5

Dimensions of Identity

Functions, Protagonists, Deficiencies

New opinions are always suspected, and usually opposed, without any other reason but because they are not already common.

(John Locke)

1 Introduction

Chapter 3 demonstrated a wide variety of case law, proving that it is impossible to construct one coherent account of identity claims. It therefore viewed identity claims according to their distinctive underlying justificatory reasons, thereby creating different identity clusters.

This chapter changes that perspective. It no longer views identity claims according to their underlying rationales, but rather explores their dimensions. If the previous chapter focused more on the substance, the objective here concentrates on the features of identity itself: its relation to changeability, idiosyncrasy, sameness and collectiveness;[1] the embeddedness of identity in EU law; the function of managing multilevel constitutional relations among the EU and the Member States,[2] using identity as the ultimate limit to further integration,[3] and identity's dangerous potential.[4] The chapter unfolds around three major dimensions: the functions of identity, the protagonists of identity, and the potential deficiencies of the concept of identity.

The chapter starts with the dimension of national constitutional identity from the EU's perspective. It explores the meaning of the European identity clause, outlines its origins and development through different EU Treaties, and explains why one finds such a disparity between the wording of the European identity clause and its application by the CJEU in practice (Section 2).

It then addresses in more detail the apparent question: What is the difference between national and constitutional identity, and why is there no strict delineation between these two expressions to differentiate between extra-legal sociological elements and legal and constitutional matters, con-

1 Pietro Faraguna, 'Constitutional Identity in the EU–A Shield or a Sword?' (2017) 18 German Law Journal 1617, 1625.

2 François-Xavier Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (2021) 27 European Public Law 571, 584.

3 Kassandra Wetz, *Funktionen von Verfassungsidentität als Gerichtliches Konzept in der Europäischen Union*, vol 18 (1st edn, Mohr Siebeck 2021) 49.

4 Kriszta Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts' (2017) 18 German Law Journal 1703, 1708.

cerning purely the content of constitutions. The section demonstrates how these two expressions are interconnected and often interchangeably applied in an incoherent way (Section 3).[5]

The next section highlights the function of identity as a general principle of EU law[6] and explores the limits of the EU's obligation to respect national identities in relation to other EU general principles. Concretely, it investigates how Article 2 TEU arguably sets the inherent restriction to respect national identities,[7] should the national identities undermine the common and shared values of the said article.[8] Moreover, it stresses how identity as a general principle, managing the relationship between the EU and the Member States, must be observed in accord with the other EU principles concurrently operating to find an appropriate balance and resolve potential constitutional tensions (Section 4).

Accordingly, claims of national constitutional identity undertake various degrees of engagement. Investigated from their functional perspective, they can be red flags to avoid a constitutional dispute in the first place.[9] Moreover, they can search for a dialogue and engagement, highlighting the overlooked sensitive issues and suggesting solutions from the domestic perspective on how to avoid constitutional conflicts. Furthermore, the section shows how identity claims occasionally demonstrate open dissent and resistance, refusing to accept the authority of the CJEU concerning the interpretation of EU law. The section aims to investigate these functions in relation to their effects, showing that the higher degree of resistance does not necessarily relate to the higher degree of success (Section 5).

Identity has further multifarious functions. It can introduce pre-constitutional elements to legal reasoning, associated with national identity, be-

5 See Tímea Drinóczi, 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach' (2020) 21 German Law Journal 105, 107: 'Member States refer to their constitutional identity, while the CJEU prefers to use the term "national identity." The two terms, however, refer to the same obligation of the EU institutions—respect—and the same core element of the constitutional setting of the particular Member State—to be respected.'

6 Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 205.

7 Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo"* (*Pancharevo*) [2021] ECLI:EU:C:2021:296, Opinion of AG Kokott, para 101.

8 Luke D Spieker, *EU Values Before the Court of Justice Foundations, Potential, Risks* (Oxford University Press 2023) 231 (forthcoming).

9 Ingolf Pernice, 'Der Schutz Nationaler Identität in der Europäischen Union' (2011) 136 Archiv des öffentlichen Rechts 185, 193.

longing and majoritarian narratives.[10] The section scrutinizes how these extra-legal arguments potentially influence constitutional adjudication at the expense of full realization of individual fundamental rights.[11] Moreover, identity can only address the core constitutional commitments, as explicated in Chapter 2, which again renders these claims improbable given the fact that the Union and the Member States all share the same essential values (Section 6).[12]

The subsequent section focuses on the agents of identity. It investigates whether the courts are and ought to be the only agents identifying and creating the meaning of national constitutional identity. It shows that other agents, the legislature and the executive, also contribute to the development of identities, although in a distinctive way and often with different objectives. Finally, legal scholarship is also an important element in the evolution and pertinence of identity. As the section shows, legal scholarship occasionally facilitates the meaning of national constitutional identity beyond the classical confines of legal norms' interpretation and case law analysis (Section 7).[13]

Finally, the section concludes with the potential deficiencies of national constitutional identity: being prone to misuse and abuse. It explicates the similarities between public policy and national constitutional identity, analyzing the similarities and the shortcomings when the latter interchangeably substitutes for the former.[14] Furthermore, it considers the reasons to abandon the identity concept altogether, given the lack of a coherent theoretical account and identity's capacities for misuse.[15] Additionally, it investigates how identity invites considerations in the light of tradition, history and

10 Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 German Law Journal 534, 549.

11 Latvian Satversmes tiesa, Case 2015-01-01 *Flag of Latvia* 2 July 2015.

12 José Luis Martí, 'Two Different Ideas of Constitutional Identityidentity of the Constitution v. Identity of the People' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013) 34.

13 Helle Krunke, 'Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 125.

14 Leonard FM Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 Utrecht Law Review 36, 1449.

15 Federico Fabbrini and András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 European Law Journal 457, 472.

culture; and rejects the application of the said concepts in legal reasoning under the pretext of national constitutional identity (Section 8).[16]

In a broader sense, the objective of the chapter is to demonstrate the exceedingly complex and indeterminable nature of the identity concept, undertaking a multitude of functions. As part of the well-established constitutional canon, national constitutional identity maintains part of the constitutional discourse, despite its complex and indeterminable nature.[17] The chapter highlights its manifestations, functions and layers to help legal practice and scholarship to avoid its most apparent abuses and to find an appropriate yardstick to determine its legitimate scope and meaning.

16 Kovács (n 4) 1720.

17 Drinóczi and Faraguna noted that identity is a 'polysemic concept', explored within and by many different social sciences. See also Fabbrini and Sajó (n 15) 467. Zoltán Szente, 'Constitutional Identity as a Normative Constitutional Concept' (2022) 63 Hungarian Journal of Legal Studies 3, 7.

2 National (Constitutional) Identities from the EU's Perspective

This section investigates the evolution of the European identity clause under the various EU Treaties (2.1), and shows how the said clause attained its final wording, which in turn explains the disparity between the wording and the CJEU's practice (2.2).

2.1 Evolution of European Identity Clause under the EU Treaties

Protection of national identities was first introduced by the Maastricht Treaty of 1992 among the then-twelve Member States, together with the new introduction of the euro currency and European citizenship. Article F(1) of the Maastricht Treaty[18] stated:

> 'The Union shall respect the national identities of its Member States, whose systems of government are found on the principles of democracy.'[19]

The Treaty of Amsterdam[20] in 1999 and later the Treaty of Nice in 2003 omitted the second sentence of the article. Article 6(3) read:

> 'The Union shall respect the national identities of its Member States.'[21]

The attachment of the Member States to the 'principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'[22] was written only in the Preamble in the Maastricht Treaty, whereas the Treaty of Amsterdam additionally and specifically included the commitment to these principles into the same Article 6 as the protection of national identities. Article 6(1) stated that the 'Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Mem-

18 Treaty on European Union (Maastricht Treaty) [1992] OJ C191/1.
19 Ibid. art F(1).
20 Consolidated Version of the Treaty on European Union (Amsterdam Treaty) [1997] OJ C340/145.
21 Ibid. art 6(3).
22 Maastricht Treaty [1992] OJ C191/1, Preamble.

ber States'. That specific inclusion of the shared principles explains why the commitment to the principles of democracy was omitted in the cited sentence on protection of national identities in the Treaty of Amsterdam as compared with the Maastricht Treaty.

The Treaty Establishing a Constitution for Europe,[23] signed in 2004 but never fully ratified, due to its rejection by France and the Netherlands, drafted the identity article in a new and more complex way. Article I-5(1), titled as 'Relations between the Union and the Member States' read:

> 'The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.'[24]

The current Treaty on European Union (TEU)[25] has kept the text from the Treaty Establishing a Constitution for Europe, but added one sentence relating to national security at the end. Article 4(2) TEU states:

> 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'[26]

The EU's commitment to respect national identities from the beginning has been a political counter-statement in relation to further European integration, not reviewable under the CJEU's jurisdiction.[27] The Maastricht Treaty

23 Treaty establishing a Constitution for Europe (Constitution for Europe) [2004] OJ C 310/1.

24 Ibid.

25 Consolidated version of the Treaty on European Union (TEU) [2012] OJ C326/13.

26 TEU [2012] OJ C326/13, art 4(2).

27 Article 46 TEU of the Nice Treaty had defined the provisions over which the CJEU had jurisdiction. The Lisbon Treaty has removed that article. See also Mary Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' (2014) 33 Yearbook of European Law 298, 315.

introduced European citizenship and the right to vote for the EU citizens in local elections; a new European currency; and enhanced cooperation in the spheres of foreign policy, justice and home affairs. The respective areas have been traditionally associated with the core competences of a nation state.[28] As a response to counter-balance this competence shift, the drafters also acknowledged respect for national identities.[29]

2.2 Identity as a Core National Responsibility

To make the European identity clause more transparent, the European Convention entrusted the Working Group V (WG V) to set out the EU's competences in more detail by clarifying the areas of core national responsibilities.[30] The WG V divided them into two areas: first, fundamental structures and essential functions of a Member State; second, basic public policy choices and social values of a Member State.[31]

The first area included: (a) political and constitutional structure, including regional and local self-government; (b) national citizenship; (c) territory; (d) the legal status of churches and religious societies; (e) national defence and the organisation of armed forces; (g) choice of languages.

The second area included: (a) policy for distribution of income; (b) imposition and collection of personal taxes; (c) system of social welfare benefits; (d) educational system; (e) public health care system; (f) cultural preservation and developments; (g) compulsory military or community service.[32]

Notably, the WG V specifically mentioned that the European identity clause 'was not a derogation clause. The Member States will remain under a duty to respect the provisions of the Treaties. The article would therefore not constitute a definition of Member State competence, thereby wrongly

28 Giuseppe Martinico, 'What Lies Behind Article 4(2) TEU?' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013) 100.
29 Blanke and Mangiameli (n 6) 194.
30 Ibid. 195.
31 Final Report of the Working Group V 14 on Complementary Competencies (2002) CONV 375/1/02 REV 1, p 11.
32 Ibid. 11.

conveying the message that it is the Union that grants competence to the Member States, or that Union action may never impact on these fields.'[33]

Finally, the WG V recommended how to articulate more transparently in the Treaties the essential elements of national identity, which include, among others: 'Fundamental structures and essential functions of the Member States, notably their political and constitutional structures, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organisation of armed forces.'[34]

Although the WG V specifically identified the second area of the core responsibilities of the Member States, namely the basic public policy choices and social values, it consciously decided not to mention the second area of core responsibilities in the European identity clause. This decision has its own logic due to the further recommendations of the WG V.

In relation to various types of competences, the WG V defined three types of competences: exclusive competences, shared competences, and the so-called 'supporting measures'. Supporting measures is another name for the 'Union measures in fields where Member States are fully competent'.[35] The Union would carry out its supporting measures in the fields of employment, education and vocational training, culture, public health, trans-European networks, industry, and research and development. Hence, considering that the Treaties would specifically address the cited supporting measures, the WG V saw no reason to add a mention of these basic policy choices in the European identity clause.[36]

The proposed supporting measures are essentially the 'actions to support, coordinate or supplement the actions of the Member States' under Article 2(5) TFEU.[37] Pursuant to Article 6 TFEU, they relate to the policy areas of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection, and administrative cooperation. The idea of supporting competences is to support, coordinate and complement. Whereas the EU acts shall not force the Member States to harmonize these areas, it does not mean that they are not essentially important for the EU, or that the EU should not be involved therein within the limits of the

33 Ibid.
34 Ibid. 12.
35 Ibid. 1.
36 Ibid. 11.
37 Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States* (Hart Publishing 2017) 6.

conferred competences. The Erasmus programme is just one example of the symbolic and actual significance of the supporting competences from the EU perspective.

Finally, the WG V stated in the cited report that the principle of primacy of Community Law should be included in the Treaties.[38] Considering the cited report as the matter of the *travaux préparatoires*, the European identity clause was never considered as providing carte blanche exception to the Member States to ignore or disregard the *acquis Communautaire*.

The WG V identified the second area of core national responsibilities, basic public policy choices and social values, but nevertheless omitted them in the identity clause due to the fact that they would be mentioned as areas for supporting EU measures, where the EU continues to be active. Henceforth, the sole identification of core national responsibilities was never the reason in itself that the EU should not co-shape, support, coordinate and complement the matter together with the Member States.

The second argument is the specific and unequivocal statement of the WG V, that the European identity clause is 'not a derogation clause' and does not convey the message that the 'Union action may never impact on these fields'.[39] Hence, the European identity clause from the perspective of the EU shall not be understood as an absolute prohibition to the EU to touch upon the core national responsibilities, but rather as a sign that the EU shall not be oblivious concerning the differences among the Member States.[40]

The same legal conclusion concerning the non-absolute or relative nature of the European identity clause follows from the textual and systematic interpretation of the respective clause. Article 4(2) TEU states that the EU 'shall respect [...] national identities, inherent in their fundamental structures, political and constitutional, [...], their essential State functions, [...] In particular, national security remains the sole responsibility of each Member State.' The last sentence, different from the beginning of the clause, includes the wording *in particular* and *the sole responsibility*. It creates a difference between matters of national identity in the beginning, which

38 Final Report of the Working Group V 14 on Complementary Competencies (2002) CONV 375/1/02 REV 1, pp 13–14.

39 Ibid. 11.

40 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, 501.

are *not the sole responsibility* of a Member State, and matters of national security. Hence, only national security is the *exclusive* competence of a Member State, while the other areas *a contrario* fall within the identity concept but are not exclusive powers of a Member State. Consequently, the subject matters under Article 4(2) TEU, except for national security, are not absolute national exclusive competences.[41]

Moreover, it would even be incorrect to conclude that the wording concerning national security completely excludes any EU measures whatsoever. A conclusion like that would ignore the fact that the Treaties themselves provide a further framework for security cooperation.[42] For example, under Article 4(2)(j) TFEU, which bestows on the EU shared competences in the area of, inter alia, freedom, *security* and justice. Moreover, in the light of the European Agenda on Security, one can find numerous reports, evaluations, proposals and recommendations in relation to terrorist financing, firearms trafficking, anti-corruption, drugs, trafficking human beings, European critical infrastructure, asset recovery and confiscation, exchange of personal data, etc.[43]

Moreover, just recently, as a response to the Russian invasion and war in Ukraine, the EU's foreign and defence ministers agreed on a common security strategy which includes establishing a rapid response force of up to 5,000 troops that can be deployed in a crisis.[44] The respective European Union Rapid Deployment Capacity is precisely the type of collective European endeavour to strengthen and improve the ability to protect the Union and its citizens, and thereby secure national security as well. National security may thus be the sole responsibility of the Member States; but once again, that does not mean that the Union, via its institutions, remains inactive even in this core area of national responsibilities.[45]

41 Bruno de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' in Sacha Garben and Inge Govaere (eds), *The division of competences between the EU and its Member States* (Hart Publishing 2017) 71.

