

Constitutional Identity for the EU

*Against the Sisyphean Endeavour to Imagine  
an Identity for the EU*

*Things of this world are in so constant a flux that nothing remains long in  
the same state.*

(John Locke, *The Second Treatise of Government*)



# 1 Introduction

What is the purpose of artificially construing the possible meanings around the conceptual conundrum of the constitutional identity of the European Union? Why would the EU need to imagine its constitutional identity? And what are the potential and real pitfalls of such an undertaking? This chapter argues against the misguided and artificial Sisyphean attempt to invent a constitutional identity for the European Union, while developing the following five considerations.

First, identity as knowing thyself.<sup>1</sup> As the Oracle of Delphi from Ancient Greece suggests,<sup>2</sup> knowing thyself is not an easy task. But knowing the identity of the European Union may be even more problematic, due to the various possible narratives and characteristics. Moreover, should one only understand identity in legal terms, as ‘the essential constitutional features of a legal entity’,<sup>3</sup> then what is the purpose of identifying it for the EU? Is it to be able to compare and differentiate itself from the ‘other’? And if so, with what and for what purpose should the EU compare itself? Or alternatively, should knowing the essence of itself only serve as a symbolical strengthening of the EU’s constitutional commitments, and perhaps even limit the Member States from a potential departure from common and shared constitutional values (Section 2)?

Second, identity is a conceptual substitute for sovereignty – *nilhil novum sub sole*. Since the Lisbon Treaty<sup>4</sup> completely omitted the word sovereignty and introduced an obligation to respect the national identities of the Member States, conceptually the latter have somewhat replaced it. Yet, bringing the conceptual substitute for sovereignty to the level of the Union may upset the Member States, as well as imply global ambitions for the Union, which are at odds with its current constitutional design (Section 3).

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1 Tímea Drinóczi, ‘Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach’ (2020) 21 German Law Journal 105, 119.

2 Robin Hard, *The Routledge Handbook of Greek Mythology* (8th edn, Routledge 2019) 146–165.

3 Gerhard van der Schyff, ‘Constitutional Identity of the EU Legal Order: Delineating Its Roles and Contours’ [2021] *Ancilla Iuris* 1, 3.

4 Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon Treaty) [2007] OJ C306/1.

Third, identity as a relation. In the legal sphere, identity vocabulary is generally misunderstood in its full scope. Consequently, one of the essential meanings of the word *identity* is usually overlooked when implanting the concept into the constitutional arena. Identity is not just a characteristic or a feature of a subject (uniqueness or collective sameness), but mostly a relation between a specific subject<sup>5</sup> and what it is not, which is firstly *identified* and then internalized, practised and potentially rejected. Moreover, the semantics of identity reveal that its construction requires an active agent, capable of creating a relationship. Hence, application of identity as a descriptive measure is manifestly unsuitable for constitutional law, generally producing mystification, incoherence and confusion (Section 4).

Fourth, there is a deep tension between democracy and identity. Designating a subject in terms of identity implies an essential nature which is so paramount that it is immune to any potential challenge or change. Democracy, on the other hand, is open to constitutional contestation and modification.<sup>6</sup> Tension between democracy and identity is, thus, inevitable, though constitutional identity often paradoxically claims to safeguard the very principles of democracy.<sup>7</sup> Proclaiming and thus *conserving* a constitutional identity for the EU would potentially halt the very essence of the Union itself – its constant evolution.<sup>8</sup> The EU is perpetually changing, not only with respect to its institutional design and membership but also as a matter of its *raison d'être* – towards forming an ever-closer Union. There is hardly any persuasive reason to sustain the current status quo and to immunize some of its parts from further progressive development. In addition, a designation of some norms as the real constitutional identity for the EU can introduce a hierarchy set of constitutional norms.<sup>9</sup> If so, that may radically modify constitutional adjudication practices beyond the established practice and the initial intention of the Member States and the Treaties (Section 5).

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5 Alexandra Troitskaya, 'Constitutional identity, and Where (and Why) to find it' (12 June 2021) <[https://www.youtube.com/watch?v=pG\\_uNX15y0U](https://www.youtube.com/watch?v=pG_uNX15y0U)> accessed 24 February 2023.

6 Jakob Hohnerlein, *Recht und Demokratische Reversibilität*, vol 36 (1st edn, Mohr Siebeck 2020) 11–73.

7 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 249.

8 Consolidated version of the Treaty on European Union (TEU) [2012] OJ C326/13, art 1(2): 'the process of creating an ever closer union among the peoples of Europe [...]'.  
9 Cesare Pinelli, 'Theories Concerning the Hierarchy of Norms', *Max Planck Encyclopedia of Comparative Constitutional Law* (2016).

Finally, let us call the essential constitutional principles by their name. If one aims to declare the EU's constitutional essentials to be the EU's identity, in order to strengthen our commitments to them, there is perhaps a better approach to take. Let us simply call them by their names: human dignity, freedom, the rule of law, democracy, fundamental rights, pluralism, solidarity and equality. 'Elevating' them into an identity does not equate them with any further and more compelling normative standards. These values are, properly understood, already imperative and transcendent,<sup>10</sup> and need to be taken seriously in their own right (Section 6).

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10 John Rawls, *Political Liberalism* (Columbia University Press 1993).

## 2 The Oracle of Delphi

The following section challenges the notion that one can objectively determine a constitutional identity for the European Union (2.1). Additionally, the European (constitutional) identity could be construed due to its contrastive methodological narratives (2.2). Furthermore, constitutional identity is itself an evasive and disputed concept (2.3). Finally, in the absence of any clear methodological guidance, one would merely project one's own idea of constitutional identity and thus create a meaning according to one's own ideological aspirations (2.4). In addition, identity serves as a comparison, whereas the Member States and the Union share their essential constitutional commitments (2.5).

### 2.1 *Know Thyself*

Pythia, the famous oracle in Delphi, was consulted about the most important decisions in ancient Greece. Carved into the stone above her temple, one could read the maxim: 'Know thyself'.<sup>11</sup> Pythia knew that knowing oneself is not an easy task, since everything and everyone is constantly changing. And nothing is isolated, coherent and indivisible in itself. Thus, can one ever truly know one's own identity? So is it possible to articulate an identity for Europe, the subject of abundant and highly complex relations, achievements, nations, peoples, histories and aspirations? And, as lawyers, are we capable of determining a *constitutional* identity for the European Union?

Think of the following three perspectives regarding an identity for the Union:

- The European Union was built on the principle of a common market and four fundamental freedoms. With capital and labour intrinsically connected via the states and nations of the Union, wars and conflicts would no longer be profitable, if at all possible. Economic cooperation has brought peace and material prosperity. Henceforth, the basic con-

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11 There were apparently three carved maxims: Know thyself, nothing to excess, and certainty brings insanity. See also Hard (n 2) 146–165.

stitutional identity for the Union is a liberal market, as provided for and protected in the Treaties. Everything else is simply an appendix, constitutional accessories. After all, the majority of the most important decisions are (still) taken by heads of states behind closed doors, guided mainly by the demands of the common currency and common market, notwithstanding the limitations of the Treaties. The identity of the EU is, then, not primarily linked to democracy, human rights and the rule of law, but rather the economic cooperation of the Member States to facilitate the common market and thereby the enhancement of the economic advantages it provides.

- Alternatively, the European Union would never be possible if one were simply to put together 27 nation states and prescribe them specific forms of cooperation. The very prerequisite for such a successful and unique supranational union has been European history as seen from a broader perspective: including hundreds of years of common ideas, exchanging cultures, shared literature, education, wars and peaceful trading. The perpetual movement of borders and peoples, the immense intellectual force of the Ancient Greek and Roman philosophies and ideas, the unifying political and religious authority of the Church(es) and Judeo-Christian traditions, the Enlightenment and the French Revolution have all contributed. Consequently, the constitutional identity of the EU comprises all these *European* traditions and values, based on Christianity, humanism and ideas of human dignity. As Pope John Paul II wrote: ‘In order to build Europe on solid foundations it necessarily has to be based upon authentic values, rooted in the common moral law, as inscribed in the heart of every human. [...] The Christian inspiration may turn a political, cultural and economic gathering into a community in which every European would feel at home and create a family of nations, that could be a fruitful impulse for other regions of the world.’<sup>12</sup> Hence, the European constitutional identity is based on (legal) values derived from genuine European religious and humanistic traditions.
- Finally, the European Union can be first and foremost seen as a *legal* community, based on the Treaties, the autonomy of EU law,<sup>13</sup> and de-

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12 John Paul II, *Ecclesia in Europe* (Catholic Truth Society 2003) 116, 121.

