjunction with the primacy clause, held that the national courts should be authorized *qua* EU law to set aside secondary EU law in certain cases concerned with national constitutional identity. According to their proposal, the capacity of Member States' courts to affect uniform application of EU law should be limited to cases, where they can claim that a specific legal rule "explicitly incorporated" in the national constitution justifies non-compliance with EU law.¹³⁷ *Claes* on the contrary states that Art 4(2) TEU should not be understood as a limitation to primacy, but rather as imposing an obligation on the Union to provide for exceptions to the uniform application and thus to engage with those Member States who claim that their national identities are at stake.¹³⁸

The current case law on Art 4(2) TEU does not reveal any intentions of the CJEU to relativize its strict policy on absolute primacy. By sticking to its previous case law, national identity is at best considered as a possible derogation from free movement subject to a proportionality test where the interest to preserve national constitutional identity is balanced against a specific provision of EU law.¹³⁹ Even though the approach of the Court seems to go in the right direction, by simply "downgrading" national constitutional identity to a mere supporting argument that is swiftly mentioned in the context of the proportionality test, it surely misses the point.¹⁴⁰ What is required is no automatism of whatever kind, but rather a substantial discussion of identity relevant issues. In cases where EU law unduly encroaches on national constitutional identity, the consequence should – in line with the principle of proportionality – not go beyond what is necessary in order to attain the objective of preserving different national identities of the Member States.¹⁴¹ Therefore, the identity clause must not be understood as "overcoming absolute primacy"¹⁴², but rather as a derogation from primacy.¹⁴³ Adherence to the primacy doctrine further corresponds to the CJEU's ruling on the legal consequences of Art 53 CFREU in *Melloni*. Whereas there is nothing to argue against a joint operation of the two provisions, Art 53 CFREU applies to individual Member States' standards of

¹³⁴ Declaration No 17, OJ 2012 C 326/346.

¹³⁵ *Von Bogdandy/Schill* (supra note 9) 1419.

¹³⁶ *Besselink* (supra note 101) 47 et seq.

¹³⁷ *Kumm/Ferreres Comella* (supra note 4) 6.

¹³⁸ *Claes* (supra note 97) 112, accentuation by the author; similar *Torres Pérez* (supra note 83) 146 et seq.

¹³⁹ Art I-5 TECE was intended to "safeguard the role and importance of the Member States" within the Treaties while at the same time allowing for a margin of flexibility; the Member States were meant to remain under a duty to respect the Treaties; see final report of Working Group V (supra note 81) 11.

¹⁴⁰ Similar *Besselink* (supra note 111) 684.

¹⁴¹ In the context of the justification of restrictions to market freedoms see for instance Case C-137/09, *Marc Michel Josemans v Burgemeester van Maastricht*, ECR 2010, I-13019, para 69 with further references.

¹⁴² *Von Bogdandy/Schill* (supra note 9).

¹⁴³ Similar *Claes* (supra note 97) 112; *Torres Pérez* (supra note 83) 146 et seq.

fundamental rights protection that are (in most cases) *not* connected to national constitutional identity. The identity clause on the other hand is applicable where the protection of constitutional identity is invoked and therefore relevant for politically sensitive legal issues. Given the fact that neither European nor national courts are on their own competent to give an authoritative interpretation of the national and the European concepts of constitutional identity at the same time, it is judicial cooperation that is proposed here.

V. Conclusion: a Constitutional Committee for the European Union

What most authors share is that an intensified judicial dialogue between European and national courts is crucial for a serious balancing of national and Union interests. Accordingly, *Von Bogdandy/Schill* propose sort of a “reverse preliminary ruling”, where the CJEU is meant to request information on the view of the constitutional court of the respective Member State regarding the interpretation of national constitutional identity in a specific case. Based on the information it receives, the CJEU should balance the Member States’ and the Union’s interests by taking due account of the view expressed by the State via its constitutional court. While according to *Von Bogdandy/Schill*, the final decision would be left with the CJEU, national constitutional courts would have the possibility to carry out an identity control test themselves; under the assumption that national constitutional courts respect the principle of sincere cooperation, remaining divergences would have to be accepted in a pluralistic legal environment.¹⁴⁴ Under the proposal of *Kumm/Ferrerres Comella*, it should be for the constitutional legislator and not for the constitutional courts to override EU law, provided the national law at issue is specific in nature and not just an abstract right. Their intention is to reduce the risk for the uniform enforcement of EU law by establishing the specificity requirement.¹⁴⁵

The solution proposed here goes in a slightly different direction. Conforming with the prevailing opinion in the legal literature, a qualified European-wide discourse on the issue is certainly needed;¹⁴⁶ what would be counterproductive however, is a neutralization of the primacy doctrine on the one hand and a final authority of the CJEU to define the extent of protection that should be attributed to the constitutional core of Member States’ identity on the other. This would not correspond to the concept of constitutional pluralism that has informed European integration from the outset.

Based on the assumption that the Member States are still the Masters of the Treaties, the latter should definitely have a say on the definition of what is to be regarded constitutive for their respective constitutional identities. The objective is therefore to reconcile the two concepts of national constitutional identity, one of them rooted in European and the other in national constitutional law. What is proposed is the establishment of a “Constitutional Committee”,¹⁴⁷ an *ad-hoc* committee of representatives of national Constitutional Courts including a representative from

¹⁴⁴ *Von Bogdandy/Schill* (supra note 9) 1449.