42 de Witte (n 41).

43 See Commission, 'Recommendation for a Council Decision to authorise the opening of negotiations for an Agreement between the European Union and Japan for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime' COM (2019) 420 final. Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council' COM (2019) 552 final.

44 Council, 'Foreign Affairs Council meetings on 21 March 2022' (2022) Background Brief, p 4.

45 de Witte (n 41) 69.

Finally, in the *ZZ*[46] decision concerning the matter of public security, the CJEU stated: '[A]lthough it is for Member States to take the appropriate measures to ensure their internal and external security, the mere fact that a decision concerns State security cannot result in European Union law being inapplicable.'[47] Accordingly, even under the strongest language of national security as the *sole responsibility* of a Member State, the matter is still not an exclusive competence of the Member States, which would in itself justify an absolute absence of the Union's supportive activities.

To conclude, the current European identity clause does not specifically mention all the core responsibilities of the Member States. Moreover, the explicitly written core elements, as well as the ones which are omitted, were never meant to justify an absolute passivity of the Union, especially in its capacity of supportive actions.[48] Moreover, the European identity clause cannot in itself justify an absolute absence of EU law for the Member States in the respective areas.[49] From the EU's perspective, the European identity clause rather enables the EU and its institutions, particularly the CJEU, exceptionally to allow a particular Member State to disapply EU law, subject to the other EU principles and rights and according to the rules of proportionality.

46 Case C-300/11 *ZZ v Secretary of State for the Home Department* (*ZZ*) [2013] ECLI:EU:C:2013:363.

47 Ibid. para 38.

48 Cf 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) 14.

49 Loïc Azoulai, 'The European Court of Justice and the Duty to Respect Sensitive National Interests' in Bruno de Witte, Elise Muir and Mark Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Pub 2013) 172.

3 National Constitutional Identity: National or Constitutional

The terminological difference between *national* and *constitutional* identity, and their interchangeable application in scholarship and judicial practice,[50] creates much confusion.[51] This section aims to explain their interchangeability and the unsuitability of both when addressing identity claims in European constitutional law.

The Member States' apex courts sometimes speak about national *constitutional* identity,[52] sometimes only about *national* identity,[53] and sometimes they connect both of them together, as for example the Polish Constitutional Tribunal stating that 'the constitutional identity remains in a close relation with the concept of national identity'.[54] However, the European identity clause in the Treaties specifically and exclusively promises to protect *national* identities. Nevertheless, the European identity clause does not really refer to national identity, but rather to the fundamental (constitutional) structures and essential functions, within or outside a national constitution, as cited above. Hence, neither national nor constitutional identity really corresponds to the intended meaning of the European identity clause. Accordingly, the following sub-section posits the question: How to differentiate between national and constitutional identity?

What is the meaning of *national identity*? Generally speaking, there is no commonly accepted definition. More broadly, one can pinpoint two distinctive approaches: the historical and the liberal one. The former definition of national identity was most notably defended by Max Weber in *The*

50 Carina Alcoberro Llivina and Alejandro Saiz Arnaiz (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013); Fabbrini and Sajó (n 15) 465.

51 Pietro Faraguna, 'On the Identity Clause and Its Abuses: "Back to the Treaty"' (2021) 27 European Public Law 427, 445.

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

53 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.

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

Protestant Ethic, loosely based on language and ethnography,[55] and more contemporarily by Walker Connor, who regards nationality as 'a belief in common ancestry or ethnicity'.[56] Whereas an ethnic group may be defined from the outside, the nation must be self-defined. This self-identification consists of the perception of ancestral ties, the sense of uniqueness, and the politically orientated consciousness to achieve some political expression.[57]

The liberal approach sometimes completely rejects an attempt to have a clear definition of national identity, as for example Eric Hobsbawm,[58] who 'views nationality as a malleable term without fixed properties'.[59] Others like Benedict Anderson, Ross Pool and Paul Gilbert define the nation as an 'imagined political community' or 'a group which [...] has a right to independent statehood by virtue of being the kind of group it is'.[60]

Moreover, one may differentiate between a nation and a state, as the following questions indicate.[61] 'Is there a Swiss nation, a people, or just a state? Could there be several (language-based) nations within Switzerland, e.g. German, French, or Italian ones? Are there people(s) who have (or states that contain) no nation(s) at all?'[62]

The present research observes the meaning of national identity from the following three perspectives. The first perspective concerns national identity from the perspective of the individual; that national identity is then multiplied by the number of respective individuals who are sharing this narrative; national identity is a multitude of individuals who all believe that they somehow share a similar or even common commitment to one another and to a community which encloses the respective individuals. It does not matter whether the respective individuals really share the narrative; it is enough that they believe so. This creates an imaginary linkage

55 Harry Liebersohn, 'Weber's Historical Concept of National Identity' in Guenther Roth and Hartmut Lehmann (eds), *Weber's Protestant Ethic: Origins, Evidence, Contexts* (Cambridge University Press 1993) 124.

56 Omar Dahbour, 'National Identity: An Argument for the Strict Definition' (2002) 16 Public Affairs Quarterly 17, 17.

57 Walker Connor, *Ethnonationalism: The Quest for Understanding* (Princeton University Press 1994) 104, 197, 202.

58 Eric J Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (2nd edn, Cambridge University Press 1992).

59 Dahbour (n 56).

60 Ibid. 19.

61 Bernhard Peters, 'A New Look at "National Identity": How Should We Think about "collective" or "National Identities"?' (2002) 43 European Journal of Sociology 3, 4: 'A dichotomous typology between the 'Kulturnation' and 'Staatsnation'.'

62 Ibid. 21.

which arguably binds them together and enables a willingness to show and exercise an actual solidarity and (political) cooperation. The actual solidarity and cooperation then in turn nurture and further stimulate that identity, together with political dialogue, art, literature, culture.

The second perspective concerns the creation of a (nation) state which presupposes a sort of distinctive community, and the members of which arguably share some kind of national identity. This pre-constitutional state of the art needs an existing linkage, a connection, or a national identity in order to justify its particular creation according to specific characteristics: for example, a language which connects them, a common historical narrative, or geographical specificities, or a belief in shared ethnic ties, and any various combinations thereof.[63] Upon the creation of a (national) state, these elements cease to have a legal and a constitutional relevance. Speaking strictly in a legal sense, the previous connecting factor is replaced by the constitution and its expressions. The people may still believe in and feel the previous pre-constitutional sentiments and inclinations, but this national identity no longer carries a decisive legal relevance.[64] In other words, national identity from a legal and constitutional perspective is relevant only as the empirical factor in a pre-constitutional period.[65]

Finally, a constitution itself contains national identity elements which have a double nature.[66] On the one hand, a constitution incorporates concrete elements which are expressions of a connecting factor among the respective people: for example, a historical narrative, a song or anthem, a historical flag, or language.[67] On the other hand, these symbols serve more

63 Liebersohn (n 55) 131.

64 See also Barbara Oomen, 'Strengthening Constitutional Identity Where There Is None: The Case of the Netherlands' (2016) 77 Revue interdisciplinaire d'études juridiques 235, 248.

65 Will Kymlicka, 'Modernity and National Identity' in Shlomo Ben-Ami, Yoav Peled and Alberto Spektorowski (eds), *Ethnic Challenges to the Modern Nation State* (Palgrave Macmillan 2000) 11.

66 See Lithuanian Respublikos Konstitucinis Teismas, Case 102/2010 *State Pension* 22 February 2013: 'it is obvious that not only the continuity of the State of Lithuania, but also the identity thereof is upheld: having restored its independence, the Republic of Lithuania, from the viewpoint of international and constitutional law, is a subject of law identical to the State of Lithuania against which the aggression of the USSR was perpetrated on 15 June 1940; such constitutional sameness of the State of Lithuania is confirmed inter alia through the Republic of Lithuania's Law.'

67 Aistė Mickonytė, 'The Right to a Name Versus National Identity in the Context of Eu Law: The Case of Lithuania' (2017) 42 Review of Central and East European Law 325, 330, 333.

abstractly as the symbols of identification.[68] They serve as elements with which the individual may or ought to identify in the future. The (future) members of the respective society or nation state will learn to recognize these symbols as the expressions of their connection to the respective community. These symbols may be a vehicle to express their figurative belonging, their national identity; although the actual articulation of the particular national identity among the individuals could never be defined in one coherent narrative.

If a state protects and supports a national language, this is not protection of national identity, although the respective language may be a constitutive element of that national identity. The state protects this language because it is the constitutional language of the given state or society and has a great constitutional value to be protected. To put it simply, although a constitutional state consists of several features which are constitutive for the respective national identity, a state itself does not and cannot protect the respective national identity itself.[69] If one considers these pre-constitutional social elements as the prerequisite for the existence and effectiveness of a liberal democratic state, then one recalls the famous Böckenförde dictum: 'A free and secular state lives under conditions which it cannot guarantee itself.'[70]

National identity is not a constitutional principle which could justify potential limitations on other constitutional rights and principles, or legitimately shape and motivate its legislative solutions; although some isolated

68 Drinóczi (n 5) 119: 'Post-socialist states emphasize their national historical traditions, morals, and values as a reaction to the decades-long oppression by the Soviet Union. The preambles of Spain and Portugal also show a clear contrast to the previous authoritarian regimes.'

69 See Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 203: 'constitutions cannot be thought of exclusively as the purely internal expression of a polity that coheres as a unified whole. As mentioned, constitution-making requires a break with the past, thus setting the future polity against the past polity, shattering the temporal unity of the whole. Perhaps even more importantly, constitution-making as an act of negation also requires a break with the polity's prevailing conceptions of collective identity. In other words, it is not enough to overthrow the ancien régime, it is also necessary to differentiate the constitutional "we" from the preconstitutional and extraconstitutional "we".' See also Mark Tushnet, 'How Do Constitutions Constitute Constitutional Identity?' (2010) 8 International Journal of Constitutional Law 671, 672.

70 Anna Katharina Mangold, 'Das Böckenförde-Diktum' (*Verfassungsblog*, 9 May 2019) <https://verfassungsblog.de/das-boeckenfoerde-diktum/> accessed 24 February 2023.

cases indicate otherwise.[71] Yet, the statement here is made in a normative sense and not as an empirical observation.

That brings us to the second part of the question. What is the meaning of *constitutional identity*? It seems logical that constitutional identity derives its meaning from a constitution;[72] hence, it is a constitutional matter. In that light, one can find the content and meaning of constitutional identity in the constitution, or in the case law which gives the constitution its concrete meaning. While any deduction of meaning from textual and historical materials cannot exist in a viewpoint-free way,[73] several definitions of constitutional identity indicate yet another dimension, more closely connected with identity of the people. For Rosenfeld, constitutional identity encapsulates three general meanings: the fact of having a constitution, the content of a constitution, and the context in which it operates.[74] He argued that constitutional identity plays an 'important and multifaceted role in constitutional interpretation',[75] and not the other way around: namely, that constitutional interpretation determines what is the identity of constitution. Martí expanded the notion of constitutional identity to being the identity of the constitution and the identity of the people ruled by such a constitution.[76] Troper argued that 'constitutional identity results from a process of extraction of certain principles which can be posited as essential and as such distinguishable from other constitutional norms and which can be relied upon to protect the integrity of the constitution in cases in which it confronts threats that might erode its vital bond to the people or nation which it is meant to serve'.[77] Jacobsohn wrote that constitutional identity 'represents a synthesis of political aspirations and commitments that are

71 Latvian Satversmes tiesa, Case 2015-01-01 *Flag of Latvia* 2 July 2015, para 15.2: 'The national flag, as the symbol of the State, is an indispensable element in the constitutional and international identity of the State'.

72 Martí (n 12) 22.

73 Laurence H Tribe, 'A Constitution We Are Amending: In Defense of a Restrained Judicial Role' (1983) 97 Harvard Law Review 433, 440.

74 Michel Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 737.

75 Ibid. 771.

76 Martí (n 12) 19.

77 Michael Troper, 'Behind the Constitution? The Principle of Constitutional Identity in France' in Andras Sajo and Renata Uitz (eds), *Constitutional Topography: Values and Constitutions* (Eleven 2010) 202.

expressions of a nation's past, as well as the determination of those within the society who seek to transcend the past'.[78]

All the cited descriptions indicate that constitutional identity closely relates to national identity; which suggests that constitutional identity cannot be solely a descriptive tool to present the most important or the most idiosyncratic features of the particular constitution.

Yet, while the European identity clause speaks about *national* identities, it clearly does not refer to national identities in the classical sociological sense.[79] It rather concerns fundamental political structures and essential state functions (core responsibilities of a state), which again does not subsume well under the above given definitions of constitutional identity.[80] For that reason, neither of the terminological alternatives, *national* and *constitutional*, fit well with the European identity clause. For that reason, de Witte recently called the European identity clause 'protection of *institutional* diversity', arguing that the said article only guarantees constitutional structures of the Member States against the broader notion which understands identity as protection of national diversities in general.[81]

Another view on the European identity clause concerns the question of cultures and languages: Does the said clause include cultural and linguistic identities?[82] The Opinion of AG Kokott in *UTECA*[83] suggests the affirmative. Kokott argued: 'The Community thus contributes to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore [...]. Respect for and promotion of the diversity of its cultures constitutes one of the Community's main preoccupations [...] it is ultimately an expression of the European Union's respect for the national identities of its Member States (Article 6(3) EU).'[84] Furthermore, in relation

78 Gary J Jacobsohn, 'Static and Dynamic: Comments on the Misuse of Constitutional Identity' [2021] Round Table: Constitutional Identity: Universality of Constitutionalism vs. National Constitutional Traditions? 2.

79 Drinóczi (n 5) 107.

80 Pietro Faraguna, 'Taking Constitutional Identities Away from the Courts' (2016) 41 Brooklyn Journal of International Law 492, 495.

81 Bruno de Witte, 'Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States' (2021) 27 European Public Law 559.

82 Blanke and Mangiameli (n 6) 200.

83 Case C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA)* [2008] ECLI:EU:C:2008:468, Opinion of AG Kokott.

84 Ibid. para 93.

to linguistic diversity, AG Maduro in *Spain v Eurojust*[85] argued in a similar direction: 'Respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States.'[86] Finally, the CJEU determined in several cases that linguistic protection falls within the scope of Article 4(2) TEU.[87]

Despite these opinions and decisions, the prevailing legal opinion leans towards a different conclusion.[88] The identity clause does not mention language, culture, history or tradition, even though these elements do appear in the Treaties elsewhere. The Preamble to the TEU states: 'respecting their history, their culture and their traditions'; Article 3(3)(4) TEU guarantees that the Union 'shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'; in Article 22 of the EU Charter one reads that the Union 'shall respect cultural, religious and linguistic diversity'; in Article 167(1) TFEU states that the 'Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.'