13 Theodor Schilling, ‘The Autonomy of the Community Legal Order: An Analysis of Possible Foundations’ (1996) 37 *Harvard International Law Journal* 389; JHH Weiler and Ulrich R Haltern, ‘The Autonomy of the Community Legal Order-Through the Looking Glass’ (1996) 37 *Harvard International Law Journal* 411.

veloped further through the progressive jurisprudence of the CJEU and the occasional resistance of the national apex courts. It is a community of law<sup>14</sup> which shares the common constitutional traditions of the Member States. Accordingly, it is also a Union of principles and values,<sup>15</sup> as currently articulated in Article 2 of the Treaty on European Union (TEU) but initially established already by the Copenhagen criteria of 1993.<sup>16</sup> From this perspective, European constitutional identity is solely a legal concept which, arguably, does not have anything to do with any necessary connecting links of identification among the people(s) of the Union. After all, the membership of the Union is constantly changing, and there is no need for the kind of communal feeling of belonging and solidarity which is often considered a prerequisite for successful democratic participation and contestation – the component which enables and facilitates the collective self-governing of a nation state. Hidden and distanced from the political, European constitutional identity enjoys the privileges of a legal concept being determined and interpreted by the courts for reasons of adjudication of constitutional conflicts alone. Hence, the constitutional identity of the EU is considered to be solely a legal matter, articulated as essential liberal constitutional principles, as reflected, *inter alia*, in Article 2 of the TEU.

Most readers would probably subscribe to at least one of the above examples of what a potential European constitutional identity should consist of, not to mention many other possibilities which are not broached here. However, it would be categorically wrong to simply project one's own ideological preferences regarding the Union and its potential status according to one's personal (here, legal) intuition under the pretext of seemingly scientific, objective, legal, deductive interpretation.<sup>17</sup> A lack of predictably

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14 Walter Hallstein, 'Speech at the University of Padua' (March 1962): 'The European Economic Community is a community of law [...] because it serves to realize the idea of law. The founding treaty, which may not be terminated, forms a kind of a Constitution for the Community.'

15 Armin von Bogdandy, Carlino Antpöhler and Michael Ioannidis, 'Protecting EU Values: Reverse Solange and the Rule of Law Framework' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017).

16 European Council in Copenhagen, 21–22 June 1993, Conclusions of the Presidency, DOC/93/3, p 12.

17 See also Gráinne de Búrca, 'Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments' (2022) 20 *International Journal of Constitu-*

valid methods, as well as the enigmatic meaning of (constitutional) identity, should compel us to be cautious when setting off on the uncharted journey of discovering and imagining a constitutional identity for the European Union.<sup>18</sup>

## 2.2 European (Constitutional) Identity – Two Contrasting Methodological Narratives

The idea of articulating a European identity is not new;<sup>19</sup> but it is certainly ambiguous. One can construe the European and consequently the European *constitutional* narrative from at least two distinctive methodological perspectives. One is closely connected with and limited to the birth of the European Union as an ‘institution’. The second narrative is more holistic and goes beyond the mere institutionalized project of European cooperation.

The European Union (as it is called today) initially connected the steel industries of the two biggest continental European powers with the objective of preventing another devastating war on the European continent or beyond. As a response to World War II, the EU project commenced with the Treaty of Paris (1951), the creation of the European Coal and Steel Community, and especially with the Schuman declaration,<sup>20</sup> declaring two European core principles: peace and solidarity; or in the words of Robert Schuman: ‘Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de

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tional Law 13, 16: ‘to ask whether there is any reason to doubt the assertion in the EU treaties that it is these values, and not others such as economic liberalization or market integration, that are core to the EU’s identity and *raison d’être* today.’

- 18 Federico Fabbrini and András Sajó, ‘The Dangers of Constitutional Identity’ (2019) 25 *European Law Journal* 457, 469.
- 19 Dirk Jacobs and Robert Maier, ‘European Identity: Construct, Fact and Fiction’ in Marja Gastelaars and Arie de Ruijter (eds), *A United Europe: The Quest for a Multifaceted Identity* (Shaker Publishing 1998); Jeffrey T Checkel and Peter J Katzenstein, ‘Conclusion - European Identity in Context’ in Jeffrey T Checkel and Peter J Katzenstein (eds), *European Identity* (Cambridge University Press 2009) 213–227; Alex Drace-Francis, *European Identity: A Historical Reader* (Macmillan International Higher Education 2013); Viktoria Kaina, Ireneusz Pawel Karolewski and Sebastian Kuhn (eds), *European Identity Revisited: New Approaches and Recent Empirical Evidence* (Routledge 2017); Stephanie Bergbauer, *Explaining European Identity Formation* (Springer 2018).
- 20 The Schuman Declaration (Paris, 9 May 1950).

facto solidarity.<sup>21</sup> And also: '[T]he establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions.' That was the birth of Europe as a political entity, 'laying the true foundation of an organised Europe'.<sup>22</sup>

Since the initial practical perspective, with regard to the economic terms among the six founding Member States, it has become a progressive and sophisticated political project of today with 27 members. Every new treaty or its revision has brought the Member States closer, and at the peak of its optimism, the European Union had its own draft of a European Constitution and 28 Member States. Today, the EU has its own EU Charter of Fundamental Rights, a provision in the Treaties where the basic values are articulated, and a formal commitment<sup>23</sup> to be open to new memberships. In principle, it is open to any state that is willing and ready to adhere to the common European constitutional values. Or at least for the 'enlargement countries' from the Western Balkans – although 'Realpolitik' demonstrates immense reservations about any further expansion at this particular stage.<sup>24</sup> However, the first identity narrative was constructed around the legal and economic story of the gradual and progressive evolution of the European Union and its current state.

The second narrative is broader. European history, in all its political, economic and historical aspects, dates back over hundreds of years; it was only comparatively recent events, like the rivalry of Germany and France, which propelled the foundation of the Union. Therefore it's worth tracing at least some of the most important milestones in Europe's intertwined narratives. Of course Ancient Greek philosophy and mythology from the 6<sup>th</sup> century BC has influenced our thinking until today; one could say that '[t]he European philosophical tradition consists of a series of footnotes to Plato'.<sup>25</sup> The Roman Empire defined and spread the application of civil law at a level of unprecedented sophistication; in fact, even today we are mostly applying the same rules and principles as developed by the Roman

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21 Ibid.

22 Joint Declaration of the Ministers signatory to the Treaty establishing the European Coal and Steel Pool (18 April 1951).

23 European Council in Copenhagen, 21–22 June 1993, Conclusions of the Presidency, DOC/93/3.

24 See the political reservations concerning Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Kosovo and Serbia.

25 Alfred North Whitehead, *Process and Reality* (Free Press 1978) 39.

jurists.<sup>26</sup> In the 6<sup>th</sup> century AC, in the Eastern Roman Empire, Justinian the Great codified a collection of fundamental jurisprudence in the *Corpus Iuris Civilis*, considered to be the encyclopaedia of the writings of the Roman jurists, and the foundation of the Western civil legal tradition. The oldest university in the world, the University of Bologna (founded in 1088), first taught Justinian's code, and it remained the dominant centre for law studies through the High Middle Ages. Then, the Napoleonic Code, mostly still in force, was the next biggest pan-European project with its attempt to modernize and defeudalize the member countries; it had vast influence throughout the Napoleonic Wars, and is considered one of the few documents to have influenced the entire world.<sup>27</sup>

But there are many additional European narratives which have strongly impacted and connected Europe: the role of the Church and religion in particular. But it does not conflict with Europe's own identity building, as the writings of Erasmus of Rotterdam convey: he wrote in the *Querela pacis* (1521): 'How very wrong this is! A geographical name of no importance divides them... In earlier times the Rhine divided the French and the Germans, but it does not separate one Christian from another. The Pyrenees separate Spaniards and Frenchmen, but they do not undo the communality of the church. The sea flows between the English and the French but can in no way split the unity of faith.'<sup>28</sup>

Furthermore, some authors argue that the fierce religious wars following the Reformation and the period of Westphalian 'sovereignty' created the modern myth of a nation state,<sup>29</sup> which continues to remain until today the predominant political entity.

Finally, it cannot be overemphasized how the era of the Enlightenment, with the French and American Revolutions and nation building, have fundamentally changed Europe. The principles of individual freedom, solidarity and equality, even if de facto at first only for some, established the values which have remained our inspiration and commitment to this very day. The

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26 Reinhard Zimmermann, 'Roman Law in the Modern World' in David Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press 2015) 452–80.

27 Robert B Holtman, *The Napoleonic Revolution* (Louisiana State University Press 1981).

28 Desiderius Erasmus, *The Complaint of Peace. Translated from the Querela Pacis (A.D. 1521)* (The Open Court Publishing Co 1917) 60.

29 William T Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (1st edn, Oxford University Press 2009) 142–80.

will of the people, as expressed through and via the notion of a nation, has secured the highest legitimacy, and remains the only and the highest authority even today.

In addition, the Bill of Rights (1689), the Declaration of the Rights of Man and of the Citizen (1789), and finally, after two shattering world wars, the Universal Declaration of Human Rights (1948) are ground-breaking documents, exhibiting the political achievements of their time. Despite opposition, they have all significantly influenced and co-shaped the self-image that we hold of ourselves today, both politically and legally.