¹⁴⁵ *Kumm/Ferrerres Comella* (supra note 4) 21 et seq, 25 et seq; their proposal has to be seen in the TECE context though.

¹⁴⁶ For instance *Arnulf*, *Judicial Dialogue in the European Union*, in Dickson/Eleftheriadis (eds), *Philosophical Foundations of European Union Law*, 2012, 109.

¹⁴⁷ Cf the proposal of a “Constitutional Council”, *Weiler*, *To be a European Citizen – Eros and Civilization*, WPS in *European Studies*, 1998, 45 et seq.

the CJEU that meets in cases where Art 4(2) TEU is invoked before the CJEU respectively where the latter considers it necessary. The debate in the Committee, chaired by the representative of the Member State, whose identity is at stake, should ideally result in a common final opinion. While there are multiple options regarding the distribution of votes, it is essential that the vote of the Member State who is directly involved in a case should be accorded more weight in relation to all other votes. Another decisive feature is, that unlike the procedure before the CJEU, dissenting opinions should be allowed. In contrast to the opinions of the Advocate Generals, all opinions should be published before the final judgment of the CJEU is adopted. The opinion of the Committee should have a binding effect on the CJEU, comparable with that of a preliminary ruling on a national court.

The proposed procedure would force the CJEU to accept the opinion of national constitutional courts in their collectivity and result in a broad and intensified judicial dialogue instead of just exclusively focusing on the constitutional court of the Member State concerned; the publication of common and dissenting opinions would contribute to a more differentiated debate – not only among the judiciary, but ideally also including the public sphere. This procedure would adequately correspond to the significance of national constitutional identity and by upgrading constitutional courts in the European legal arena, it would result in the protection of the fundamental interests of the Member States and the Union. Even though at first sight the respect Art 4(2) TEU calls for seems to be first and foremost in the interest of the Member States, it only emerges at second glance that today's Union, as a sui generis legal construct, remains largely dependent on the (democratic) legitimacy of its Member States. On the basis of the principle of sincere cooperation, national constitutional courts would no longer simply intervene from the national level; they would rather become real counterparts of the CJEU on the European stage. At the same time, the pre-clarification of delicate identity-related issues could lastingly strengthen the authority of the CJEU. Admittedly, conferring the decision competence to the Constitutional Committee could imply that identity-related limits to European integration are set by the judicial rather than by the political branch.¹⁴⁸ There is nothing new in this however; some of the most revolutionary developments that have coined European integration to date go back to judicial hazards – one may just think of decisions such as *Van Gend*¹⁴⁹, *Costa v ENEL*¹⁵⁰, *Internationale Handelsgesellschaft*,¹⁵¹ *Frontini Franco*,¹⁵² *Solange*,¹⁵³ *Francovich*,¹⁵⁴ *Maastricht*,¹⁵⁵ *Schmidberger*¹⁵⁶ and *Lisbon*¹⁵⁷. Thus, constitutional courts as such are political actors. An institutionalized decision making process would probably constitute the perfect trade-off between the national interest of preserving national identity and the European interest of deepening integration. Furthermore, constitutional courts are not as much exposed to populist day-to-day politics as the political branches and therefore more suitable to take serious decisions.

¹⁴⁸ *Von Bogdandy/Schill* (supra note 9) 1437.

¹⁴⁹ Case 26-62, *van Gend & Loos*, ECR 1963, 1.

¹⁵⁰ Case 6-64, *Costa v E.N.E.L.*, ECR 1964, 1141.

¹⁵¹ Case 11/70, *Internationale Handelsgesellschaft*, ECR 1970, 112.

¹⁵² Corte Costituzionale, Sent 183/73, 18.12.1973, *Frontini Franco*.

¹⁵³ BVerfG 37, 271, 29.5.1974, *Solange I*.

¹⁵⁴ Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECR 1991, I-5357.

¹⁵⁵ BVerfG 1993, 89, 155, 12.10.1993, *Maastricht*.

¹⁵⁶ Case C-112/09, *Schmidberger*, ECR 2003, I-5659.

¹⁵⁷ BVerfG, 2 BvE 2/08, 30.6.2009, *Lisbon*.

Whereas this is not the place to assess if there are suitable legal bases in place – national and European – that allow for the establishment of the proposed Constitutional Committee, there are two general arguments supporting such a construction. First, the Union’s judicial system is based on the cooperation of European and national Courts and therefore dual in nature¹⁵⁸ and second, the decisions of the Committee would not interfere with the CJEU’s monopoly on the interpretation of EU law, as it is not for the European Union judiciary to interpret national law. Therefore, an effective and advantageous operationalization of the identity clause requires joint efforts and above all the willingness of the CJEU to accept decisions of those institutions that are competent to decide; in the case of national constitutional identity the CJEU itself is definitely not. What is also required is the willingness of national constitutional courts to interpret national constitutional identity narrowly in the sense of the essential elements doctrine of the CJEU as well as to allow for a common say of the national constitutional courts in their collectivity on identity-related issues. The certainly more comfortable option for the CJEU and for national courts – at least in the short term – would be to insist on their current positions. This would result in a reduction of the identity clause to a mere symbolic gesture as well as a continuation of the antagonism between national and European courts.

¹⁵⁸ See Art 19(1) TEU; *Torres Peres* identifies a „procedural obligation of dialogue“ of the CJEU, *Torres Pérez* (supra note 83) 155.

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