Furthermore, the Preamble of the EU Charter differentiates between the three following values: first, diversity of cultures and traditions; second, national identities of the Member States; and third, organization of their public authorities at national level.[89] Hence, the grammatical and systematic interpretation both suggest viewing these elements as autonomous from one another. Finally, applying comparative textual interpretation, in contrast to the German text which states '*zum Ausdruck bringen*',[90] the French, English, Spanish, Romanian, Bulgarian, Estonian, Maltese and Slovenian language versions of Article 4(2) TEU use the word *inherent/inhérente/ne-*

85 Case C-160/03 *Kingdom of Spain v Eurojust* (*Eurojust*) [2004] ECLI:EU:C:2004:817, Opinion of AG Maduro.

86 Ibid. para 24.

87 Case C-391/09 *Runevič-Vardyn* [2011] ECLI:EU:C:2011:291, paras 84, 86; Case C-391/20 *Proceedings brought by Boriss Cilevičs and Others* (*Cilevičs*) [2022] ECLI:EU:C:2022:638, para 87.

88 Fabbrini and Sajó (n 15) 468.

89 Blanke and Mangiameli (n 6) 201.

90 'Die Union achtet die Gleichheit der Mitgliedstaaten vor den Verträgen und ihre jeweilige nationale Identität, die in ihren grundlegenden politischen und verfassungsmäßigen Strukturen einschließlich der regionalen und lokalen Selbstverwaltung zum Ausdruck kommt.'

ločljivo povezan.[91] The difference is not insignificant. The German text sees the identities *expressed* in the fundamental structures, whereas the other cited translations perceive identities as the structures itself.[92] The latter formulation protects the fundamental structures as identity, whereas the German formulation primarily protects the identities which are *expressed* by the fundamental structures, which invites extra-legal or cultural considerations into the scope of the European identity clause.[93]

Accordingly, the scope of the European identity clause from the EU perspective corresponds neither to the meaning of *national* identity nor to the meaning of *constitutional* identity, considering the variety of definitions. It does not refer to individual relation(s) which the individuals of a Member State intuitively and intimately feel and experience as their national identity towards the respective state. The European identity clause is also not concerned with the connecting identity links between the people and the state. On the contrary, the European identity clause as a legal norm is descriptive in the sense that it is concerned with the essential core responsibilities and fundamental structures of Member States.

As a result, many scholars call the claims of the Member States under the European identity clause the claims of *national constitutional identity*.[94] In that way one can signal the special constitutional meaning of the European identity clause, which goes beyond a national constitution in a strict sense but is not directly concerned with national identity in its classical, socio-cultural meaning.[95]

91 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' See also Blanke and Mangiameli (n 6) 200.

92 Armin von Bogdandy and Stephan W Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 Common Market Law Review 1417, 1427.

93 Leonard FM Besselink, 'The Persistence of a Contested Concept: Reflections on Ten Years Constitutional Identity in EU Law' (2021) 27 European Public Law 597, 602.

94 See Alcoberro Llivina and Saiz Arnaiz (n 50); 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.

95 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised edition, Verso 2016) 5.

The present research similarly applies the terminology of *national constitutional* identity. However, this is not the only view.[96] From the national German judicial perspective, the German Federal Constitutional Court (FCC) made clear that it differentiates between national and constitutional identity.[97] National identity is a matter for the CJEU under Article 4(2) TEU, whereas the FCC is the only one who can define German *constitutional* identity (*Verfassungsidentität*), which cannot be balanced against any other legal right or interest.[98] Moreover, concerning the difference between constitutional and national identity, Leonard F.M. Besselink argued in a similar fashion that due to the fact that the CJEU cannot interpret national constitutional law, the national apex courts have the top competence to determine the meaning of their *constitutional* identities, whereas the CJEU subsequently determines the meaning of *national* identity under Article 4(2).[99]

To conclude, if one simply follows the terminological distinction between national and constitutional identity in European legal discourse, that in itself does not solve any of the highlighted ambiguities. It does not help to differentiate between the legitimate and illegitimate identity claims. Moreover, due to the above-cited definitions of constitutional identity, it also does not differentiate between strictly descriptive legal constitutional features and pre-constitutional conceptions of people's bonds, aspirations and identifications. Furthermore, calling identity claims from a national perspective either national or constitutional does not affect the substantive evaluation of their foundational justification in relation to the scope of the European identity clause. Finally, the terminological differentiation does not delineate between legal and sociological matters. Some of the national apex courts as well as the European identity clause apply the word *national*, whereas the substance clearly refers to the legal and political features of a constitutional system. On the other hand, the strict meaning of the word *constitutional* unjustly restricts the scope of the European identity clause. Henceforth, focusing on the differentiation between national and constitu-

96 Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 205.

97 Giuseppe Martinico, 'Taming National Identity: A Systematic Understanding of Article 4.2 TEU' (2021) 27 European Public Law 449.

98 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, para 29.

99 Besselink, 'National and Constitutional Identity before and after Lisbon' (n 14) 10.

tional identity from the perspective of the EU only blurs and convolutes the subject matter in question.

4 Mutual Constraint between Identity and other Values and Principles

This section investigates the connection between national constitutional identity and the common and shared values under Article 2 TEU. It explores the argument that an obligation of the EU to respect national constitutional identities finds its inherent limitation in respecting shared commitments under Article 2(4.1). Moreover, it highlights the special function of identity as a general principle of EU law. It explains that identity in the said capacity functions to manage the relationship among the multilevel constitutional orders together with the other general EU principles in accord (4.2).

4.1 Protecting National Identity to Sacrifice Common European Values

The scope of the European identity clause remains relatively open and in the hands of the CJEU, which up to now has not yet seriously engaged with the respective provision beyond some rather uncoherent platitudes.[100] In other words, the normative potential of the clause is not yet exhausted. As Millet argued, the CJEU has not handled the identity clause very differently 'than cases involving derogations to free movement or other types of exceptions to EU rules provided for in secondary law'.[101] However, in the light of increasing attempts to misuse and abuse the respective clause from the national perspective of the Member States,[102] and due to the relative

100 Laurence Burgorgue-Larsen, 'A Huron at the Kirchberg Plateau or a Few Naive Thoughts on Constitutional Identity in the Case-Law of the Judge of the European Union' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013) 275.

101 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) 573.

102 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; Viktor Orbán, 'Prime Minister Viktor Orbán's Speech at the 30th Bálványos Summer Open University and Student Camp' (30th Bálványos Summer Open University and Student Camp,

indeterminacy of the clause on its own, one ought to determine at least the absolute semantic boundaries thereof from the EU's perspective; in particular, the boundaries concerning the structure of the Treaties and the EU's normative commitments. In other words, this section engages with the question of mutual coexistence between Article 2 and 4(2) TEU, and the limits thereof.[103]

Article 2 TEU highlights common European values, shared among and common to the Union and its Member States. Hence, Article 2 defines the ideological and constitutional (substantially speaking) common ground for the respective supranational cooperation. It states:

> '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.'

What is the relationship between both norms and how their mutual coexistence impact and shape the meaning and the scope of the European identity clause? To put it differently, can the EU respect national identities even if that would be at the same time at odds with the respective common values? Moreover, can a Member State claim its national constitutional identity against the values to which it is itself committed under Article 2?[104]

Contrary to some (initial) scholarly observations,[105] the respected values are not only programmatic and ideological statements; they are increasingly

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Tusnádfürdő (Băile Tuşnad), Romania, 27 July 2019) <www.miniszterelnok.hu/prime-minister-viktor-orbans-speech-at-the-30th-balvanyos-summer-open-university-and-student-camp> accessed 24 February 2023.

103 Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (n 2) 591.

104 Daniel Sarmiento, 'The EU's Constitutional Core' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration*, vol 4 (Intersentia 2013) 178. Gerhard van der Schyff, 'Constitutional Identity of the EU Legal Order: Delineating Its Roles and Contours' [2021] Ancilla Iuris 1, 6.

105 Frank Schorkopf, 'Value Constitutionalism in the European Union' (2020) 21 German Law Journal 956, 963. Christoph Möllers and Linda Schneider, *Demokratiesicherung in Der Europäischen Union* (1st edn, Mohr Siebeck 2018) 125. Christian Calliess, 'Europa Als Wertegemeinschaft – Integration und Identität durch Europäisches Verfassungsrecht?' (2004) 59 JuristenZeitung 1033. Dimitry Kochenov,

considered as justiciable and judicially enforceable legal principles, at least when further elaborated by the European legislation within the conferred competences.[106] The Treaties do not draw a strict normative distinction between these two categories of principles or values,[107] but they are slowly becoming the subject of the CJEU's deliberations.[108] While the CJEU has not fully and judicially developed all of the stated values in the said article, it has already given concrete and powerful meaning to the principles of the rule of law, democracy, solidarity, and freedom and equality, connecting them with other norms in the Treaties.[109]

Starting with the decision of the Portuguese judges, *ASJP*,[110] the CJEU stated that 'the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law'.[111] The CJEU continued this trajectory in the *Celmer*[112] decision, where it stated that 'the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'.[113]

Moreover, concerning the Polish judicial reform, the CJEU stated that the 'requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial

'On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed' (2013) 33 Polish Yearbook of International Law 145–65.

106 Tom L Boekestein, 'Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values' (2022) 23 German Law Journal 431–44.

107 Christian Calliess and Matthias Ruffert, 'EUV Art. 2 Die Werte der Union', *EUV/AEUV* (4th edn, 2011) Rn. 7-11.

108 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. Cf Giulio Itzcovich, 'On the Legal Enforcement of Values. The Importance of the Institutional Context' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 28.

109 Spieker, 'Breathing Life into the Union's Common Values' (n 108).

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

111 Ibid. para 36.

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

113 Ibid. para 48.

protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'.[114]

Finally, relating to the newly introduced regime of conditionality for the protection of the European Union budget, the CJEU recently argued that '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.'[115]

All the cited cases demonstrate the prerequisite of common basic values and principles for successful European (legal) cooperation and integration, where the competences are shared, and their delimitation remains intertwined.[116] The European supranational system designed in that way is only possible if all agents, the Union and the Member States, adhere to the same principles and values, because the character of the European legislation is not designed as a separate and parallel legal system, but rather integrated in a way that the national and supranational legislative solutions coexist. The same (national) judges carry out concurrently national and supranational law, thus having a double role. Such a system must be built on common values and principles in order to function. In other words, neither the EU nor the Member States can renounce these values and principles, because that would undermine the conditions of European integration as it stands today.

How can one resolve a constitutional dispute when a Member State claims a national constitutional identity which allegedly conflicts with the common values and principles under Article 2TEU? Can the EU respect and protect one value to lose the other?

114 Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* (*AK*) [2019] ECLI:EU:C:2019:982, para 120.

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

116 Sacha Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of Its Legislative Powers' (2015) 35 Oxford Journal of Legal Studies 55.

Considering recent case law developments,[117] as briefly stressed above, scholars argue that the European identity clause has its boundaries in the narrowly interpreted Article 2 TEU.[118] National differences must be confined within the ambit of common values. That is not a radical supposition. When the Member States joined the EU, they had to comply with and commit themselves to the Copenhagen criteria,[119] the accession conditions for the new members. As currently stipulated in Article 49(1) (first sentence) TEU, any 'European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union'. These criteria were initially established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995. They demand stability of institutions guaranteeing democracy, the rule of law, human rights and respect for, and protection of, minorities; a functioning market economy and the ability to cope with competitive pressure and market forces within the EU; the ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law; and adherence to the aims of political, economic and monetary union.[120] Consequently, all Member States committed to the common values and principles as stated above upon their accession to the Union.[121]

This view is confirmed by case law as well. AG Kokott argued in the *Pancharevo* decision:

> 'It follows from the foregoing considerations that, where the fundamental expression of national identity in accordance with Article 4(2) TEU is at issue, the Court must confine itself to a review of the limits of the

117 Laurent Pech and Dimitry Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' [2021] Swedish Institute for European Policy Studies.

118 Pietro Faraguna and Tímea D Drinóczi, 'Constitutional Identity in and on EU Terms' (*Verfassungsblog*, 21 February 2022) <https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/> accessed 24 February 2023. Faraguna, 'On the Identity Clause and Its Abuses' (n 51) 445.

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

120 Ibid.

121 Christophe Hillion, 'The Copenhagen Criteria and Their Progeny' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing 2004) 5ff.

reliance on that principle, in particular respect for the values enshrined in Article 2 TEU.'[122]

A potential claim of a Member State, that EU law disregards its national constitutional identity, which would be concurrently a deviation from the common values under Article 2 TEU, would still be possible in rare circumstances. A Member State could consciously depart from the common values, claiming that it has acquired or developed a new constitutional identity: for example, should Hungary amend its constitution in a way that would stipulate a political vision of illiberal democracy, as has been politically advocated by the current government; or de facto becoming one.

Member States cannot regress from the common values under Article 2 and then subsequently argue that they obtained a new anti-democratic or illiberal identity, which the EU has to respect. The CJEU confirmed that view in the recent *Repubblika*[123] decision, where it stated that a Member State 'cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU'.[124]

Similarly, the CJEU stated that '[o]nce a candidate country becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the Union that implements them will be respected […]'.[125] The laws and practices of Member States must continue to comply with the common values on which the Union is founded.

Finally, and most challenging, a Member State can claim that it fully commits to the common and shared basic values and principles, but argue that it understands and interprets these principles in a substantially different manner from the institutions of the EU and other Member States.

122 Case C-490/20 *Pancharevo* [2021] ECLI:EU:C:2021:296, Opinion of AG Kokott, para 101.

123 Case C-896/19 *Repubblika v Il-Prim Ministru* (*Repubblika*) [2021] ECLI:EU:C:2021:311.

124 Ibid. para 63.

125 Case Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU* [2014] ECLI:EU:C:2014:2454, para 168.

Accordingly, it argues that a subject which is allegedly incompatible with EU law, due to national constitutional identity, complies with its national idiosyncratic interpretation of the common and shared values; they are just understood and interpreted differently.[126] Adam Czarnota argued that regional understanding of the principle of the judiciary 'is going far beyond institutional guarantee of the independence of the judge in the adjudication process but is rather interpreted as the principle of organization of the judiciary, namely its self-organization and autonomy.'[127]

One example of this is the recent constitutional dispute between the Union and Poland concerning Polish judicial reform. Poland claimed that it is fully committed to the general principle of the rule of law,[128] but it is the Union which has politicized the principle according to its recent interpretation of the CJEU.[129] Moreover, the Republic of Poland and Hungary have argued in the case concerning the newly introduced regime of conditionality for the protection of the EU budget in the case of breaches of the principles of the rule of law in the Member States:[130]

> '[T]he contested regulation breaches the principles of legal certainty and legislative clarity, which are recognised as general principles of EU law,

126 Boekestein (n 106) 450. Armin von Bogdandy and Luke D Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 European Constitutional Law Review 391, 422.