These aspects of European history, along with gradual and mutual integration, are crucial to constructing European (constitutional) identity. But equally one could debate to what extent one should include or omit them when defining the *legal* aspect of constitutional identity.

To sum up, both narratives are not mutually exclusive. But is there a clear answer as to which one is stronger? Or what kind of combination of them? For they surely impact on one another. But within the scope of constitutional law, what kind of role do these historical, political, philosophical and economic aspects play in the anticipated endeavour of articulating a constitutional identity for the European Union? There is no absolute methodological approach as to how to define a constitutional identity for the Union.

### 2.3 (*Constitutional*) Identity as an Evasive Concept

An alternative approach to defining a constitutional identity for the EU is to scrutinize scholarly theoretical accounts and the national jurisprudence of the Member States – containing the arguments of national constitutional identity and defining the meaning of constitutional identity accordingly. Subsequently, one would simply apply such a definition to the Union.

Yet, the survey of claims of national constitutional identity among the Member States exhibits quite diverse case law, as explicated in Chapter 3: from identity claims which are in deep contrast even with basic liberal commitments,<sup>30</sup> to the extra-legal arguments of culture and history.<sup>31</sup> Constitutional identity can be a peculiar and idiosyncratic interpretation

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30 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, para 66; Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 *German Law Journal* 534.

of fundamental rights,<sup>32</sup> or a general commitment to human rights and democracy.<sup>33</sup> It can be a different name for sovereignty,<sup>34</sup> or an argument as to how to legalize the political question of the scope and intensity of the European integration process.<sup>35</sup> Finally, national apex courts may adhere to identity argument simply because it gives them flexibility to extend their competences against EU law, due to its conceptual vagueness. As argued by Fabbrini and Sajó, once ‘identity is left to the constitutional courts, the scope, content and sphere of applicability becomes a matter of identity conjecture’. [I]ts application becomes unforeseeably and easily arbitrary in the hands of constitutional judges.<sup>36</sup>

Henceforth, there is little we can learn from the Member States concerning a potential all-encompassing definition and content for the concept of constitutional identity. Due to case law, one is almost more confused than at the beginning of the journey. Is constitutional identity just the most essential ‘DNA’ of the political system? Is it the essentials of political community, like the principle of democracy, the rule of law, human rights, solidarity, welfare state and the prohibition of discrimination? One could call these ‘essentials’ a constitutional identity.<sup>37</sup> Although, if every Member State were the same, there would be no need to claim an identity. Is constitutional identity then something unique, something which makes every Member State a special and idiosyncratic case? A way to differentiate itself from others? Or the other way around, is the aim of identity to include everyone who shares the same constitutional identity?

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31 Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* [2017] ECLI:EU:C:2017:631, para 302.

32 Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien (Sayn-Wittgenstein)* [2010] ECLI:EU:C:2010:806; Case C-42/17 *Criminal proceedings against M.A.S. and M.B. (Taricco II)* [2017] ECLI:EU:C:2017:936.

33 Czech Ústavní Soud, Case Pl. ÚS 36/01 *Bankruptcy Trustee* 25 June 2002.

34 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon Treaty* 24 November 2010, pp 23, 38, 41.

35 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, paras 249, 252.

36 Fabbrini and Sajó (n 18) 471.

37 Daniel Sarmiento, ‘The EU’s Constitutional Core’ in Alejandro Saiz Arnaiz and Carina Alcobero Llivina (eds), *National Constitutional Identity and European Integration*, vol 4 (Intersentia 2013) 177ff, 187.

Some scholars have called the different faces of identity *sameness*; others have defined identity as *differentiation*.<sup>38</sup> But then again, is constitutional identity just the peculiar and special, context-specific, and locally sensitive *interpretation* of the shared values of liberal constitutionalism? Is constitutional identity only a unique understanding of *universal* human rights in a concrete case?<sup>39</sup> Or is constitutional identity the fragments which are within the scope of common values, but completely new and different, with no variation among other Member States? Or, after all, all of the above?<sup>40</sup>

As already highlighted in Chapter 3, the Aristotelian understanding of identity conflates national identity with the identity of the polis, which no longer corresponds to contemporary liberal understanding of a state and liberal constitutionalism.<sup>41</sup> Francis Fukuyama argued that national identity covers both legal and sociological aspects of a state. It is embodied in formal laws and institutions, in language, but it also extends into the realm of cultures and values, the stories that people tell about themselves and their shared historical memories.<sup>42</sup> J. H. H. Weiler wrote that 'constitutions are said to encapsulate fundamental values of the polity and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a state, as a community, or as a union'.<sup>43</sup> Or even more poetically, in his influential book on constitutional identity, Jacobssohn argued that 'a constitution acquires an identity through experience, that this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Rather, identity emerges dialogically and represents a mix of political aspirations and commitments

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38 Michel Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 762–66.

39 Against this view, see e.g. Monica Claes, 'National Identity and the Protection of Fundamental Rights' (2021) 27 *European Public Law* 517, 517.

40 See also Jürgen Habermas, 'The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship' (1996) 9 *Ratio Juris* 125; Mattias Kumm, 'The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History' in Helle Porsdam and Thomas Elholm (eds), *Dialogues on Justice: European Perspectives on Law and Humanities*, vol 3 (De Gruyter 2012) 323.

41 Aristotle, *The Politics of Aristotle* (Ernest Barker tr, Oxford University Press 1962) 99.

42 Francis Fukuyama, 'Why National Identity Matters' (2018) 29 *Journal of Democracy* 5, 8.

43 Joseph HH Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 3 *International Journal of Constitutional Law* 173, 184.

that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings.<sup>44</sup>

Considering the varying definitions above, it seems to me that the methodology of transferring the meaning of constitutional identity from the various theoretical accounts as well as from national examples to the supranational EU level does not bring us a single, uncontested result. For there is simply no unified, coherent and persuasive meaning of national constitutional identity.<sup>45</sup>

#### 2.4 An Endeavour of Numerous Projections – Following Intuition and Creating Meaning

If neither scholars, nor the national apex courts and the Court of Justice of the European Union (CJEU) have come up with a clear and unambiguous definition of constitutional identity, is it viable to pursue the aim of articulating a European constitutional identity?

There are still other avenues of pursuit. According to Faraguna, the main pillars of constitutional identity for the EU are the principles of primacy of EU law and direct effect.<sup>46</sup> For Calliess and van der Schyff, 'constitutional identity is [...] defined as the core or fundamental elements or values of a particular state's constitutional order as the expression of its individuality'.<sup>47</sup> Or constitutional identity as essentials, which are not and cannot be subject to change.<sup>48</sup> Or alternatively, the constitutional identity of the Union is the common and shared constitutional traditions or values of

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44 Gary J Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 7.

45 Martin Belov, 'The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States' (2017) 9 *Perspectives on Federalism* 72, 79. See also François-Xavier Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (2021) 27 *European Public Law* 571.

46 Pietro Faraguna, 'Constitutional Identity in the EU – A Shield or a Sword?' (2017) 18 *German Law Journal* 1617, 1624.

47 Christian Calliess and Gerhard van der Schyff, 'Constitutional Identity Introduced' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 7.

48 About the account of unchangeability, see Monika Polzin, 'Constitutional Identity as a Constructed Reality and a Restless Soul' (2017) 18 *German Law Journal* 1595.

all its Member States. Or else the constitutional identity of the Union will rather be developed and articulated by the CJEU, as the recent application of identity terminology by the CJEU indicates. ‘The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.’<sup>49</sup> Or again, this time in a negative sense, the constitutional identity of the Union, as it differentiates itself from the other ideological and political regimes in the world, is one where individuals are not the supreme authority of legitimate power, but one where democracy (if at all) is exercised together with the freedom of press and respect for minorities and human rights.

These are but a few projections which can be more or less legitimately ascribed to the identity concept. For the conception still lacks an absolute theoretical and normative account, which would be generally shared among legal scholars and supported by case law practice.<sup>50</sup> But as indicated above, one can go further, beyond the alleged limits of strict legal confines. European constitutional identity could be construed around both fundamental freedoms and the common market. One could plausibly make the case for this and evaluate the *constitutional* case law of the CJEU with an economic and market application to human rights and other constitutional principles. This might pacify the German Federal Constitutional Court (FCC) and its *Solange* jurisprudence,<sup>51</sup> or so the argument goes. So a cynical projection could articulate the *constitutional* identity of the Treaties as the practical advancement of the market and the preservation of some of the geo-strategic powers, which only a select few of the Member States could boast in the past.

The current dilemma is threefold. First, if one is to imagine a constitutional identity for the European Union, whom would that concern? The scholars, the CJEU, or rather the Member States as the ‘Masters of the Treaties’? Furthermore, according to what kind of methodology? As we have seen, the meaning of constitutional identity cannot be straightforwardly extracted from the judicial practices of the national apex courts, nor

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49 Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:98, para 145.