127 Adam Czarnota, 'Rule of Lawyers or Rule of Law?: On Constitutional Crisis and Rule of Law in Poland', *Governance and Constitutionalism* (Routledge 2018) 61.

128 Ibid. 51: 'No doubt some consensus has been destroyed and new, tectonic movements are taking place. The outcome of these changes could be new constitutionalism in the region. This constitutionalism will be based not only on meaningless mimicking of the institutional solutions imported from the West but will be based as well on a conscious reflection upon the identity of societies in the region.' See also Adam Czarnota, 'The Constitutional Tribunal' (*Verfassungsblog*, 3 June 2017) <https://verfassungsblog.de/the-constitutional-tribunal/> accessed 24 February 2023; Adam Czarnota, '[Reforma sądów] Ruch w kierunku demokratycznego państwa prawa? Polemika' (*Kultura Liberalna*, 24 February 2017) <https://kulturaliberalna.pl/2017/02/24/polemika-demokratyczne-panstwo-prawa-czarnota/> accessed 24 February 2023.

129 Spieker, *EU Values Before the Court of Justice Foundations, Potential, Risks* (n 8) 192.

130 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] OJ L193/1.

> on the ground that the concepts in that regulation, on the basis of which a Member State may be found to have breached the principles of the rule of law, have no uniform definition in the Member States. […] in particular, that the concept of 'the rule of law', as defined in Article 2(a) of the contested regulation, reveals serious conceptual uncertainties and serious inconsistencies which could jeopardise the interpretation of EU values and lead to that regulation being applied in a way that is contrary to those values.'[131]

Although the CJEU firmly rejected that argument, the underlying question extends beyond the concrete legal dispute. As shown in Chapter 4, some reasonable disagreement concerning an appropriate interpretation of the respective principles and basic rights cannot be avoided, and is not *ab initio* illegitimate; but not when a Member State simply attempts to circumvent the common rules, as the quite straightforward example of the judicial reform in Poland demonstrated.

To conclude, there are strong normative arguments and a considerably developed judicial practice to support the presupposition that the European identity clause must be read in accord with and subject to the common values and principles stipulated under Article 2 TEU.[132] If claims of national constitutional identity cannot go beyond these values, that in itself eliminates the abusive potential of undermining identity claims, as illustrated in Chapter 3.[133] The recent case law by the CJEU, declaring Article 2 as part of the identity of the European legal order, must be read from that perspective. A national identity cannot be protected on account of European identity.

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

132 Cf Christian Calliess, 'The Transnationalization of Values by European Law' (2009) 10 German Law Journal 1367; Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549; Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart/C.H. Beck 2011) 21; Egils Levits, 'Die Europäische Union Als Wertegemeinschaft' in Thomas Jaeger (ed), *Europa 4.0?* (Jan Sramek Verlag 2018).

133 Joseph HH Weiler, 'Taking (Europe's) Values Seriously' in Rainer Hofmann and Stefan Kadelbach (eds), *Law Beyond the State* (Campus Verlag 2016); Koen Lenaerts, 'Die Werte der Europäischen Union in der Rechtsprechung des Gerichtshofs der Europäischen Union: Eine Annäherung' (2017) 21 Europäische Grundrechte-Zeitschrift 639.

While introducing the same terminology, calling Article 2 identity,[134] the CJEU strengthened that connection of mutual constraint, as confirmed in the public speech by the CJEU's president Koen Lenaerts.[135] That rightfully narrows the scope of the European identity clause, although the next Chapter 6 critically rejects the general proposition of creating identity for the EU.

4.2 National Constitutional Identity and the Other EU Principles in Accord

The identity clause is not solely complementary with the basic values pursuant to Article 2 TEU, but it has to be interpreted alongside the other general principles of EU law, most notably with the principle of equality, the principle of presumed Member States' competences,[136] and the principle of sincere cooperation. In addition, the principles of proportionality, the principle of subsidiarity, and the principle of conferral have a substantial influence on the understanding of respect of national identities.

Not just as mere rules, the principles help us to answer the question why.[137] According to Dworkin, rules stipulate answers, whereas the general nature of principles provides us with a direction for where to go without necessitating a concrete result.[138] Principles help us to understand the nature of the legal order, the logic behind its more abstract ideological commitments, and the structural milestones as to how the rules function together, as well as how to resolve their inner contradictions.[139]

134 Tímea Drinóczi and Pietro Faraguna, 'The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States' in Jurgen de Poorter et al. (eds), *A Constitutional Identity for the EU?* (TMC Asser Press 2022) (forthcoming).

135 Konferenz aus Anlass des 70-jährigen Bestehens des EuGH, 'Der EuGH und die nationalen Gerichte – Kooperation vor aktuellen Herausforderungen, Berlin (9. September 2022).

136 Barbara Guastaferro, 'Sincere Cooperation and Respect for National Identities' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order*, vol 1 (Oxford University Press 2018) 308.

137 Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' in Académie de Droit International de la Ha (ed), *Collected Courses of The Hague Academy of International Law*, vol 92 (Brill Nijhoff 1968); Juan B Etcheverry, 'An Approach to Legal Principles Based on Their Justifying Function' (2019) 32 Canadian Journal of Law & Jurisprudence 321, 321.

138 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 24.

139 See also Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2007) 29.

In general, Article 4 TEU offers an inside view into the nature of the constitutional relationship between the Member States and the Union.[140] Or to put it differently, the pluralistic, constitutional relationship between the Union and its Member States is regulated and constituted by the principles contained in Article 4 TEU. Together with the principle of identity, the cited article contains four basic principles.[141]

First, the principle of conferral. Although the said principle is redefined in the subsequent Article 5, Article 4 needs to introduce it, due to its function of regulating the *federal* relationship. Barbara Guastaferro calls it 'the principle of presumed Member States' competences',[142] which presents striking similarities with the clauses existing in some federal orders, such as the 10th amendment to the US Constitution.[143]

Second, the principle of equality. The first sentence in Article 4(2) states that the 'Union shall respect the equality of Member States'. This is not the principle of equality in EU law, but the principle of equality among the Member States as a structural EU principle. Equality of the Member States is the opposite from respect for national identity, which eventually leads to a disapplication of respective EU law. Granting an exemption just to one, although well justified, is still a differentiation or a different treatment among the Member States.[144] Accordingly, any claim of national constitutional identity should be considered in relation to its opposite principle of equality of the Member States.[145]

Finally, the principle of sincere cooperation. Accordingly, the Union and the Member States have to mutually respect, assist and carry out the tasks which flow from the Treaties. The principle of sincere cooperation is a pivotal principle which demands a constructive role from any agent and expresses the gravitational force of the EU law.[146] Where the delimitation

140 Constitution for Europe [2004] OJ C 310/1, art I-5(1): 'Relations between the Union and the Member States'.

141 Lucia S Rossi, 'The Principle of Equality Among Member States of the European Union' in Lucia S Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 25.

142 Guastaferro (n 136) 308.

143 ibid.

144 Jan Wouters and Pierre Schmitt, 'Equality Among Member States and Differentiated Integration in the EU' in Lucia S Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017).

145 Rossi (n 141) 26.

146 Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 20.

of competences due to its nature leaves room for reasonable disagreement, the Union and the Member States have to approach potential disputes according to the principle of sincere cooperation. It is a glue and a mechanism which emphasizes cooperation, compliance and complementarity;[147] and without it, it would not be possible to entrust the Member States to facilitate the objectives of the Union.[148]

The principle of sincere cooperation pushes towards closer integration, uniformity,[149] and the avoidance of discrepancies.[150] Accordingly, the Member States cannot enact domestic legislation against EU law. The CJEU established that long ago in *Costa ENEL*, stating that it would jeopardise the objectives of the EU.[151] Moreover, the principle of sincere cooperation goes hand in hand with the principle of the primacy of EU law. AG Mancini stated, in relation to the Treaty of Rome, that in the absence of specifying the primacy principle in the Treaty, the principle of loyal cooperation is a hortatory provision to the same effect.[152] It has the capacity to solve constitutional disputes if applied in a meaningful way, as the case law of the CJEU indicates as well.[153]

Henceforth, it is not a coincidence that the identity clause stands together with the principle of sincere cooperation in the same article. Many claims of national constitutional identity would have difficulties in sustaining their validity and legitimacy if meaningfully reviewed against the principle of sincere cooperation.[154]

147 Cf 23/02/2023 15:25:00

148 See also Guastaferro (n 136) 382. Eleanor Sharpston, 'Preface' in Elke Cloots, Geert De Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) viii.

149 Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403, 2416.

150 Guastaferro (n 136) 377.

151 Ibid.

152 G Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 Common Market Law Review 595, 599. See also Marcus Klamert, 'Loyalty and the Constitutionalization of EU Law', *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 70.

153 Klamert (n 152) 69–70.

154 Francesca Strumia, 'When Managed Recognition Turns into Outright Denial' (*Verfassungsblog*, 18 May 2020) <https://verfassungsblog.de/when-managed-recognition-turns-into-outright-denial/> accessed 24 February 2023; Marjan Kos, 'The PSPP Judgment of the Bundesverfassungsgericht and the Slovenian Constitutional System' (2021) 2 Central European Journal of Comparative Law 93.

Finally, the European identity clause is also shaped by the general principles of proportionality, subsidiarity and conferral. The applicability of the first principle automatically signals that national constitutional identity in EU law does not have the nature of a trump. The same as any other principle, the European identity clause must be counter-balanced against the other rights and principles as well,[155] as stated by the CJEU many times.[156] Additionally, the principle of conferral and the subsidiarity principle are crucial to keeping the competence–delimitation balance stable and within the confines of reasonable legal argumentation. The Member States must not argue identity (as ultra vires), but rather the violation of subsidiarity and conferral, should the CJEU overstep its boundaries.

To conclude, when the Member States claim their national constitutional identity against EU law under the European identity clause, one should evaluate these claims in accord with other cited principles governing the relationship between the national and supranational constitutional orders. As Guastaferro wrote, only together can they offer a full picture of how to navigate potential constitutional tensions.[157]

155 Hermann-Josef Blanke and Stelio Mangiameli, *Treaty on the Functioning of the European Union - A Commentary, Volume 1: Preamble, Articles 1-89* (Springer 2021) 189.

156 Case C-473/93 *Commission of the European Communities v Grand Duchy of Luxembourg* (*Commission v Luxembourg*) [1996] ECLI:EU:C:1996:263, para 35.

157 Guastaferro (n 136) 378.

5 Multilevel Constitutional Relations – From Engagement to Resistance

The following section explores identity claims' different degrees of cooperation and resistance. First, it starts with identity, which serves as a pre-emptive deterrence and constructive engagement (5.1). Furthermore, it analyzes identity claims which communicate open dissent and even directly exhibit resistance against CJEU and EU law (5.2). The section demonstrates that the degree of resistance does not always correspond with its success in accommodating the respective identity claims.

5.1 Deterrence and Engagement

From the functional perspective concerning multilevel constitutional relationships between the EU and the Member States, identity serves as both deterrence and engagement. The sub-section highlights both functions, and demonstrates where engagement of the national and supranational courts may find its limits.

The previous section explained the structure of Article 4 TEU and its four basic principles in navigating the relationship between the EU and the Member States, to illustrate that identity serves also as a general principle. In that sense the identity clause does not serve solely as a judicial remedy, but rather as a pre-emptive signal to avoid constitutional conflicts. Respect for national identities is directed towards all institutions and bodies in the EU.[158] According to the commentators of the European identity clause, the said principle must be taken into account by the institutions, bodies, offices and agencies of the EU as addressees 'at any stage of the decision-making processes in the EU'.[159] If the national sensibilities of the Member States were taken seriously, the majority of potential constitutional disputes could be resolved beforehand: through the adoption of less harmonized legislation in the form of a directive, via sensitive drafting of the respective provisions, or by excluding some provisions from the applicability for the

158 Pernice (n 9) 193.
159 Blanke and Mangiameli (n 155) 189.

respective Member State by individual declaration or reservation. The special status of Gibraltar, the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, or the Irish Protocol (No 35) concerning abortion are all examples of national sensibilities, recognized beforehand.[160]

Moreover, identity as deterrence to avoid constitutional conflicts comes also from the national apex courts. Many decisions by the highest national courts in relation to ratification of the Lisbon Treaty have exactly this effect – anticipating potential constitutional conflicts in order to avoid them.[161] As highlighted in Chapter 2, the German *EAW*[162] decision similarly raised awareness: reviewing EU law without ultimately declaring it as inapplicable. Deterrence of identity speaks through the words of former judge Voßkuhle, that identity review works best when it is not applied;[163] or, as some scholars put it, 'all bark and no bite'.[164]

In addition to deterrence, identity can work as engagement.[165] The Member States' apex courts can signal their considerations concerning EU law or specific interpretation of the CJEU relating to their essential or sensitive

160 Protocol on the concerns of the Irish people on the Treaty of Lisbon [2013] OJ L60/131. See also
Consolidated version of the Treaty on the Functioning of the European Union, 55. Declaration by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland [2016] OJ C202/356 or alternatively Consolidated version of the Treaty on the Functioning of the European Union, 56. Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice [2016] OJ C202/356. Consolidated version of the Treaty on the Functioning of the European Union (TFEU) Protocol (No 35) on Article 40.3.3 of the Constitution of Ireland [2016] OJ C202/320.

161 Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law Review 96, 123.

162 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015.

163 Andreas Voβkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 6 European Constitutional Law Review 175, 195: '"Emergency brake mechanisms" are most effective if they do not have to be applied. Precisely because of their existence – and not despite their existence – it has never "come to the crunch".'

164 Christoph U Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's "Banana Decision"' (2001) 7 European Law Journal 95; Niels Petersen, 'Karlsruhe Not Only Barks, But Finally Bites – Some Remarks on the OMT Decision of the German Constitutional Court' (2014) 15 German Law Journal 321.

165 Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (n 2) 595.

constitutional provisions. The preliminary reference procedure provides the perfect forum for exchange and constructive engagement.