50 Fabbrini and Sajó (n 18) 471.

51 BVerfGE 37, 271 *Solange I* 29 May 1974. See also Monika Polzin, *Verfassungsidentität*, vol 272 (1st edn, Mohr Siebeck 2018) 199–209.

from the CJEU.<sup>52</sup> Second, would that endeavour not necessarily privilege a specific normative projection of the observer on the Union, an action which is predominantly political by nature?

Finally, is the articulation of a constitutional identity for the European Union a legal or a political task? Does ‘legalization’ by the apex courts turn disputed political issues into a legal matter?<sup>53</sup> Or the other way around – does the legal intervention of articulating constitutional identity for the Union rather politicize the issues, which beforehand were not on the political agenda as matters of political dispute?<sup>54</sup> In my opinion, one should avoid both avenues, regardless of which of the two potential interpretations is analytically better suited.

## 2.5 Shared Constitutional Traditions – Comparison and Differentiation

Let us assume, even if just for the sake of argument, that the constitutional identity of the European Union has the following meaning: the European Union as a community of values (*Wertegemeinschaft*)<sup>55</sup> in the light of recent case law of the CJEU. According to the CJEU,

‘Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.’<sup>56</sup>

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52 Calliess and van der Schyff (n 47). Even the recent case law of the CJEU which applies the terminology of identity avoids connecting it with ‘constitutional’ or ‘national’. See Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:98, para 145.

53 Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021.

54 BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

55 Christian Calliess, ‘Europa als Wertegemeinschaft — Integration und Identität durch europäisches Verfassungsrecht?’ (2004) 59 *JuristenZeitung* 1033; Armin von Bogdandy, ‘Towards a Tyranny of Values? Principles on Defending Checks and Balances in EU Member States’ in Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe’s Actions* (Springer 2021) 73–97.

56 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232.

These values have an important feature – they are ‘common to the Member States’:<sup>57</sup> human dignity, freedom, democracy, equality, the rule of law, respect for human rights, protection of minorities, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. All these values are concurrently the values of the Member States and the Union.<sup>58</sup> Consequently, the constitutional identity of the European Union is the same as the constitutional identity of the Member States. That follows basic logic. However, alas, that cannot be; something in this equation must be wrong?

The function of identity usually serves to create a distinction between *I/we* and *they*. If one knows thyself, then one is able to see the differences as well as the similarities in relation to the other. The same identity of the subjects connects them, and it also divides them in relation to everybody else who does not share the same identity. In other words, identity serves as both comparison and differentiation.<sup>59</sup>

In the European constitutional context, the (national constitutional) identity argument has the same role. Moreover, the very reason why identity was, and perhaps still is, celebrated so much is the conciliatory role that it might have in the light of potential conflicts among the heterarchical constitutional orders, national and supranational,<sup>60</sup> in the light of constitutional pluralism.<sup>61</sup> It was a promised tool which would have the capacity to

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57 TEU [2012] OJ C326/13, art 2.

58 The meaning of values and principles should not be understood in Habermasian sense (Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (New edition, Blackwell Publishers 1997) 255ff.), where the values as opposed to principles lack the legal normativity, but rather as similar and interchangeable concepts in the sense of Alexy (Robert Alexy and Julian Rivers, *A Theory of Constitutional Rights* (Oxford University Press 2009) 86ff, 91, 378.).

59 Faraguna (n 46) 1632.

60 Anita Schnettger, ‘Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System’ in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 16; Giacomo Di Federico, ‘The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards’ (2019) 25 *European Public Law* 347, 378.

61 Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond*, vol 14 (Hart Publishing 2012); Matej Avbelj, ‘Pluralism and Systemic Defiance in the EU’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* (Oxford University Press 2017) 44–61; Mattias Kumm, ‘Rethinking Constitutional Authority: On the Structure

articulate important constitutional issues and bring them to the fore in the frame of engagement. Why? Because a national constitutional identity is inherently a *national* matter, subject to determination solely by the respective Member State and its (judicial) institutions, but at the same time subject to evaluation and potential acceptance by the CJEU in the light of its duty to respect national identities; naturally, weighted and balanced with all the other relevant principles and rights in the respected situation. Or to put it simply, the identity tools were the doors between the supranational and national constitutional systems for the rare and exceptional circumstances when unforeseeable constitutional conflicts might arise.

From that functional perspective of identity argument, one can critically reflect on the current endeavour to articulate the constitutional identity of the European Union from two viewpoints: from the perspective of sameness, and from the perspective of distinctiveness. But both perspectives are inherently problematic.

The former perspective is the question of sameness in an inwards direction. In the light of the above assumed fundamental values pursuant to Article 2 TEU, as the assumed constitutional identity for the EU, there is simply no differentiation among the Member States and the Union. The value of the European constitutional identity for the purpose of active engagement with the potential differences among the heterarchical constitutional systems within the EU is therefore considerably limited; except in one scenario, where a Member State would distance itself from the fundamental principles of liberal democracy. This scenario might indeed slowly become a painful reality.<sup>62</sup> This might even be the underlying reason for the scholarly attempts to create a European constitutional identity. However, such a ‘Reverse *Solange*’<sup>63</sup> against the ‘rouge State’ requires, in my opinion, more than a scholarly account of constitutional identity. It needs a robust and fully transparent mechanism, as foreseen in the Article 7 TEU<sup>64</sup> procedure. The political sensibility to ‘punish’ one of your own is just too

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and Limits of Constitutional Pluralism’ in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond*, vol 14 (Hart Publishing 2012) 39ff.

62 Laurent Pech, Patryk Wachowiec and Dariusz Mazur, ‘Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action’ (2021) 13 *Hague Journal on the Rule of Law* 1.

63 ‘Reverse *Solange*’, see von Bogdandy, Antpöhler and Ioannidis (n 15).

64 Leonard Besselink, ‘The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of*

gargantuan to include in a scholarly notion like identity, as will be further suggested in the last section.

The second perspective, distinctiveness, is construed in an outwards direction. The constitutional identity of the EU, as liberal fundamental principles and values, must be contrasted with the actuality of the regimes, states and political actors which are pursuing different ideological commitments: religious, autocratic, communistic, monarchic, military, etc. It is in that sense that the EU may exhibit its distinctiveness. Hence the question: To what extent do European values limit and guide the EU when it conducts, trades, communicates, and acts with others? This question opens up a completely new avenue of exploration, which exceeds the scope of this chapter. But probably in order to answer this question, one would first have to define the constitutional identity of the Union.

To summarize, even if we agree on the most apparent definition of the constitutional identity of the European Union, namely the shared fundamental values as articulated in Article 2 TEU, that in itself still does not prove of benefit to the engagement relationship between the Member States and the Union, as well as with others.

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*EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017).

### 3 Identity as Conceptual Substitute for Sovereignty – *Nihil Novum Sub Sole*

The underlying issue behind constitutional identity is firstly explored through conceptual history (3.1). Furthermore, sovereignty has not been fully replaced, but rather used together with identity, either as a substitute or an addition (3.2).<sup>65</sup> Finally, applying the concept of sovereignty to the level of the European Union might imply neo-colonial delusions and create tensions with the Member States (3.3).

#### 3.1 Conceptual History

The underlying issue behind the (new) conception of constitutional identity is essentially an old and well-known issue: the quest to justify and maintain the supreme importance of the political order in relation to others, and at the same time the necessary coordination of and commitment to essential cooperation, constitutional conflict solving and solidarity. The story is as old as the political systems.<sup>66</sup>

The advent of the rhetoric of national constitutional identity in the last ten years<sup>67</sup> has only reframed and conceptualised the underlying problem differently.<sup>68</sup> Ergo, *nihil novum sub sole*.

The first attempt to develop a concept of the respective multileveled constitutional structures was undertaken by the ECJ: as a simplified vision that all constitutional orders of the Member States would simply fall into the ideal, geometrical pyramid of norms; a perfect Kelsenian monistic order,

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65 Elke Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) 45 *Netherlands Journal of Legal Philosophy* 82, 92; Thomas Wischmeyer, 'Nationale Identität Und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven' (2015) 140 *Archiv des öffentlichen Rechts* 415, 427.

66 See also Mattias Kumm, 'The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 219.

67 Fabbrini and Sajó (n 18) 471.

68 Weiler (n 43) 173–84.

where EU law would have undeniable primacy and supremacy. The push was strong enough, because it was built on the practical implications of (dis)functionality, where the EU norms remained only as a ‘buffet’, an open invitation to freely choose and select. Every Member State would take what it pleased and when it pleased, and there would be no common, effective, binding rules across the Union.<sup>69</sup> The idea was in principle accepted by the Member States, but it soon became too absolute, considering the early and underdeveloped constitutional design of the Union.<sup>70</sup>

Henceforth, the apex courts of the Member States have asserted an alternative approach: partially because they were afraid of the ever-increasing competence gain of the Union through progressive adjudication, and partially due to the fear that the national highest courts would consequently no longer be the most important judicial actors; or would at least have to share the highest judicial powers. The Union was therefore alternatively interpreted, and thus reduced, to be the subject of the Member States, *Herren der Verträge*, which in itself does not possess any legal autonomy and democratic legitimacy. It is a derivative structure, which is fully subordinated to the sovereign control of the Member States; with the emphasis on the principle of sovereignty.

But the Member States (and their apex courts) have forgotten about the nature of sovereignty, which is not a black-or-white concept with solely two categories, having it or not, but rather a linear conception: a concept where the degree of its realization always correlates to normative and factual circumstances; a concept which cannot be blind to the fact that nobody is alone in this world, and that without the principle of *pacta sunt servanda*, no fair cooperation is possible.

Accordingly, the Union could not accept this conceptual alternative either. Disrespecting the primacy would severely endanger the legal order of the EU, its *raison d'être*, which could become an existential problem for the

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69 Case 26/62 *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (van Gend en Loos)* [1963] ECLI:EU:C:1963:1; Case 6-64 *Flaminio Costa v E.N.E.L. (Costa ENEL)* [1964] ECLI:EU:C:1964:66.

70 Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009); Mattias Kumm, ‘How Does European Union Law Fit into the World of Public Law? Costa, Kadi, and Three Conceptions of Public Law’ in Jürgen Neyer and Antje Wiener (eds), *Political Theory of the European Union* (Oxford University Press 2011).

Union. It is not a coincidence, after all, that throughout the 145 pages of the Lisbon Treaty, the word sovereignty is not mentioned a single time.

Public international law demands compliance with freely undertaken international obligations, regardless of inner constitutional requirements, which leaves the States with only two options: to withdraw, or to change their national constitutional requirements in order to achieve compliance with international law. Not to mention that the nature of the Union goes far beyond those of any international organization.<sup>71</sup> The autonomous legal system of the Union, the Union's foundations of shared constitutional traditions, and its democratic features, although with no doubt still many shortcomings, are demanding more than just compliance with the Treaties. The Treaties have become *constitutionalized*<sup>72</sup> and they are directly applicable across every Member State, in parallel to national constitutions and within the scope of the conferred competences.

While accepting this, the only questions remaining are who has the last word; the concerns of the ultra vires dilemma; and the refusal to confer on the Union the power to determine its own competences, the so-called *Kompetenz-Kompetenz*.<sup>73</sup> But, as the FCC correctly stated in the *Honeywell* decision,<sup>74</sup> the Member States can only refuse to comply with EU law should the violation of conferred competences appear *manifest* (obvious and not a question of reasonable legal disagreement), structurally significant, and only after they engage into a dialogue with the CJEU concerning the respective subject matter, issuing preliminary reference proceedings.

Finally, the alternative conceptual attempt to navigate the heterarchical constitutional relationships was the identity concept: praised at the begin-

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71 Neil Walker, 'Post-Constituent Constitutionalism? The Case of the European Union' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008) 247–67.

72 Jean-Claude Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge University Press 2006) 192–197; Maurizio Arcari and Stefania Ninatti, 'Narratives of Constitutionalization in the European Union Court of Justice and in the European Court of Human Rights' Case Law' (2017) 11 *Vienna Journal on International Constitutional Law* 11.

73 Markus W Gehring (ed), 'Ius Obstacles to European Constitutionalization', *Europe's Second Constitution: Crisis, Courts and Community* (Cambridge University Press 2020).

74 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.

ning<sup>75</sup> as an engagement mechanism that would bring the two misleading perspectives together, away from absolute primacy, but also away from the complete control of the Member States. And in the light of heterarchical constitutional pluralism, which is only *shallow* and based on the basic common commitments, it would promise to bridge the constitutional systems in a unique and context-sensitive way.

### 3.2 Sovereignty and Identity Together

The engagement tool of (constitutional) identity has yet to fulfil its potential promise adequately; perhaps because the concept never had any comprehensive meaning which would be subject to a clear definition; or because it was too often applied in *mala fide*; or rather, due to the reserved and quite cautious adjudications of the CJEU, it did not dare to embrace the term and define its limits. Be that as it may, the Member States have slowly realized that identity vocabulary might be worth a shot, but also it has only rarely been picked up by the CJEU anyway. As a consequence, they have started to identify other vocabulary and other concepts, notably the notion of sovereignty, all with the aim of being successful in claims to be allowed to apply EU law. Or as Fabbrini and Sajó wrote, the use of constitutional identity ‘signals that certain courts uttering “identity” are really reclaiming sovereignty’.<sup>76</sup>

The Polish Constitutional Court, in its *Lisbon* decision, simply merged the significance of constitutional and systemic identity with the sovereignty of the Member States, while allegedly summarizing the common characteristics of the other national apex courts’ adjudications.<sup>77</sup> The Lithuanian Court connected protection of the state language with the preservation of the nation’s identity, which, inter alia, ensures the expression of national sovereignty.<sup>78</sup> The Hungarian Constitutional Court stated that ‘Hungary

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75 Constitutional identity as a tool of convergence. See François-Xavier Millet, *L’Union européenne et l’identité constitutionnelle des États membres* (Lextenso editions et Karine Roudier 2013) 239–56.

76 Fabbrini and Sajó (n 18) 471.

77 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010.

78 Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others (Runevič-Vardyn)* [2011] ECLI:EU:C:2011:291, paras 84, 86; Lithuanian Respublikos Konstitucinis Teismas, Case 14/98 *Name Spelling* 6 November 2009.

can only be deprived of its constitutional identity through the final termination of its sovereignty [...] Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases.<sup>79</sup> Additionally, apart from the specific identity review in France, the French Conseil examined the compatibility of the EU treaties with the French Constitution according to the criterion of ‘the essential conditions for the exercise of national sovereignty’:<sup>80</sup> a condition which refers to matters which limit national sovereignty, such as monetary policy, immigration, foreign policy, defence; plus any condition that also limits national sovereignty in procedural terms, such as for example qualified majority voting.<sup>81</sup> Similar is the Danish example, where the Danish Constitution (subject to potential change) limits the scope of transfer of sovereignty, which is in practice then concretely articulated by the legislative branch, stating specific exemptions from European integration: namely security, defence, criminal law, migration and asylum, citizenship, and fiscal policy, which can all be understood as matters of core national sovereignty, but in the words of Helle Krunke also as the expression of national constitutional identity.<sup>82</sup> Furthermore, the Czech Constitutional Court in the *Lisbon* decision understood the identity of the Czech Constitution in relation to the limited transfer of sovereignty to the Union.<sup>83</sup>

Finally, the German FCC similarly developed the notion of the European Union as ‘an association of sovereign states (*Staatenverbund*)’, which can only remain *sovereign* by retaining specific essential areas of national control within a nation state. The guarantee to remain sovereign, according to the FCC, is even reflected in the Treaties, pursuant to Article 4(2) TEU. Concretely, the German legislature has to claim control over substantial and procedural criminal law; a monopoly on the use of force by the police

79 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation 5 December 2016*, para 67.

80 François-Xavier Millet, ‘Constitutional Identity in France: Vices and – Above All – Virtues’ in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 139.

81 Ibid.

82 Helle Krunke, ‘Constitutional Identity in Denmark’ in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 132.

83 Czech Ústavní Soud, Case Pl. ÚS 19/08 *Lisbon Treaty I* 26 November 2008, paras 107–109.

and the military (war and peace); taxation, public revenue, expenditures and fiscal decisions; social policy considerations or welfare; and culture, education and religion.<sup>84</sup>

The examples above demonstrate that the argument of identity often share the space with sovereignty; sometimes as an additional element, other times as a substitute. Henceforth, one cannot think of (national constitutional) identity without an awareness that many apex courts have already made substantial steps either to connect the concept with national sovereignty, or even to replace the sovereignty principle with identity vocabulary, while addressing the same underlying challenges.

### 3.3 European Sovereignty and Neo-Colonial Delusions

What would happen if we assumed that the connection between sovereignty and identity, as depicted above, continued to exist even when construing European constitutional identity? Would that not in turn award European sovereignty to the Union? And if so, how would that impact on the relationship between the Union and the Member States?<sup>85</sup>

The argument will be explored from two perspectives. What does it mean for the EU to assume its own sovereignty in a legal sense? Moreover, how can this rhetoric bring about imperial tensions from a political perspective?<sup>86</sup>

If constitutional identity is nothing other than a different pretext for sovereignty, then imagining European constitutional identity logically assumes its sovereignty. The European legal order is already legally estab-

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84 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, paras 249, 252.

85 See also Adam Tomkins and Damian Chalmers (eds), 'Sovereignty and Federalism: The Authority of EU Law and Its Limits', *European Union Public Law: Text and Materials* (Cambridge University Press 2007) 196ff; Richard Bellamy, 'Sovereignty, Republicanism and the Democratic Legitimacy of the EU' in Richard Bellamy (ed), *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press 2019) 83; Willem T Eijsbouts and Jan-Herman Reestman, 'Editorial: European Sovereignty' (2018) 14 *European Constitutional Law Review* 1: 'Emmanuel Macron, then still only a candidate for the French presidency, seized the opportunity to lay out his plans for building 'A Europe of Sovereignty'. In an op-ed article in the Financial Times two weeks later, he was even more outspoken: 'Sovereignty has become the great cause of our time.'