As explained in Chapter 3, the *Taricco II*[166] decision presents a powerful example of how a constructive judicial engagement overcomes specific constitutional tensions. In the *Taricco I*[167] decision, the CJEU firstly rejected the Italian claim, arguing that Italian national courts could no longer apply national provisions on limitation periods since that would prevent Italy from effectively countering illegal activities and thus affecting the financial interests of the Union. As a response, the Italian Constitutional Court in the second preliminary reference procedure patiently explained again the specificities of the Italian (constitutional) legal system according to which the statute of limitations forms part of substantive criminal law. The Italian Constitutional Court argued that 'Article 4(2) TEU allows the national court to disregard the obligation laid down by the Court in the judgment in Taricco and Others, in so far as that obligation breaches an overriding principle of its constitutional order and, consequently, is capable of affecting the national, and in particular the constitutional, identity of the Italian Republic.'[168] And indeed, the second time the CJEU acknowledged the problem, it consequently reversed its previous decision, allowing Italy as an exception.[169]

Concerning the constructive engagement of the courts in dialogue, one is faced with the following dilemma. Does a dialogue and engagement require an equal footing, an equivalent stand? The question connects with the broader narrative of constitutional pluralism, where the constitutional systems function heterarchically.[170] The following scholarly initiative

166 Case C-42/17 *Criminal proceedings against M.A.S. and M.B.* (*Taricco II*) [2017] ECLI:EU:C:2017:936.

167 Case C-105/14 *Criminal proceedings against Ivo Taricco and Others* (*Taricco I*) [2015] ECLI:EU:C:2015:555.

168 Case C-42/17 *Taricco II* [2017] ECLI:EU:C:2017:564, Opinion of AG Bot, para 49.

169 The French case law is also an example of cooperative and constructive dialogue. Wetz (n 3) 352.

170 Neil Walker, 'Constitutionalism and Pluralism' in Matej Avbelj and Jan Komárek (eds), *The Federal Constitutional Court Rules for a Bright Future of Constitutional Pluralism* (Hart Publishing 2012) 18; Andreas Voßkuhle, 'Der Europäische Verfassungsgerichtsverbund' [2010] Neue Zeitschrift für Verwaltungsrecht 1, 1; Cf 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) 243.

highlights this dilemma and concurrently indicates the inherent limits of engagement on an equal footing.

Four constitutional judges from four Member States' jurisdictions – Austria, Germany, Slovenia and Latvia – have recently published a scholarly proposition of the reversed preliminary reference procedure.[171] They argued that the CJEU should have the possibility and duty to turn to the national apex courts when an issue at hand needs clarification from a national perspective.[172] The reversed preliminary reference procedure would in their opinion enhance the element of constructive engagement, because it would establish a true dialogue on an equal footing.[173] Justice Huber argued similarly in a newspaper interview concerning the *PSPP*[174] decision, stating that the courts 'are players on an equal footing'.[175]

The proposition is daring and has the inherent danger of undermining the fact that the CJEU alone has the competence to interpret EU law. In other words, it is an attempt to move from engagement into renegotiating the relationship between the national and supranational courts. While the judges argue for cooperation to 'reach the conclusion jointly',[176] they also stated the following:

> 'The cooperation between the constitutional courts and the CJEU […] is in fact a dialectic process in which the constitutional (and supreme) courts of the Member States will wrangle with the CJEU over the true understanding of the allocation of competences, and in which they - i.e., the constitutional (and supreme) courts - have the final say regarding the determination of their own national constitutional identity.'[177]

The presented argument is subtle but clear. Concerning national constitutional identity, the national apex courts shall have the final say. Or in the words of the authors, 'the cooperation between the constitutional courts

171 Christoph Grabenwarter et al., 'The Role of the Constitutional Courts in the European Judicial Network' (2021) 27 European Public Law 43.
172 Ibid.
173 Ibid. 57.
174 BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.
175 Wolfgang Janisch and Stefan Kornelius, 'Spieler auf Augenhöhe: Interview mit Richter Peter Michael Huber' *Süddeutsche Zeitung* (13 May 2020) <https://suddeutsche.de/politik/ezb-urteil-bundesverfassungsgericht-anleihenkaeufe-peter-michael-huber-1.4905311> accessed 24 January 2023.
176 Grabenwarter et al. (n 171) 60.
177 Ibid. 51–2.

and the CJEU in safeguarding […] the respective constitutional identity must not be a one-way street which enables the latter to enforce solely its own perceptions'.[178]

According to the cited understanding, the CJEU no longer decides on validity, proportionality and justifiability of the national claims of identity, but rather the national apex courts in a one-way street to enforce solely its own perceptions.[179] An identity claim then no longer serves as engagement, but has a rather different agenda. It aims to recalibrate the European design and the relationship between the apex courts of the Member States and the CJEU. While it is framed in a dialectic and cooperative manner, at the same time it aims to renegotiate the role of the CJEU as the interpreter of EU law. Identity is thus no longer an engagement, but rather a dissent.

5.2 Identity as Dissent and Resistance

As highlighted above, identity can serve as a tool to signal national sensibilities, or as a general principle of EU law to avoid potential future constitutional conflicts. However, identity can also undertake the role of expressing dissent and even open resistance. The following section outlines these further functions of identity as dissent and resistance.

The recent *PSPP* decision is a good example of judicial dissent and soft resistance. In the said decision, the FCC declared the CJEU's decision on *Weiss*[180] ultra vires and argued that the CJEU had overstepped its conferred competences due to its insufficient interpretation. Namely, the CJEU's argumentation was not 'tenable from a methodological perspective'[181] and 'not comprehensible and thus objectively arbitrary'.[182] Accordingly, the FCC prohibited the German Central Bank from cooperating in the actions of the European Central Bank in the form of its Secondary Markets Public Sector Asset Purchase Programme (PSPP).

178 Ibid. 51.
179 Ibid.
180 Case C-493/17 *Proceedings brought by Heinrich Weiss and Others* (*Weiss*) [2018] ECLI:EU:C:2018:1000.
181 Ibid. para 116.
182 Ibid. para 118.

As some scholars argued, the decision could be read as a plea for more transparency and accountability[183] relating to fiscal policies,[184] more democratic control by the national parliaments, and perhaps even as an incentive to the CJEU to strengthen its argumentation.[185] Yet, the scholarly discussion was far more concerned with the legal controversy and legitimacy of the said decision itself.[186] Many argued that the FCC's decision demonstrates a parochial[187] and self-absorbed view that the only acceptable application of the legal methods is to reflect German understanding of proportionality as the universal one.[188]

Furthermore, after the European Commission had launched the infringement proceeding against Germany, the matter was essentially politically resolved, and the infringement procedure closed due to the political assurance by Germany's government to respect the principles of primacy, effectiveness and uniform application of EU law, as well as the values laid down in Article 2 TEU.[189] Additionally, the government considered that 'the legality of Union institutions cannot be made subject to the examination of

183 Jakob de Haan and Sylvester CW Eijffinger, 'The Democratic Accountability of the European Central Bank: A Comment on Two Fairy-Tales' (2000) 38 Journal of Common Market Studies 393.

184 Matej Avbelj, 'The Right Question about the FCC Ultra Vires Decision' (*Verfassungsblog*, 6 May 2020) <https://verfassungsblog.de/the-right-question-about-the-fcc-ultra-vires-decision/> accessed 24 February 2023: 'The ruling warns us that we have a major constitutional problem with the constitutional role of the ECB.'

185 Isabel Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) 21 German Law Journal 1090.

186 Sven Simon and Hannes Rathke, '"Simply Not Comprehensible." Why?' (2020) 21 German Law Journal 950; Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German Law Journal 979.

187 Toni Marzal, 'Is the BVerfG PSPP decision "simply not comprehensible"?' (*Verfassungsblog*, 9 May 2020) <https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/> accessed 24 February 2023.

188 Pavlos Eleftheriadis, 'Germany's Failing Court' (*Verfassungsblog*, 18 May 2020) <https://verfassungsblog.de/germanys-failing-court/> accessed 24 February 2023.

189 European Commission, December Infringements Package, 2 December 2021. See also Deutscher Bundestag, Referat PE 2, Nr. 09/21, 'Aktueller Begriff Europa, Vertragsverletzungsverfahren gegen die Bundesrepublik Deutschland aufgrund des PSPP-Urteils des Bundesverfassungsgerichts'. Cf Matthias Ruffert, 'Verfahren eingestellt, Problem gelöst?: Die EU-Kommission und das Bundesverfassungsgericht' (*Verfassungsblog*, Dezember 2021) <https://verfassungsblog.de/verfahren-eingestellt-problem-gelost/> accessed 24 February 2023.

constitutional complaints before German courts'.[190] Finally, it has pledged to 'use all the means at its disposal to avoid, in the future, a repetition of "ultra vires" finding, and take an active role in that regard'.[191]

In comparison to *Taricco II* as active engagement and *PSPP* as dissent and soft resistance, the latest Polish decision demonstrates much more radical resistance. Quickly learning from their German peers, except in the degree of legal sophistication, the Polish unconstitutionally packed Constitutional Tribunal on 7 October 2021 declared Articles 1, 2 and 19 of the TEU (conferred competences, an ever closer Union, shared and common values and the jurisdiction of the CJEU) to be unconstitutional, if interpreted as established by the CJEU.[192] The decision not only contrasts with previous Polish case law;[193] the reasoning is unprecedented, and the reactions thereto from the whole spectrum of European observers – politicians, journalists, legal scholars[194] and (even Polish constitutional) judges[195] – demonstrate the united response of the illegitimacy of such a judicial act. In fact, the decision has been called a *Polexit*,[196] and it is a clear 'breach of the general principles of autonomy, primacy, effectiveness and uniform application of Union law and the binding effect of rulings of the Court of Justice of the European Union'.[197]

190 European Commission, December Infringements Package, 2 December 2021.

191 Ibid.

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

193 Polish Trybunał Konstytucyjny, Case K 18/04 11 May 2005.

194 Marta Lasek-Markey, 'Poland's Constitutional Tribunal on the Status of EU Law: The Polish Government Got All the Answers It Needed from a Court It Controls' (*European Law Blog*, 21 October 2021) <https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/> accessed 24 February 2023.

195 Stanisław Biernat et al., '26 sędziów TK w stanie spoczynku: wyrok z 10.03.2022 r. jest gorszącym ekscesem orzeczniczym zbliżającym nas do Rosji' (*Konstytucyjny.pl*, 13 March 2022) <https://konstytucyjny.pl/26-sedziow-tk-w-stanie-spoczynku-wyrok-z-10-03-2022-r-jest-gorszacym-ekscesem-orzeczniczym-zblizajacym-nas-do-rosji/> accessed 13 February 2023: '26 retired judges of the Constitutional Tribunal: the judgment of March 10, 2022 is a scandalous jurisprudence that brings us closer to Russia.'

196 Jakub Jaraczewski, 'Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal' (*Verfassungsblog*, 12 October 2021) <https://verfassungsblog.de/gazing-into-the-abyss/> accessed 24 February 2023.

197 Press Release 'Rule of Law: Commission Launches Infringement Procedure against Poland for Violations of EU Law by Its Constitutional Tribunal' (*European Commis-*

The decision unequivocally stated that insofar as the national 'Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application',[198] the EU primary law provisions, namely Article 1(1)(2) in conjunction with Article 4(3) TEU, are inconsistent with the provisions of the Polish Constitution (Article 2, Article 8 and Article 90(1). In other words, the Polish Constitutional Tribunal has directly rejected the principle of primacy and the established case law of the CJEU.

This example of open resistance against the EU without any constructive engagement is seen as an identity phenomenon due to its context. As stated by Jakub Jaraczewski, the case was initiated by Prime Minister Morawiecki, who issued 129-page application which 'amounted to a treatise on constitutional identity and pluralism, with a misleading bevvy of selective quotes from Polish and foreign academics writing on various aspects of separation between EU law and domestic legal orders of EU Member States. One important strand of the Prime Minister's argumentation were the multiple references to laws and constitutional court judgments coming from the other EU Member States, with the German FCC's 2020 *PSPP* judgment being most prominent.'[199] Henceforth, identity argument has been instrumentalized as a mechanism for constitutional conflicts in the capacity of constitutional resistance.

A national apex court cannot unilaterally and unconditionally declare a particular interpretation of the Treaties by the CJEU as unconstitutional.[200] The European Commission started an infringement procedure against the cited actions, and the CJEU issued a daily penalty of 1 million EUR to Poland, as it had not suspended the application of the provisions of national legislation relating, in particular, to the areas of jurisdiction of the Disciplinary Chamber of the Supreme Court, which violated the ruling of the CJEU.[201] Just recently, in July 2022, the chamber was dissolved to unlock

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sion, 22 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070> accessed 16 January 2023.

198 Polish Trybunał Konstytucyjny, Case K 18/04 11 May 2005.

199 Jaraczewski (n 196).

200 R Daniel Kelemen et al., 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order' (*Verfassungsblog*, 26 May 2020) <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/> accessed 24 February 2023.

201 Case C-204/21 R *European Commission v Republic of Poland* [2021] ECLI:EU:C:2021:878.

the frozen EU funds and end the penalties levied by the CJEU.[202] While more than 35 billion EUR as pandemic recovery funds for Poland remain frozen – until all the requirements of independence of the judiciary are fulfilled[203] – Poland demonstrated a considerable change of heart. While it is too soon to determine conclusively all the consequences of the said decision, one can say that the Constitutional Tribunal's resistance did not change the CJEU's firmly settled case law[204] on the required independence of the national judiciary as a matter of EU law under Article 19(1) TEU in relation to Article 2 TEU. Moreover, it did not shield the Polish judicial reform from European expectations and demands. Accordingly, the cited judicial resistance did not achieve the desired results, despite the confrontational level of resistance.

To conclude, identity can serve as a confrontational argument of dissent and resistance by the national apex courts against the CJEU. The above-cited examples demonstrate various degrees of dissent and resistance in the name of identity. However, these are by no means the only examples of national judicial resistance. One can find similar patterns in the past, starting with the famous *Solange I* decision, as demonstrated in Chapter 2, but also decisions such as the Lithuanian *Runevič-Vardyn*,[205] the Danish *Ajos*,[206] the Czech *Slovak Pensions*,[207] the Hungarian *Refugee Allocation*[208] decision, and others.[209] This sub-section has demonstrated how the intensity of resistance

202 Pawel Marcisz, 'A Chamber of Certain Liability' (*Verfassungsblog*, 31 October 2022) <https://verfassungsblog.de/a-chamber-of-certain-liability/> accessed 24 February 2023.

203 Wojciech Sadurski, 'The Disciplinary Chamber May Go – but the Rotten System will Stay' (*Verfassungsblog*, 11 August 2021) <https://verfassungsblog.de/the-disciplinary-chamber-may-go-but-the-rotten-system-will-stay/> accessed 24 February 2023.

204 Case C-64/16 *ASJP* [2018] ECLI:EU:C:2018:117; Sébastien Platon and Laurent Pech, 'Judicial Independence under Threat:The Court of Justice to the Rescue in the ASJP Case' (2018) 55 Common Market Law Review 1827.

205 Case C-391/09 *Runevič-Vardyn* [2011] ECLI:EU:C:2011:291, paras 84, 86.

206 Danish Højesteret, Case 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A* (*Ajos*) 6 December 2016.

207 Czech Ústavní Soud, Case Pl. ÚS 5/12 *Slovak Pensions* 31 January 2012.

208 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, para 66.

209 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (*Egenberger*) [2018] ECLI:EU:C:2018:257; Martijn van den Brink, 'When Can Religious Employers Discriminate? The Scope of the Religious Ethos Exemption in EU Law' (2022) 1 European Law Open 89, 90. The *Egenberger* saga still awaits for its final chapter. The CJEU's decision has been challenged via constitutional complaint

in the name of identity is not necessarily directly proportional in relation to the desired result.

in front of the BVerfG, allegedly violating the German constitutional identity and going ultra vires.