86 Bruno de Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition' in Neil Walker (ed), *Relocating Sovereignty* (1st edn, Routledge 2006).

lished as autonomous,<sup>87</sup> and there is a close and complicated link between autonomy and sovereignty.<sup>88</sup> But what would the creation of European sovereignty mean? Is it that the EU could no longer give away some of its attained competences and powers, if European integration in the future took the road back to a more disconnected and loose cooperation? Or that it must have the power to determine its own powers, the *Kompetenz-Kompetenz*?

The European Union has the legal subjectivity to be the holder of rights and obligations in the public international sphere. Would the notion of sovereignty increase the power and legitimacy of the Union? Would it facilitate relationships with other international subjects? Would it enhance the current integration process?

And in turn, how would the Member States, the *Herren der Verträge*, respond to this notion? The Union does not have its own territory, its Member States are constantly changing, and European citizenship has only an auxiliary nature. Yet, the Union assumes to have constitutional characteristics resembling the sovereignty of a state.

As Mattias Kumm argued, thinking of the European Union in terms of ‘Legal Monism’,<sup>89</sup> state-developed conceptions would seriously undermine the purpose and nature of the Union as it *is* and as it *ought to be*. However, can one avoid that trap if one is determined to summon identity vocabulary to describe the Union? Can constitutional identity on the level of the Union be completely detached from the underlying sovereignty concept, which constitutional identity is only half-heartedly trying to replace?

In addition, sovereignty assumes a certain scope of independence. It assumes its own power. And since it is clear that in the 21<sup>st</sup> century the European countries wield only a small and almost insignificant reflection of their previous global influence, often obtained due to dubious moral and legal standards, and even the biggest members can no longer independently shape global politics and economy, then the European Union can at least

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87 Joseph HH Weiler and Ulrich R Haltern, ‘The Autonomy of the Community Legal Order-Through the Looking Glass’ (1996) 37 Harvard International Law Journal 411.

88 Christina Eckes, ‘The Autonomy of the EU Legal Order’ (2020) 4 Europe and the World: A Law Review 1.

89 Kumm, ‘How Does European Union Law Fit into the World of Public Law? Costa, Kadi, and Three Conceptions of Public Law’ (n 70) 130; Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law’ (2013) 20 Indiana Journal of Global Legal Studies 605.

partially correct that picture. The Union can lend sufficient size and capacity to warrant a say in the world once again.

But that should not be the case, in any possible way: neither the *raison d'être*, nor the by-product of European integration. And every time that people talk about Europe losing influence, or wanting to (re)gain a primary seat among the big powers once more, the EU has been instrumentalized as a vehicle for neo-colonial delusions, expressed only in a different form. Equally, the argument for imagining European constitutional identity and underlying European sovereignty follows the same distorted narrative; instead of its true path of simply engaging with fundamental rights, the rule of law, and democracy from within.

## 4 Identity as a Relation

According to Newman, ‘We are all safer when language is specific; it improves our chances of knowing what is going on.’<sup>90</sup> In brief, language matters. If jurisprudence were to be more like a natural science, perhaps we could get away without words, dealing solely with numbers and symbols. Yet, legal science is intrinsically connected with language and its interpretation. Hence, one must first determine the meaning of a legal term in order to use it justly.

But what is the meaning of a legal concept? As Danny Crane famously put it: ‘The Constitution says whatever the Supreme Court says it says.’<sup>91</sup> That is certainly true. But words still have meanings on their own. Without words, the courts would have no means to articulate what the given words are supposed to mean. In reality, we can discuss H.L.A. Hart’s ‘vehicles in the park’<sup>92</sup> problem as long as we please, but one fact remains: a common, regular car is definitely included under the definition of ‘vehicles’. In other words, even in the world of legal language, where everything can be disputed and misinterpreted, some basic ‘rules of gravity’ cannot be denied.

This brings us to a discussion about the meaning of identity and its transposition in the era of identity politics, from the social and psychological spheres into constitutional law. Despite the courts and legal scholarship trying to imagine and artificially construe the *legal* meaning of (constitutional) identity, the merciless rules of gravity have the last word, meaning that certain content of the original meaning of identity cannot be ignored. For it is not the creation of new meanings that bewilders me, but rather the purposeful ignorance of a discernible core of identity.

Hence, I put forward an argument that, due to its intrinsic original meaning, the use of identity vocabulary regarding constitutional identity for the European Union misguides and convolutes such efforts. First, be-

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90 Edwin Newman, *A Civil Tongue* (1st edn, Bobbs-Merrill Co 1976).

91 Susan Dickens and David E. Kelley, ‘*Dances With Wolves*’: Boston Legal (6 October 2008) Season 5, Episode 3.

92 HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 607.

cause identity is a relational and not descriptive concept (4.1).<sup>93</sup> Second, an idea such as the European Union, as an identifying subject of the many, cannot be objectively and accurately articulated according to just one narrative (4.2). Lastly, an identity concept is never single, but actually comprises a chord of multitudes (4.3).

#### 4.1 Identity as Relational, not Descriptive

Identity is a relational concept.<sup>94</sup> And that has two distinctive consequences: firstly, it requires an active agent that is capable of creating a *connection*; and secondly, identity is the connection itself, the belonging, rather than the identifying subject matter.<sup>95</sup>

Two small examples can illustrate this point. If one were to say: I have German and Christian identity, the identity would not be the Federal Republic of Germany or Christianity itself. Rather, it would be the connection that one is able and willing to make to the mentioned subject matter. German identity is not Germany itself; it is the relation to Germany. Henceforth, an identity concept is not simply a matter that one can describe and depict, but rather a relation to a specific matter of identification.

Or again, what is the identity of a particular car? It may be diesel, red, with luxurious leather seats and a rearing horse logo on the bonnet. You might confidently say it's a Ferrari, but the answer would be wrong. A car has no identity. It has a name, one can describe its main features, and one can even relate to it. But the car itself cannot: it is not an agent, it cannot identify itself with anything, it is not capable of creating an active connection.

Arguably, an identity concept cannot be used as a substitute for descriptive endeavours with the aim to characterize the subject. A constitution has no identity, because it is not capable of creating a relation. Constitutional identity could only be, theoretically, a Habermasian constitutional

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93 See also Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 37: 'the subject is defined not in relation to its objects, but in terms of its interaction with other subjects.'

94 Christopher JF Williams, 'Is Identity a Relation?' (1979) 80 *Proceedings of the Aristotelian Society* 81.

95 See also Anna Śledzińska-Simon, 'Constitutional Identity in 3D: A Model of Individual, Relational, and Collective Self and Its Application in Poland' (2015) 13 *International Journal of Constitutional Law* 124, 124.

patriotism (*Verfassungspatriotismus*),<sup>96</sup> which would describe the identity of the respective constitutional subjects of those who identify themselves with the constitution. But to the best of my knowledge, no one has tried to ascribe the meaning of constitutional identity in this manner. Alternatively, a constitution could articulate the national identity of the people. But then we should be talking about *national* identity as potentially *described* in the constitution. But that meaning has even less sense when one is trying to describe the common identity of the peoples of 27 nations. The conventional assumption of constitutional identity rather refers to the constitution, which has its own identity, like that of a Ferrari.

Accordingly, the use of the word identity when *describing* a constitution, a lifeless legal text, creates confusion and misleading expectations. It ignores the basic gravity rule that the core meaning of identity requires an *agent*, one capable of creating an active *relation*.

#### 4.2 Identified Subject Matter as Idea or Narrative

When one identifies with a subject matter, the subject matter inherently influences the identifying agent in turn – somewhat like a circle. The identity relation is not just *liking* the subject matter, but partially, and to a certain degree, rediscovering the identified subject matter in some form also in itself.

The situation however changes when the identified subject matter is no longer in a materialized form, but represents an idea or a narrative.<sup>97</sup> The identified idea is then adopted by the agent as its own version. In a society of many individuals, that process is multiplied, and suddenly one has the feeling of belonging to the idea, and of others belonging to this idea, simply by sharing this same narrative.<sup>98</sup> Yet, with the multitude of processes of adopting an idea, the idea itself is no longer singular. It lives in every single individual on its own, and it no longer has only one

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96 Jürgen Habermas, 'Address: Multiculturalism and the Liberal State' (1995) 47 *Stanford Law Review* 849, 851.

97 See also Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised edition, Verso 1991) 204: 'These narratives, like the novels and newspapers discussed in Chapter 2, are set in homogeneous, empty time. Hence their frame is historical and their setting sociological. This is why so many autobiographies begin with the circumstances of parents and grandparents, for which the autobiographer can have only circumstantial, textual evidence.'

98 See also Śledzińska-Simon (n 95) 141.

proper form and context. The identity in this form is then by definition lacking coherence. And even if one tried to identify the true definition of the idea and empirically asked the multitude of individuals about it, the answers would be neither the initial idea itself, nor something which would overlap among the interlocutors. Rather, one would get a thousand versions of identity; like a children's game of Chinese Whispers, where the initial message always becomes garbled along the way.

The nature of an identity concept, as described above, illustrates the tensions of the concept with legal science, where expectations and rules are radically different. The entire legal undertaking is dedicated to making language and its meaning as clear and predictable as possible. The introduction of identity vocabulary, on the other hand, is by definition the opposite: a meaning which cannot be encapsulated in one single narrative;<sup>99</sup> the toothpaste which cannot be squeezed back into the tube.

#### 4.3 Singleness and Multitude of Identities

Finally, the conventional legal knowledge of (national) constitutional identity somehow assumes that one agent bears just one identity: in other words, the assumption that there *is* a constitutional identity; one German, one Italian, one European. Yet, due to the initial meaning of identity, nothing could be further from the truth.<sup>100</sup>

Every agent has a multitude of identities; identities *are*, whether European, national, regional, local, professional, etc. One agent can have it all; or if it pleases, none. Yet, the legal constitutional discourse consistently assumes that a constitutional identity is just one concept, only waiting to be discovered and articulated; as if it was only due to the lack of good scholarship and case law that we are still missing the final, unified and coherent theoretical account of it.<sup>101</sup>

The question of compatibility between the multitude of identities in sociological and psychological meaning on the one hand, and the assumed sin-

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99 Fabbrini and Sajó (n 18) 467.

100 Eric Hobsbawm, 'Language, Culture, and National Identity' (1996) 63 *Social Research* 1065, 1067: 'Human mental identities are not like shoes, of which we can only wear one pair at a time.'

101 Sorina Doroga, 'Understanding Constitutional Identity Through the Language of Courts' in Alexandra Mercescu (ed), *Constitutional Identities in Central and Eastern Europe* (Peter Lang 2020).

gleness of constitutional identity on the other, is not a trivial one. If national constitutional identity, or the European constitutional identity, could have several identities, what would be the purpose of construing them? How would they relate to one another? For example, fundamental rights identity as incorporated in the EU Charter; common market identity as developed due to fundamental freedoms; weak democratic identity according to the current design of institutions, etc. And then we could compare them, or make combinations of them. But is that really the intended purpose when trying to construe European constitutional identity? And if there has to be just one main identity, how is that compatible with the initial meaning, which was clearly never intended to monopolize just one relation?

Once again, the invited identity vocabulary brings to lawyers far more difficult questions than the guiding answers. Does it really make sense to raise all these dilemmas up to EU level?

## 5 Tensions Between Identity and Democracy

The construction of identity is especially delicate regarding the question of permanence and change. Is identity a *perpetuum mobile*, a constant reinvention of itself? Or a stable and unchangeable feature, a subject matter which simply cannot be alternated (5.1)? Moreover, how does conventional constitutional understanding of constitutional identity relate to this particular feature of identity change (5.2)? And accordingly, what kind of tensions then arise between the principle of democratic reversibility and the notion of unchangeable constitutional identity (5.3)?

### 5.1 Identity as *Perpetuum Mobile*

Heraclitus stated, about 2,500 years ago: ‘You cannot step into the same river twice.’<sup>102</sup> The beautiful metaphor is perfect to describe the whimsicality of every moment, ever-changing human nature, the inevitability of change in time and space, and thereby of one’s identity.

Judith A. Howard put it more fittingly: ‘The basic premise of symbolic interaction is that people attach symbolic meaning to objects, behaviours, themselves, and other people, and they develop and transmit these meanings through interaction. People behave toward objects on the basis not of their concrete properties, but of the meanings these objects have for them. Because meanings develop through interaction, language plays a central part. [...] Identities locate a person in social space by virtue of the relationships that these identities imply, and are, themselves, symbols whose meanings vary across actors and situations.’<sup>103</sup>

Identities in their initial meanings are thus scarcely a stable and fixed concept. They are not motionless or finished products, but rather ‘the problematic ongoing process of access to an image of totality’.<sup>104</sup> Finally,

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102 Plato, ‘Cratylus’ (Benjamin Jowett tr, 360AD) para 402a <<http://classics.mit.edu/Plato/cratylus.html>> accessed 24 February 2023.

103 Judith A Howard, ‘Social Psychology of Identities’ (2000) 26 *Annual Review of Sociology* 367, 371.

104 Homi K Bhabha, *The Location of Culture* (2nd edn, Routledge 2004) 73.

identities are never a priori absolute and isolated in the ivory tower, but rather continuously forced to adapt in accordance with societal notions of narrative, intelligibility and accountability.<sup>105</sup>

The character of Meursault in Camus' novel *L'Étranger* is a powerful example of this duality of identity:<sup>106</sup> on the one hand, what somebody *is* in relation to the outside evaluation; on the other, how society demands from an individual to adapt to social standards and norms. Meursault, while on trial because he was not crying at his mother's funeral, is a *stranger* to society, as much as society is *strange* to him. 'What Meursault displays is a passive threat to society, albeit what society does is a major threat to his individuality.'<sup>107</sup> Thus, understanding as well as navigating one's 'identity is highly depended on the social construction a person hails from'.<sup>108</sup>

### 5.2 (Dis)Ability to Change and the Hierarchy of Norms

Constitutional identity, on the other hand, assumes the opposite. Constitutional identity often imitates unchangeability. The very reason why the Member States are putting so much into the claims of constitutional identity, against the application of EU law, is the nature of the argument which assumes inability to change. The argument of constitutional identity is only strong when the Member States can say: 'Sorry, but we are simply not able to change this feature of our constitutional law, because it is our identity. It is not *possible* to change it.'

For example, when German Basic Law conflicted with the application of the EU law directive on equal treatment within employment,<sup>109</sup> because the German constitutional provision provided only for men to serve in the army, Germany had to change its respective constitutional norm.<sup>110</sup>

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105 Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Reprint edition, Harvard University Press 1992) 218.

106 The reference to Camus' character in relation to identity (change) was made at the WZB Colloquium Global Constitutionalism by Mattias Kumm.

107 Bhumika Devi, 'Negotiating Identity in Albert Camus's *The Outsider*' (2020) 12 *Journal of Interdisciplinary Cycle Research* 351, 355.

108 *Ibid.* 351.

109 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.

110 Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECLI:EU:C:2000:2.

This was not seen as a constitutional problem, because the constitutional norm was not declared as a matter of constitutional identity. But when a constitutional norm which is also a constitutional identity conflicts with the EU, a Member State cannot simply change it. Because it is identity, and identity cannot simply be changed by new legislation. And this is precisely the power of the constitutional identity argument: it gives the Member States grounds to refuse compliance within EU law; not because they don't want to comply, but because they supposedly cannot.

The unamendable core of the constitution, or such constitutional identity, has two important consequences. First, it is not subject to change.<sup>111</sup> That is a highly problematic notion in the light of the democracy principle, as will be further elaborated below. The national apex courts are then able to navigate and block constitutional changes in their society. And as far as this 'safety brake' may primarily aim to prevent a potential escalation into an autocratic or undemocratic catastrophe, it can also circumvent democratic decision-making, enabling judges to gain powers beyond the constitutional confines of the judiciary. And second, more importantly, that creates a constitutional hierarchy of norms.<sup>112</sup> Declaring something as constitutional identity eventually creates a constitutional hierarchy<sup>113</sup> which clearly privileges some constitutional norms over others.<sup>114</sup>

### 5.3 Law and Democratic Reversibility

The initiative of scholars to designate the values of Article 2 TEU as European constitutional identity will potentially create two significant problems.

The first one is the problem of reversibility. To use the vocabulary of identity, the identity of the European Union and European legal integration is most likely 'the change' itself. The famous metaphor of the EU and its

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111 Wischmeyer (n 65) 435.

112 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2019) 105ff.

113 See also Julia Villotti, 'National Constitutional Identities and the Legitimacy of the European Union – Two Sides of the European Coin' (2015) 4 *Zeitschrift für Europarechtliche Studien* 475, 480.

114 Reijer Passchier and Maarten Stremmer, 'Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision' (2016) 5 *Cambridge Journal of International and Comparative Law* 337, 355; See also Frank Schorkopf, 'Value Constitutionalism in the European Union' (2020) 21 *German Law Journal* 956, 967.

reforms is illustrative in that regard: they are like a bicycle which has to be continuously pushed forward if it is not to fall on its side. Every crisis brings new challenges which demand new solutions. That is translated into the new treaties, which bring about new institutional designs. Or, as cited at the beginning, the actual connection of economies and the creation of a common market will create real and tangible results and establish connections; these connections will create solidarity, and the solidarity will lead to a more integrated and successful society.