6 Multifarious Identity Functions

Identity has a further multitude of functions,[210] most notably its sociological or pre-constitutional aspect, which allegedly define the respective community (6.1). This section explores how these majoritarian and imagined narratives enter the classical constitutional adjudication and impact on the full realization of individual fundamental rights, at odds with liberal constitutional commitments (6.2). Additionally, it shows how the said *identitarian adjudication* consolidates illiberal trajectories, as evident examples beyond the EU explicitly indicate (6.3). Finally, it highlights how the opposite view, the narrow strictly legal understanding of national constitutional identity, merely as the core of a constitution, has its own inconsistencies. The said understanding and application of identity has little value if it is applied against the EU, which shares the same common values and principles as the said identity protects (6.4).

6.1 Identity as a Pre-Constitutional Conception to Define the Community

A national state presupposes a nation (or nations) as a prerequisite. Where the states have been artificially created by the colonial and imperial drawing of lines, that often resulted in unstable communities.[211] After all, every state collects and distributes its economic means and thus requires a certain level of solidarity among its members. This is even more important in relation to democratic self-governing processes, which require dialogue, mutual respect and eventually compromises among the various interests.

As stressed above, belonging and interconnectedness are usually designated as national identity.[212] National identity in this sense denotes a relative cohesive entity which is represented, connected and shaped by a distinctive language, history, traditions and culture. The identity of a

210 Thomas Wischmeyer, 'Nationale Identität Und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven' (2015) 140 Archiv des öffentlichen Rechts 415, 418.

211 Parker Shipton, 'Relationships between Ethnicity and Stability' in Frances Stewart et al. (eds), *Ethnic Diversity and Economic Instability in Africa: Interdisciplinary Perspectives* (Cambridge University Press 2012).

212 Hobsbawm (n 58) 14; Anderson (n 95).

particular society is then translated into a constitutional framework. The specific language or languages become the official languages of a state. The preambles often speak about the common elements of national identity which reflect and further fortify the cohesiveness and identity of the respective communities or states.

National identity can be seen as a pre-constitutional prerequisite to create a political entity, but it can also continue to exist within the respective community even after the community is legally constituted into its political form. Moreover, it can refer to the identity of majority or to specific minorities within the state. Accordingly, what is the legal and constitutional significance of national identity, given its undeterminable features? Additionally, does identity still shape the legal contours, and how is that notion at odds with a liberal understanding of constitutionalism, properly so called?

The Slovenian Constitution in its preamble speaks about the creation of the state 'from the historical fact that in a centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood'.[213] The Croatian Constitution similarly states: 'The millenary identity of the Croatian nation and the continuity of its statehood, confirmed by the course of its entire historical experience within different forms of states and by the preservation and growth of the idea of a national state, founded on the historical right of the Croatian nation to full sovereignty.'[214] Both examples presuppose national identity in a political sense as a pre-constitutional element, regardless of and in addition to the current political form.

At the same time, nation states conversely apply the terminology of national identity in their constitutions also in relation to minorities. The Irish Constitution states that it is the 'will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions'.[215] The Slovenian Constitution includes a similar statement in relation to the special rights of the autochthonous Italian and Hungarian national communities, guaranteeing 'the right to use their national symbols freely and, in order

213 Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13 and 75/16, Preamble.

214 The Constitution of the Republic of Croatia, Official Gazette of the Republic of Croatia, No. 41/01 of May 7, 2001, 'Narodne novine' No. 55 of June 15, 2001.

215 Constitution of Ireland, Enacted by the People 1st July, 1937, In operation. As from 29th December, 1937, art 3(1).

to preserve their national identity, the right to establish organisations and develop economic, cultural, scientific, and research activities'.[216] Along the same lines the Constitution of Montenegro includes Article 79: Protection of identity, referring to 'persons belonging to minority nations and other minority national communities' and entitles them to the right to publicly exercise and develop their national, ethnic, cultural and other particularities, language, symbols, associations, etc. The Romanian Constitution similarly states, in Article 6 Right to identity, that the state recognizes and guarantees national minorities 'the preservation, development and expression of their ethnic, cultural, linguistic and religious identity'.[217] Similar provisions can be found in many other constitutions.[218]

While these provisions are mainly political statements, there is a risky tendency to ascribe to them some legal relevance. The following two judgements from Lithuania exemplify these tensions, at odds with a liberal understanding of political entity in the sense of Schmittian pre-constitutional understanding.

After the Republic of Lithuania restored its independence, overtaken by the USSR in 1940, the Constitutional Court of Lithuania wrote in one of its judgements on the constitutional continuity of the previous and current state of Lithuania: '[I]t is obvious that not only the continuity of the State of Lithuania, but also the identity thereof is upheld.'[219] The identity argument above was used to indicate the identity of Lithuanian society beyond the formal or legal parameters of the state.

In another Lithuanian example, the Lithuanian Constitutional Court defined its language and identity as follows: '[T]he Lithuanian language is a special constitutional value, it is the basis of ethnic and cultural distinction of the Lithuanian nation, the guarantee of the identity and survival of the nation; the Lithuanian language protects the identity of the nation, integrates the civil society, ensures the integrity and indivisibility of the state,

216 Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13 and 75/16, art 64(1).

217 Constitution of Romania, The Official Gazette of Romania, Monitorul Oficial, Part I, No. 233 dated 21 November 1991, art 6(1).

218 The Constitution of The Republic Of Poland of 2nd April, 1997, published in Dziennik Ustaw No. 78, item 483, art 35(2).

219 Lithuanian Respublikos Konstitucinis Teismas, Case 102/2010 *State Pension* 22 February 2013.

the normal functioning of state [...].'[220] This example exhibits once more that identity here refers to distinctive ethnic and cultural elements of the Lithuanian nation.[221] It serves to describe the community as a whole under the common denominator of identity, whereas language here constitutes just one element of this ethnic identity, purportedly a prerequisite for the survival of the nation and consequently the state.

One must be cautious when identity here denotes a homogenous society, in order to *legally* justify a particular political decision.[222] As history shows, the parallels of Schmittian legal observations and the politics of German national socialism must not be dismissed as a mere coincidence.[223] Whereas national identity presupposes a coherent narrative, a liberal and free society based on freedom of expression will never be able to articulate one common and coherent account. The creation of one narrative necessarily endangers the pluralistic nature of a society, and could facilitate autocratic tendencies.[224] For every minority and every individual who does not fit into the majoritarian imagination of the common national identity is by definition excluded. Accordingly, when identity takes on the meaning of a pre-constitutional society and claims legal relevance, it may stand at odds with liberal constitutional commitments and the protection of individual and minority rights, as the following sub-section reveals.

220 Lithuanian Respublikos Konstitucinis Teismas, Case 14/98 *Name Spelling* 6 November 2009.

221 See also Laurianne Allezard, 'Identité(s) et Droit Constitutionnel' (These de doctorat, Université Clermont Auvergne 2021) 135 <https://www.theses.fr/2021UCFAD009> accessed 24 February 2023.

222 Kovács (n 4) 1712.

223 Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press Books 2008) 141.

224 R Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies 59, 61.

6.2 *Identity as a Constitutional Argument* – Identitarian Adjudication

Identity argument is not only a federative tool to manage multilevel constitutional conflicts,[225] national claims against the application of EU law,[226] or a general principle of EU law,[227] but also it operates domestically within a constitutional system. This sub-section illustrates how national constitutional identity influences national constitutional adjudication concerning fundamental rights. Consequently, a simplified majoritarian understanding of national constitutional identity can lead to constitutional disputes where the interests of the majority trump the rights of minorities and individuals.

The following case in Latvia[228] demonstrates the role of identity argument within the national constitutional adjudicative practice. According to the Latvian statute concerning the national flag,[229] citizens were obliged to place the Latvian flag on residential buildings on certain days of festivities and mourning. The provision included an administrative sanction for non-compliance with the respective obligation. An applicant challenged this provision, claiming that it violated her constitutional (negative) right to freedom of expression, which included the right to freely receive, keep and distribute information and to express her views. The Constitutional Court of the Republic of Latvia recognized that the respective obligation restricted the applicant's freedom of expression, but noted that the restriction was justifiable and necessary for the benefit of public interest. The national flag as the symbol of state was of great importance in creating and consolidating awareness of statehood. The respective obligation consolidated this awareness and therefore also the democratic Republic of Latvia. The Court stated:

225 Luke D Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts' (2020) 57 Common Market Law Review 361, 380.

226 Wischmeyer (n 210) 427.

227 Pernice (n 9) 193.

228 Latvian Satversmes tiesa, Case 2015-01-01 *Flag of Latvia* 2 July 2015.

229 Law on the National Flag of Latvia, Section 7:
(1) The national flag of Latvia shall be placed on public buildings, buildings of legal persons governed by private law and associations of persons, as well as on residential buildings, on 1 May, 4 May, 21 August, 11 November and 18 November.
(2) The national flag of Latvia in mourning presentation shall be placed on public buildings, buildings of legal persons governed by private law and associations of persons, as well as on residential buildings, on 25 March, 14 June, 17 June, 4 July and on the first Sunday of December.

> 'The Latvian national flag as a symbol of the state is also an integral element in the constitutional and international identity of the Latvian state. The obligation to place the Latvian national flag on residential buildings strengthens the awareness of statehood and, thus, also the democratic Republic of Latvia, where fundamental rights can be effectively exercised. Stable awareness of the statehood shows that citizens perceive their state as a value per se, and such awareness of the statehood can develop only under democracy, when citizens can freely express their views.'[230]

The Court annulled the administrative sanction as inadmissible and not proportional, but found the respective obligation compliant with the Latvian Constitution.[231] The Court was balancing a negative aspect of the individual right to freedom of speech against the public interest: specifically, the consolidation of awareness of statehood through the obligation to raise the national flag as the symbol of state that should protect Latvia's democratic state order.[232] Furthermore, the flag was perceived as a national constitutional identity which had the role of strengthening the democratic state order. Additionally, the Court implied that only an awareness of statehood and belonging to the state as such enables and facilitates liberal commitments such as the protection of fundamental rights.

Another example of national identity argument against individual rights in a domestic framework is illustrated by the scholarly lecture by the president of the Hungarian Constitutional Court, Dr. Tamás Sulyok at an international conference in 2018 titled 'Universal Human Rights and National Identity'. In his speech Sulyok raised the question 'when do individual rights prevail and when do we have to give priority to national identity'. He argued that human rights violations can be justified in the name of national or constitutional identity, subject to certain conditions. He stated:

> 'The protection of human rights must be guaranteed not only at the individual level [but] we must respect national identity in cases where the normative acts of the EU affect such attributes of human beings with

230 Latvian Satversmes tiesa, Case 2015-01-01 *Flag of Latvia* 2 July 2015, para 15.2.

231 The Court made an unusual distinction between the norm and its enforcement. It is odd that the Court found the respective obligation compliant with the constitution, yet it refused the possibility of enforcing this provision.

232 Latvian Satversmes tiesa, Case 2015-01-01 *Flag of Latvia* 2 July 2015, para 16.4.

> equal dignity who have no or little choice and will be bound by the decision in such cases (concerning ethnicity, religion or history).'[233]

The tendencies of *identitarian adjudication* can hinder the full realization of individual fundamental rights.[234] Identity is presented as a new constitutional argument which stands on an equal footing with other fundamental rights, although its legal nature and purpose fundamentally differ from fundamental rights. In that way it introduces majoritarian argumentation into liberal adjudication through the back door.

6.3 Identitarian *Adjudication Beyond the EU*

The significance of the following example from the Russian Federation is twofold. First, it once again demonstrates the inherent tensions between fundamental rights and national constitutional identity, indicating how identity argument limits the protection of individual rights. Second, it indicates the trajectory of liberal decline in relation to international legal orders. In other words, identity argument is the perfect tool for autocratic tendencies,[235] because it comprises three functions in one: it entails the mystical narrative of national exceptionalism;[236] it is a legal concept, which makes it legitimate and more objective; and finally, it has the power to yield the entrance of international law into the domestic system, thereby detaching it from external scrutiny.[237]

The lack of democratic features and mutual checks and balances in the Russian Federation are currently well known. Other consequences of the long trajectory of democratic decline are the changes to the Russian Consti-

233 Constitutional Court of the Slovak Republic, International Conference 'Constitutional Justice: Challenges and Perspectives' on the occasion of the 25th Anniversary of the Constitutional Court of the Slovak Republic, Slovakia, Košice, 10 April 2018, Tamás Sulyok, Universal Human Rights and National Identity.

234 E.g., Latvian Satversmes tiesa, Case 2005-02-0106, 14 September 2005, para 15.3.

235 R Daniel Kelemen and Laurent Pech, 'Working Paper: Why Autocrats Love Constitutional Identity and Constitutional Pluralism' (Reconnect 2018) 17.

236 Julian Erhardt, Steffen Wamsler and Markus Freitag, 'National Identity between Democracy and Autocracy: A Comparative Analysis of 24 Countries' (2021) 13 European Political Science Review 59.

237 Cf Dimitry Vladimirovich Kochenov and Petra Bárd, 'The Four Elements of the Autocrats' Playbook' (*Verfassungsblog*, 18 September 2018) <https://verfassungsblog.de/the-four-elements-of-the-autocrats-playbook/> accessed 24 February 2023.

tution in 2020,[238] and the current war in Ukraine following the military invasion in February 2022, unprecedented in Europe since the Second World War, in blatant violation of international law.[239]

However, the Russian Federation did have an epoch of engaging with liberal values. As a member of the Council of Europe, it often struggled with the judgements of the European Court of Human Rights.[240] The following shows how the identity argument helped the Russian Constitutional Court to contest the enforceability of the ECtHR's judgements and redefine the relationship between the European Convention on Human Rights (ECHR) and national constitutional law; in other words, how the identity argument relativized the commitment and obligation to respect international human rights and its binding case law.

In the case of *Anchugov and Gladkov v. Russia*,[241] when the ECtHR declared Russia's automatic and non-discriminatory prohibition of prisoners' voting rights disproportionate and in violation of Article 3 of the Protocol 1 of the ECHR, the Russian Constitutional Court declared the ruling as not enforceable.[242] The Russian Constitutional Court stated:

> 'The participation of the Russian Federation in any international treaty does not mean giving up national sovereignty. Neither the ECHR, nor the legal positions of the ECtHR based on it, can cancel the priority of the Constitution. Their practical implementation in the Russian legal

238 Jakub Sadowski, 'Amendments of 2020 to the Russian Constitution as an Update to Its Symbolic and Identity Programme' (2022) 35 International Journal for the Semiotics of Law 723, 723; Lauri Mälksoo, 'International Law and the 2020 Amendments to the Russian Constitution' (2021) 115 American Journal of International Law 78, 84; William Partlett, 'Russia's 2020 Constitutional Amendments: A Comparative Analysis' (2021) 23 Cambridge Yearbook of European Legal Studies 311, 316.