But declaring some articles of the current Treaties as a constitutional identity could freeze this process. It would be wrong to presume that the EU has reached its final stage, no longer open to progressive change. That is, after all, the most important feature of democracy: the ability to stay agile and flexible in order to evolve with time. European constitutional identity could well stop that process. It could freeze the current modest level of protection of human rights as sufficient; it could signal that we are satisfied with the current state of the art, where social rights are only articulated as soft law,<sup>115</sup> where the European Parliament for example has a position which is almost only as a mere observer or a correcting mechanism, without any real power to initiate a legislative process on its own. It would signal that we can be satisfied with the current level of democratic participation.

On the other hand, if European constitutional identity is articulated broadly and in general terms, as for example a commitment to democracy, human rights and the rule of law,<sup>116</sup> what could that general articulation of European constitutional identity offer in the legal sense? For what purpose of differentiation, since those commitments are already shared among the Member States?<sup>117</sup>

The second problem concerns the hierarchy of norms.<sup>118</sup> If Article 2 TEU is declared as European constitutional identity, how would that elevation of the norm impact on the adjudicative process of the European judiciary in relation to other constitutional principles and norms? Would that give

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115 Interinstitutional Proclamation on the European Pillar of Social Rights [2017] OJ C428/10.

116 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232.

117 See e.g. Faraguna (n 46) 1625: 'Identity as difference and identity despite difference. In the first sense, constitutional identity is based on differences distinguishing one constitution from another.'

118 See also Villotti (n 113) 480.

the CJEU the possibility to give clear priority to the rule of law over the other principles, such as the principle of sincere cooperation, or respect for national identity, or the principle of conferral?<sup>119</sup> Would the principle of prohibition of discrimination as part of Article 2 TEU thereby automatically outweigh fundamental freedoms because of its higher rank as identity? Or over the principle of ‘freedom to conduct business’?

Constitutional law is cautious not to prioritize among constitutional norms. It requires the judges to exercise real work; to put all the elements into the equation and to balance them; to find the least intrusive way of limiting one’s right so as to enable the widest possible exercise of another. Designating some norms with the label of constitutional identity could demolish that fragile equilibrium of constitutional adjudication. And once again, it would arguably create more problems than it promised to solve.

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119 See Luke D Spieker, ‘Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision’ in Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe’s Actions* (Springer 2021).

## 6 Call the Essential Constitutional Commitments by their Name

Confucius was once asked what is the beginning of wisdom; his reply was: ‘Call things by the right names.’<sup>120</sup> In his *Analects* one reads: ‘If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success.’<sup>121</sup>

At the beginning, we asked the question what is the purpose of constructing European constitutional identity? Various answers could be: to strengthen the essential constitutional commitments of the Union; to give them true legal meaning; to make them judicially applicable;<sup>122</sup> to be able to enforce them; and thereby to protect the Union as a community of values.<sup>123</sup>

One way of identifying the basic constitutional values of the Union is to refer to Article 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, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’<sup>124</sup>

Additionally, many other principles could also qualify as ‘essential constitutional commitments of the Union’: most notably, the four fundamental freedoms of the common market as the pivotal practical reason of the Union’s existence. Furthermore, the special *sui generis* nature with no comparable constitutional structure in the world could also qualify as an essential constitutional element: principles of primacy, of subsidiarity, of conferral, and of sincere cooperation, to name but a few.

Yet, there is a missing link when one aims to answer the initial research question. Why would the denomination of identified (potentially *these* particular) essential constitutional values of the Union as *European constitu-*

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120 Confucius, *The Analects* (DC Lau tr, 1st edn, Penguin Classics 1998).

121 *Ibid.*

122 Spieker (n 119).

123 For a somewhat more balanced approach against the Schmittian ‘Tyranny of Values’, see von Bogdandy (n 55) 74–97.

124 TEU [2012] OJ C326/13, art 2.

*tional identity* in any way contribute to the gravity and significance of their existence? Truly, would such a denomination *elevate* them normatively? Would it qualify them as the highest normative standards and thus improve their protection and enforcement?

Here, I argue the opposite, or at least raise cautious concerns about the potential pitfalls of such an endeavour. As indicated above, there are many reasons why identity vocabulary might bring about more confusion and additional challenges, apart from the lack of any intelligible methodology to identify and create such a (constitutional) identity, henceforth subjectively projecting and *imagining*<sup>125</sup> it. In fact, the semantics of identity terminology suggest the complete omission of the concept as unsuitable for the purposes of *describing* the essential elements of constitution.

But even more importantly, there are no reasons why such a denomination would in fact enhance respect for essential constitutional values. Whereas facilitating the argument of constitutional identity from the Member States at least makes sense, due to the fact that the Union itself is bound to respect national identity. And thus, it gives the Member States some leverage in negotiating the potential constitutional tensions, as there is no such reference for the identity of the EU.

Alternatively, I suggest following the advice of Confucius. Let us call things by their right names. Let us take the essential constitutional commitments of the EU seriously, simply by using their names as they have them already. In the light of the ongoing backsliding by some Member States, respect for the rule of law has already been taken more seriously by the CJEU.<sup>126</sup> Initially, in the *ASJP*<sup>127</sup> decision by the Portuguese judges, in the *obiter dictum*, the CJEU boldly introduced protection of the rule of law not just as programmatic or ideological guidelines which allegedly cannot be enforced, but as indispensable legal structures that enable the functioning of the EU. It recognized that ‘effective judicial review [...] is of the essence of the rule of law.’<sup>128</sup> Subsequently, it has only strengthened

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125 Anderson 1991.

126 See also Luke D Spieker, ‘Breathing Life into the Union’s Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis’ (2019) 20 German Law Journal 1182.

127 Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas (ASJP)* [2018] ECLI:EU:C:2018:117.

128 Case C-64/16 *ASJP* [2018] ECLI:EU:C:2018:117, para 36.

the initial position further. Just a few months later, it issued the *Celmer*<sup>129</sup> decision, thus confirming the chosen trajectory to give life to the rule of law as an enforceable principle, not just a programme-based phrase. In addition, the CJEU has not only started to develop the content of the rule of law, but also of other values pursuant to Article 2 TEU, as for example the principle of democracy within the latest case law concerning the Catalan politicians and their immunities.<sup>130</sup> Finally, the most recent case law of the CJEU, concerning the infringement proceedings by the Polish judiciary *reform*, has only confirmed the true dedication of the CJEU to securing and protecting the principles and values pursuant to Article 2 TEU.<sup>131</sup>

In my opinion, this is a much better way of ensuring a robust commitment to the essential constitutional principles and values of the EU. And if the CJEU continues to take these legal values seriously, that in itself is the preferred route to constitutionalization<sup>132</sup> of the Union without clinging to equivocal terminology of identity,<sup>133</sup> because these principles and values are already properly understood, imperative and transcendent. We just have to take them seriously and simply call them by their names.

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129 Case C-216/18 PPU *Request for a preliminary ruling from High Court (Ireland) (Celmer)* [2018] ECLI:EU:C:2018:586, paras 48–51.

130 Case C-502/19 *Criminal proceedings against Oriol Junqueras Vies* [2019] CLI:EU:C:2019:1115, paras 63, 83.

131 Pech, Wachowiec and Mazur (n 62); Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232; Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:98, para 145.

132 Kumm, ‘The Cosmopolitan Turn in Constitutionalism’ (n 89). See also Christian Joerges, ‘Law, Economics and Politics in the Constitutionalisation of Europe’ (2003) 5 *Cambridge Yearbook of European Legal Studies* 123; Cf Gehring (n 73) 166.

133 For a more nuanced view on the limits of the CJEU’s jurisprudence to solve the current democracy and the rule of law crisis, see Linda Schneider, ‘Responses by the CJEU to the European Crisis of Democracy and the Rule of Law’ (2020) 2 *re:construction Working Papers, Forum Transregionale Studien* 1, 4–28.

## 7 Concluding Remarks

Imagining a constitutional identity for the European Union is much like Alice going down the rabbit hole: entering unknown territory, and not knowing how deep the rabbit hole goes.

This chapter has therefore been a five-step plaidoyer, to highlight the potential traps of the arguably misguided Sisyphian endeavour to imagine a constitutional identity for the EU while asking the following question: What is the purpose, the additional value, and the pitfalls to artificially construing a meaning around this conceptual conundrum?

The task is Sisyphian, because it is pointless and interminable. The denomination of essential constitutional values of the EU, to the qualifying standard of constitutional identity, elevates the respective principles. That in itself creates a subjective hierarchy of constitutional norms and therefore generates tensions with the democratic principle of reversibility. Moreover, it invites confusion as to the methods, consequences and meaning of constitutional identity.

Furthermore, the semantics of the identity concept strongly argue for the omission of any correlation with the term in the field of constitutional law. This is due to its specific nature, which presupposes an agent, capable of establishing a *relation* with the respective subject matter as an undertaking of identification.

In conclusion, rather than constitutional identity, one should embrace the principles and values of the Union by their names. Already imperative and transcendent, they might present a more useful way of reaching a true constitutionalization of the Union and the potential qualitative evolution of European integration, as well as its democratic standards.