239 Ingrid (Wuerth) Brunk and Monica Hakimi, 'Russia, Ukraine, and the Future World Order' (2022) 116 American Journal of International Law 687, 688.

240 Anatoly I Kovler, 'Russia: European Convention on Human Rights in Russia: Fifteen Years After' in Ineta Ziemele and Iulia Motoc (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge University Press 2016) 351ff. Sergey Marochkin, 'ECtHR and the Russian Constitutional Court: Duet or Duel?' in Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press 2017) 93ff.

241 *Anchugov and Gladkov v Russia* App no 11157/04 and 15162/05 (ECtHR, 9 December 2013).

242 Russian Конституционный суд, Case 12-П/2016, 19 April 2016.

> system is only possible through recognition of the supremacy of the Constitution's legal force.'[243]
>
> 'The effectiveness of norms of the Convention for the Protection of Human Rights and Fundamental Freedoms in the Russian legal order in many respects depends on the respect of the European Court of Human Rights for the national constitutional identity.'[244]

Wischmeyer lucidly wrote, 'one who says identity, means sovereignty and remains mentally in the era of statehood'.[245] The Russian Constitutional Court created a condition to respect human rights only if these obligations did not violate Russian national constitutional identity as defined by the respective court. This understanding of identity, although not limited to the Russian Federation, is even more vividly expressed in the writings of the current Chair of the Constitutional Court of the Russian Federation, Valery Dmitrievich Zorkin. In his book *Legal Path of Russia* he dedicated one chapter to the constitutional identity of Russia, where he wrote:

> 'The constitutional identity as a concept means the essence (ethos) of the nation-state in the sociocultural context of regularities and specificities of the country's historical development expressed primarily in the fundamentals (principles) of the constitutional system. The concept of national constitutional identity allows to determine the most significant provisions of the Constitution and the national legal order based on them serves as deterrent, a legal obstacle to unpredictable activist expansion of supranational regulation.'[246]

Behind this understanding of national constitutional identity, one can unequivocally observe the relativization of human rights in the name of com-

243 Lauri Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-П/2015' (2016) 12 European Constitutional Law Review 377, 383. Maria Smirnova, 'Russian Constitutional Court Affirms Russian Constitution's Supremacy over ECtHR Decisions' (*UK Constitutional Law Association*, 17 July 2015) <https://ukconstitutionallaw.org/2015/07/17/maria-smirnova-russian-constitutional-court-affirms-russian-constitutions-supremacy-over-ecthr-decisions/> accessed 24 February 2023.

244 Opinion 832/2016 'Russian Federation Judgmenet No. 12-П/2016 of 19 April 2016 of the Constitutional Court, Venice Commission (Strasbourg, 6 May 2016)' [2016] CDL-REF(2016)033, 5.

245 Wischmeyer (n 210) 427.

246 Valery Zorkin, *Legal Path of Russia* (Norma Publishing House 2019) 252.

munal values and the critique of the 'Western' rights of the individual.[247] The relativization is evident in his further observation:

> 'In the West, the common good has traditionally been viewed as a condition for the good of each individual. […] But in the Russian cultural matrix the concept of the common good has always occupied a much more significant place. […] human and civil rights and freedoms may be limited by law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State. Thus according to the Constitution, it is not only the rights of others, but also constitutional values that can be designated as values of the common good that serve as the basis for restricting human freedom. Our society's understanding of these specific values is the main semantic content of the concept of constitutional identity of the people and the state.'[248]

Zorkin understands the protection of fundamental rights as subject to other majoritarian and self-ascribed values. The doctrine of national constitutional identity has a significant role in justifying limitations of fundamental rights. He goes so far as to write that 'minority rights can be protected to the extent that the majority agrees'.[249]

As already indicated above, the tacit interconnectedness between national identity and constitutional identity is constantly present.[250] In other words, the pre-constitutional elements at odds with liberal principles are continuously entailed in the legal reasoning concerning constitutional identity.[251] What is more, the argument of national constitutional identity directly justifies violations of individual rights.[252] It introduces into the constitutional adjudication the extra-legal arguments of majoritarian self-perception, developed from the historical, cultural and social self-image

247 Mikhail Antonov, 'Philosophy behind Human Rights: Valery Zorkin vs. the West?' in Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press 2017).

248 Zorkin (n 246) 253.

249 Ibid. 254.

250 Fabbrini and Sajó (n 15) 465.

251 Joseph HH Weiler, 'Der Staat "über Alles" Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts' (Jean Monnet Chair 1995) 7.

252 *Anchugov and Gladkov v Russia* App no 11157/04 and 15162/05 (ECtHR, 9 December 2013).

as determined by the respective courts. Such a normative constitutional framework departs considerably from the essence of the universal protection of human rights and liberal constitutionalism, properly so called. Accordingly, one should acknowledge the trajectory of constitutional development connected with *identitarian adjudication* as described above. The Member States within the EU are not immune from illiberal backsliding under the auspices of national constitutional identity.[253]

6.4 Protecting the Core of the Constitution

As demonstrated in Chapter 2, many Member States' national apex courts understand national constitutional identity as the core of their constitutions, their national constitutional essentials. This sub-section demonstrates how raising the argument of national constitutional identity does not correlate with whether the Member States have specific constitutional provisions concerning unconstitutional constitutional amendments[254] or whether the concept of national constitutional identity follows solely from their established judicial practice. It further illustrates how the national apex courts enjoy relative leeway concerning the intensity and absoluteness of their respective identity reviews.

Eight Member States have a specific constitutional provision which sets the limit to a constitutional change, usually called an eternity clause. These are Germany, Italy, France, Czech Republic, Greece, Portugal, Romania and Cyprus.[255] Moreover, some Member States additionally developed constitutional doctrines which set ultimate conditions to EU law in order to protect these essentials. For example, according to the Italian *controllimiti*[256] doctrine, the Italian Constitutional Court safeguards that the EU

253 R Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies 59, 67; Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.

254 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2019) 236ff.

255 Spieker, 'Framing and Managing Constitutional Identity Conflicts' (n 225) 361–398.

256 See i.e. Alessandro Bernardi, *Controlimiti: Primato delle norme europee e difesa dei principi costituzionali* (Jovene, 2017), 91ff.

respects the 'fundamental principles of our constitutional order'.[257] The Court developed the doctrine further in relation to fundamental rights interpretations, as illustrated by Martinico and Repetto.[258] Additionally, the German doctrine of the eternity clause was described in Chapter 2. Accordingly, the FCC has the right to review EU law via identity and ultra vires review.

Furthermore, Hungary and Poland have developed a constitutional review which aims to protect a constitutional core or constitutional essentials despite the absence of any specific constitutional provision.[259] Conversely, among eight Member States with an eternity clause, only four have actually juridically developed constitutional identity review mechanisms.[260]

The examples indicate that the right to conduct a judicial review of EU law in the name of national constitutional identity or to protect the constitutional essentials is not necessarily conditional on the existence of specific provisions in the national constitutions. National constitutional identity as a normative argument alone can serve as justification to protect a constitutional core without a specific constitutional norm which authorizes such limitation.

The typology of national constitutional identity review by the national apex courts differs considerably, as demonstrated by Spieker.[261] He differentiated between soft and hard conflicts[262] (absolute and relative constitutional limitations) concerning identity review on the one hand, and the universality and idiosyncrasy of constitutional principles on the other.

Protection of core constitutional commitments is plausible and normatively desirable. However, in the light of common values under Article 2

257 Italian Corte Costituzionale, Case 183/1973 *Frontini* 27 December 1973; Italian Corte Costituzionale, Case 170/84 *Granital* 8 June 1984.

258 Giuseppe Martinico and Giorgio Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath' (2019) 15 European Constitutional Law Review 731.

259 See also Joël Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the" German Model"' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration*, vol 4 (Intersentia 2013) 250–54.

260 Spieker, 'Framing and Managing Constitutional Identity Conflicts' (n 225) 376.

261 Ibid. 374.

262 See e.g. Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14 International Journal of Constitutional Law 411, 431.

TEU, when it is directed towards EU law, it no longer serves its purpose. Protecting core commitments is necessary only when it is directed towards an entity with different core commitments. Accordingly, when the Member States protect their core commitments against the Union, as explicated in Chapter 4, what they really do is protect their concrete interpretations of these core commitments, what can no longer be subsumed under the same constitutional category.[263]

263 See also Monica Claes, 'National Identity and the Protection of Fundamental Rights' (2021) 27 European Public Law 517, 535.

7 Identity Protagonists

The following section raises the *who* question. Apart from creating meaning and role of identity claims in the hands of the courts (7.1), the section further investigate the potential agents of national constitutional identity. In light of the genuine meaning of the European identity clause, the legislator has a decisive role to define the national fundamental structures and essential functions. However, when the courts declare a subject matter as national constitutional identity, the legislator finds itself in a precarious position. It remains unclear how much the legislator remains bound by the courts' proclamation of the respective matter as national constitutional identity, and whether it can challenge the court on the matter (7.2). Moreover, the executive concurrently develops the meaning of national constitutional identity. For one, governments as interveners may, and frequently do, submit their observations, among other things, also concerning national constitutional identity in the preliminary proceedings. Moreover, politicians like to apply identity terminology for their own political reasons, sometimes even engaging with the courts to strengthen their views on national constitutional identity (7.3). Finally, legal scholarship is an important agent in facilitating the pertinence of national constitutional identity. One should not overlook their role in shaping and creatively constructing the meaning of national constitutional identity (7.4).

7.1 The Courts

As is clear by now, the national apex courts are the main driver for developing and determining the meaning and scope of national constitutional identity. Chapter 2 scrutinized the German FCC's case law,[264] while Chapter 3 highlighted several other national decisions concerning national

264 BVerfGE 37, 271 *Solange I* 29 May 1974, BVerfGE 73, 339 *Solange II* 22 October 1986, BVerfGE 89, 155 *Maastricht* 12 October 1993, BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016, BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014, BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015, BVerfG, 2 BvR 1685/14 *Banking Union* 30 July 2019, BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

constitutional identity as determined by the national apex courts.[265] This sub-section investigates whether the courts ought to be the only identity protagonists; and if not, why not?

One way to look at this query is to see the national apex courts as the only agents with the competence to interpret a constitution. Consequently, if one understands national constitutional identity as a constitutional concept which is inherent to a constitution, the national apex courts are the only agents who can define, deduce or interpret the meaning of a national constitutional identity.[266] Considering that national constitutional identity goes beyond the basic constitutional commitments, shared among the Member States and the EU, the national apex courts determine concrete expressions and interpretations of constitutional norms. While national constitutional courts usually balance two or more conflicting rights in a concrete case, determination of the concrete meaning of national constitutional identity derived from the general principles *in abstracto* is a different type of judicial task. Because the national apex courts do not have a transparent and common methodology for how to determine highly general principles as concrete expressions of national constitutional identity,[267] the results differ considerably[268] and are prone to critique.

De Boer argued that judicial determination of these essential abstract principles leaves too much room for reasonable disagreements, referring to arguments by Waldron and Bellamy concerning the constitutional review of fundamental rights.[269] Accordingly, he suggested that it should be the national legislator who would resolve these reasonable disagreements and

265 Czech Ústavní Soud, Case Pl. ÚS 5/12 *Slovak Pensions* 31 January 2012, Danish Højesteret, Case Ugeskrift for Retsvæsen 1998.800H [1998], French Conseil Constitutionnel, Decision 2004-505 DC *Constitutional Treaty* 19 November 2004, Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010, Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, Danish Højesteret, Case 15/2014 *Ajos* 6 December 2016, Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021.

266 Armin von Bogdandy and Stephan W Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 Common Market Law Review 1417, 1430.

267 Spieker, 'Framing and Managing Constitutional Identity Conflicts' (n 225).

268 von Bogdandy and Schill (n 92) 1440.

269 Nik de Boer, 'Karlsruhe's Europe and the Politics of National Constitutional Identity Review', *Judging European Democracy The Role and Legitimacy of National Constitutional Courts in the EU* (Oxford University Press 2023) (forthcoming).

politically co-determine the meaning and scope of national constitutional identity as derived from general constitutional principles.[270]

In addition, the essential protagonist of national constitutional identity is also the CJEU. Although without the competence to define the meaning of national constitutional identity according to national constitutions, it is the only agent to decide on the effectiveness of domestic identity arguments; at least, when we are examining identity concept in relation to and within the scope of the European Union. When the CJEU accepts a national identity claim, the subject matter inevitably becomes recognized as identity. In that way the claims of national constitutional identity *become* identity, legitimized by the CJEU.

It is clear that the mere proclamation of the subject matter as national constitutional identity, despite the fact that it may cover an unchangeable core of a constitution, cannot suffice for a Member State to be exempt from common EU rules. The national constitutional identity argument must be balanced against all the other rules and principles at hand, and only if proportionality allows may the matter be potentially resolved in favour of protection of national constitutional identity.[271]

The CJEU has not yet developed any meaningful doctrinal framework to deal with claims of national constitutional identity.[272] The review of existing case law, where the CJEU has been faced with the argument of national (constitutional) identity and where the CJEU has granted an argument of identity the strength and legitimacy to justify an exception from the unified application of EU law, indicate an inadequate level of predictability, clarity and coherence.[273] Several attempts by legal scholars in the last decade have similarly failed to provide an account which would either explain or help with a navigation of the CJEU and its identity decisions.[274] While the CJEU does not adhere to the rather narrow textual boundaries of Article 4(2)

270 Ibid.

271 Koen Lenaerts and José A Gutiérrez-Fons, 'A Constitutional Perspective' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) 111.

272 Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (n 2) 571. Robbert Bruggeman and Joris Larik, 'The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity' (2020) 35 Utrecht Journal of International and European Law 20, 31.

273 Fabbrini and Sajó (n 15) 470. Burgorgue-Larsen (n 100) 304.

274 See Bosko Tripkovic, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017); Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press

TEU, for example referring to the issues of language, completely absent from the cited article,[275] it has also not risen to the grand hopes of the proponents of constitutional pluralism who saw identity provision as the key to and door between national plurality and supranational harmonization.[276]

Finally, the CJEU itself recently invented the identity of the European legal order.[277] According to numerous scholarly appeals,[278] the CJEU stated that 'Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, 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'.[279] The subsequent Chapter 6 will critically engage with the attempt to create constitutional identity for the EU. Here it must suffice to say that the CJEU explained no better than the national apex courts how and according to what methodology it arrived at this conclusion.

7.2 The Legislator

What is the role of a legislator in determining national constitutional identity? The dilemma is the following. If national constitutional identity denotes unchangeability in relation to EU law based on the principle of primacy, then the legislator cannot change it, via constitutional amendment or statute, after the national constitutional court were to declare it part

2019); Spieker, 'Framing and Managing Constitutional Identity Conflicts' (n 225); Scholtes (n 10).

275 Case C-391/09 *Runevič-Vardyn* [2010] ECLI:EU:C:2010:784, Opinion of the AG Jääskinen, para 80.

276 E.g. François-Xavier Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (Lextenso editions et Karine Roudier 2013) 239–56.

277 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232. See also Jurgen de Poorter et al. (eds), *A Constitutional Identity for the EU?*, vol 4 (TMC Asser Press 2022) (forthcoming).

278 van der Schyff (n 104). Sarmiento (n 104) 177. Titutional identity
Wojciech Sadurski, 'European Constitutional Identity?' (European University Institute 2006) Working Paper <https://cadmus.eui.eu/handle/1814/6391> accessed 13 February 2023.

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

of national constitutional identity.[280] However, if national identity can be changed by a legislator even after it is declared an identity by the respective court, then the court cannot effectively protect it against EU law.[281] Accordingly, it would also make little sense to even declare a respective constitutional norm as national constitutional identity if the respective subject matter can always be changed by a legislator.

From the European perspective, national constitutional identity does not need to be an unchangeable constitutional matter.[282] As highlighted above, Article 4(2) TEU refers to fundamental structures and essential functions of the Member States. These structures and functions are subject to democratic self-governance and change. The Member State's legislature is free to modify the rules concerning elections, political institutions and essential functions. If not provided otherwise, according to domestic constitutional rules, Member States can create new federal or regional structures, abandon constitutional monarchy, adopt new ways for political parties to be organized. The limits concerning potential change are only the basic commitments to protect human rights, democracy and the principle of rule of law,[283] in compliance with existing EU law. Hence, according to the EU's perspective, it is (also) the legislative branch which essentially determines the national constitutional identity of Member States as it follows from their political and fundamental structures. A legislature does not usually call this national constitutional identity. For example, Ireland defined its limits concerning abortion rights in its Constitution, and together with Malta[284] they both negotiated a Protocol on the Treaty of Lisbon to reassure them that EU law would not interfere with these policies.[285] However,

280 Some scholars have observed that in the *Tarico II* decision, after the CJEU recognized the statute of limitation as Italian national constitutional identity, the legislator faced the problem of amending these norms in the light of European rules, now proclaimed as identity and thus allegedly unchangeable.

281 Roznai (n 254) 105.

282 de Witte (n 81) 561.

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

284 Protocol No 7 on abortion in Malta [2013] OJ L 236/947.

285 Protocol on the concerns of the Irish people on the Treaty of Lisbon [2013] OJ L 60/131. See also Consolidated version of the Treaty on the Functioning of the European Union (TFEU) Protocol (No 35) on Article 40.3.3 of the Constitution of Ireland [2016] OJ C202/320.

Ireland eventually change its Constitution concerning abortion rights.[286] This exemplifies how the legislature can define and re-define constitutional identity without interference from the courts and without specifically calling it identity either.

Another example is the Hungarian attempt to enact the seventh amendment to the new Hungarian constitution, which explicitly mentioned constitutional identity.[287] At the end of the day, the amendment has not been adopted due to lack of political support.[288]

Accordingly, the legislative branch additionally controls and potentially shapes the meaning of national constitutional identity. However, if the legislative branch can always change the identity of the national constitution, the value of identity in relation to EU law merely highlights national sensitive or essential constitutional elements. It would be completely up to the CJEU to decide whether the respective identity ultimately outweighs EU law, subject to balancing and proportionality,[289] because the identity argument would no longer indicate the *inability* of a Member State to comply with EU law, but rather its reluctance and unwillingness to do so. The legitimacy and strength of the latter is, however, substantially reduced.

7.3 The Executives

The courts and the legislature are not the only protagonists in creating national constitutional identity. The executives and governments have proved to be loud proponents of shaping the meaning of national constitutional identity as well, as the present sub-section will demonstrate.

Member States are invited to be directly involved in the preliminary reference proceedings in front of the CJEU. In accordance with the rules of

286 David Kenny, 'Abortion, the Irish Constitution, and Constitutional Change' (2018) 5 Revista de Investigações Constitucionais 257.

287 Renáta Uitz, 'National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades' (*Verfassungsblog*, 11 November 2016) <https://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/> accessed 24 February 2023.

288 Gábor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43 Review of Central and East European Law 23.

289 Fabbrini and Sajó (n 15) 470.

procedure of the CJEU,[290] they can participate in proceedings as interveners, or simply submit observations[291] when they are not directly involved. The content of the legal submissions of the Member States in the cited circumstances are usually determined by the respective governments or the executive branches and their legal services. Hence, in these circumstances they can define the meaning and scope of national constitutional identity.

For example, when Hungary and the Slovak Republic initiated annulment proceedings against the Council of the EU and sought to annul the Council Decision which provided provisional measures to the benefit of Italy and Greece concerning relocation quotas for asylum seekers,[292] the Republic of Poland as an intervener argued that the relocation of asylum seekers had a greater cultural impact on the virtually homogeneous population of Poland, whose population differed from a cultural and linguistic perspective.[293] The statement implied that the realization of the contested decision would potentially have an impact on the identity of Polish society. This reflected that the statement was made in relation to the plea from Hungary, which stated time and again that the 'problem' of migration was having an impact on the identity of Hungarian society: for example, when in February 2018 the Hungarian justice minister László Trócsányi filed another petition to the Hungarian Constitutional Court asking whether Hungary could argue constitutional identity, to avoid having to take in refugees.[294]

Moreover, in the famous *Sayn-Wittgenstein* decision, it was the Austrian government which argued that the provisions at issue 'are intended to protect the constitutional identity of the Republic of Austria'.[295] Furthermore, in the preliminary proceedings concerning definition of a 'spouse'

290 Rules of Procedure of the Court of Justice [2012] OJ L265/1.

291 Article 96(1)(b) of the Rules of Procedure of the Court of Justice.

292 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80).

293 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.

294 László Trócsányi, 'Ministry of Justice to Seek Position of Constitutional Court Regarding Mandatory Quotas' (*Hungarian Ministry of Justice*, 1 March 2018) <https://2015-2019.kormany.hu/en/ministry-of-justice/news/ministry-of-justice-to-seek-position-of-constitutional-court-regarding-mandatory-quotas> accessed 24 February 2023.

295 Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (*Sayn-Wittgenstein*) [2010] ECLI:EU:C:2010:806, para 74.

and the recognition of marriage between persons of the same sex, it was the Latvian government which submitted an observation in the *Coman*[296] decision wherein it stated that a refusal to recognize marriage between persons of the same sex concluded in another Member State, despite being a restriction of Article 21 TFEU, was justified on grounds of public policy and national identity, as referred to in Article 4(2) TEU.[297]

In addition, the governments of the Member States are not shaping the meaning of national constitutional identity solely within the scope of the judicial proceedings, but also independently in their political capacity beyond the legal sphere in the strict sense. The speeches of the Hungarian Prime Minister Orbán as to national constitutional identity are a well-known example.[298] The Polish White Paper on the Reform of the Polish Judiciary by the Polish government, drafted in the capacity of the Chancellery of the Prime Minister, is another.[299] The paper aimed to define the meaning and functions of national constitutional identity as a feature which can justify resistance against the regulatory intervention of the EU.[300] Finally, it was the Polish Prime Minister who asked the Polish Constitutional Tribunal to assess the constitutionality of the CJEU's judgement on the Polish judicial reform, arguing that it violated Polish national constitutional identity.[301]

To conclude, while political agents do not have any formal competence to define the content of national constitutional identity, they still participate in deliberations as to the said concept. They can submit observations in preliminary proceedings before the CJEU. Moreover, in some legal systems

296 Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (*Coman*) [2018] ECLI:EU:C:2018:385.

297 Ibid. para 42.

298 Orbán (n 102). See also Benjamin Novak, 'Hungary's Constitutional Identity Is Whatever Viktor Orbán Says It Is' *The Budapest Beacon* (2 April 2018) <https://budapestbeacon.com/hungarys-constitutional-identity-is-whatever-viktor-orban-says-it-its/> accessed 24 February 2023.

299 The Chancellery of the Prime Minister, 'White Paper on the Reform of the Polish Judiciary' <https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chanceller-white-paper-3-18.pdf> accessed 24 February 2023.

300 Ibid. 170.

301 Anna Wójcik, 'On the PM Morawiecki Motion to the Constitutional Tribunal Regarding EU Treaties Conformity with the Polish Constitution (Case K 3/21)' (*Rule of Law*, 27 April 2021) <https://ruleoflaw.pl/on-the-pm-morawiecki-motion-to-the-constitutional-tribunal-regarding-eu-treaties-conformity-with-the-polish-constitution-case-k-3-21/> accessed 24 February 2023.

they are allowed to initiate domestic constitutional proceedings and thus navigate the legal discussion on the concept of identity.[302] Finally, they can shape the meaning of identity through their political speeches, working documents and political reforms.[303] While none of the stated undertakings have a formal authoritative power to define the concept, these contributions still indirectly inform and co-shape the meaning and scope of the national constitutional concept.

7.4 Legal Scholarship

Apart from the identity protagonists above, legal scholarship significantly facilitates the significance of the national constitutional identity concept, as well as its meaning. It is not the purpose of this contribution to empirically assess and evaluate the influence of scholarly writings on the development and relevance of national constitutional identity, but to highlight its contribution as such.

The recent book *Constitutional Identity in a Europe of Multilevel Constitutionalism*[304]can serve as illustration of the scholarly resourcefulness concerning the meaning of national constitutional identity. In the contribution concerning Denmark, the author stated:

> 'Danish case law, academic literature, and other sources do not refer directly to "constitutional identity". This absence of the term does not necessarily mean that Denmark has no constitutional identity. What it does mean is that we will have to extract it ourselves from an interpretation of the Constitution, case law, and other sources in the light of this book's understanding of constitutional identity.'[305]

302 Michał Ziółkowski and Barbara Grabowska-Moroz, 'Enforcement of EU Values and the Tyranny of National Identity – Polish Examples and Excuses' (*Verfassungsblog*, 26 November 2019) <https://verfassungsblog.de/enforcement-of-eu-values-and-the-tyranny-of-national-identity-polish-examples-and-excuses/> accessed 24 February 2023.

303 Orbán (n 102); Novak (n 298); Constitutional Court of the Slovak Republic, International Conference 'Constitutional Justice: Challenges and Perspectives' on the occasion of the 25th Anniversary of the Constitutional Court of the Slovak Republic, Slovakia, Košice, 10 April 2018, Tamás Sulyok, Universal Human Rights and National Identity.

304 Calliess and van der Schyff (n 274).

305 Krunke (n 13) 114.

The cited example demonstrates how the meaning of national constitutional identity was fully constructed by a legal scholar in the absence of any legal norm or judicial case law. In that sense, national constitutional identity acquires a much broader definition. The constructed meaning of national constitutional identity by legal scholarship in the absence of any case law is not a priori wrong. But it shows how legal scholarship facilitates the development of a national constitutional identity discourse.[306] Accordingly, scholarly contributions significantly develop the meaning and scope of national constitutional identity and must be accordingly considered as a protagonist.[307]

To sum up, there are several protagonists of national constitutional identity, creating and defining its meaning and scope. While the national apex courts and the CJEU are the most important and predominant agents of interpreting and construing the meaning of constitutional identity,[308] they only partially explain the development of identity meaning. In addition to the courts, where the CJEU plays the final role, one should not forget the legislative and executive branches. Finally, legal scholarship additionally facilitates the development and co-determines the meaning of national constitutional identity. Since all the agents together influence and shape the meaning of national constitutional identity, one must holistically observe all of them when assessing the legitimacy of claims of national constitutional identity.[309]

306 See i.e. Kos (n 154) 93: 'the court explicitly left the question of absolute primacy open. The substantive preconditions for the transfer of sovereign rights […] have been interpreted in different ways in academia. However, considering the inalienable right to self-determination, in exceptional cases of serious encroachment on fundamental constitutional values, the SCC *would probably adopt* its version of the BVerfG's doctrines' (emphasis added).

307 Cf Fabbrini and Sajó (n 15) 458.

308 See also Leonard FM Besselink, 'Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, Judgment of the Court (Second Chamber) of 22 December 2010.' (2012) 49 Common Market Law Review 671, 685.

309 See also Oreste Pollicino, 'The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?' (2010) 29 Yearbook of European Law 65, 111.

8 Deficiencies of National Constitutional Identity

This section starts by drawing parallels between national constitutional identity and the much older concept of public policy or public order. It shows how one occasionally applies both concepts interchangeably due to their similarities, but it also explores their differences and the inherent shortcoming of identity undertaking that role (8.1). It continues with national constitutional identity's potential for misuse and abuse, and it considers whether one should omit the concept altogether due to its tensions with liberal principles (8.2). Finally, it highlights the arguments of tradition, culture and history concerning the meaning of national constitutional identity (8.3).

8.1 From Public Policy to National Identity – Connections and Shortcomings

National constitutional identity is a new legal concept which has emerged as the answer to older questions. Throughout conceptual legal history, one can observe national constitutional identity in relation to other concepts addressing similar underlying tensions.[310] Concerning the multilevel federal tensions between the EU and the Member States, identity to a certain extent replaces the argument of sovereignty.[311] In relation to domestic social and pre-constitutional considerations, identity resembles the old concept of public policy.[312] This sub-section first explores the similarities and interconnectedness between these concepts. It then turns to their divergences, and critically assesses the shortcomings of identity undertaking the functions of public policy considerations.

310 Dobbs (n 27) 314.

311 Wischmeyer (n 210) 427. Albert Bleckmann, 'Die Wahrung der „nationalen Identität" im Unions-Vertrag' (1997) 52 JuristenZeitung 265, 266. Cf Pernice (n 9) 195. Elke Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) 45 Netherlands Journal of Legal Philosophy 82, 92. See also Tribunal Constitucional de España, Case 1/2004 Declaración *Constitutional Treaty* 13 December 2004, paras 37, 47, 50 and 58.

312 Besselink, 'National and Constitutional Identity before and after Lisbon' (n 14) 46; von Bogdandy and Schill (n 266) 1449.

Public policy concerns so-called extra-legal considerations thereby becoming legally relevant. Public policy considerations protect the public moral, community values, and the usual forms of behaviour among the members of a particular society. In that way public policy, like national constitutional identity, protects majoritarian values.[313] The argument is an old one: already in Roman civil law, contractual relations lost their validity and were considered void should they contravene *good morals*.[314]

Similarly to identity, public policy does not have a clear and predictable definition.[315] Tim Corthaut tried to define public policy as 'the complex of norms at the very heart of a political entity expressing and protecting the basic options taken by that entity in respect of its political, economic, social and cultural order'.[316] According to Ghodoosi, public policy protects 'public interest, public morality as well as public security'.[317] However, public policy is usually defined by the courts considering the context, time and specificities of a society. In other words, public policy is time and context contingent, and is constantly changing according to its society.

Some scholars argued that the public policy argument is gradually losing strength and importance in the European legal sphere.[318] Considered as a matter of ethical and moral perception, the liberalisation and secularisation of society weakened its legitimate value. Prostitution, drugs, homosexuality, nudity and other typical examples of areas of public policy or public order prohibitions are nowadays either abandoned or specifically regulated by a statute.

However, public policy still has an important role when it comes to incorporation of foreign laws and contractual agreements into the domestic legal system, namely, due to the rules of private international law. In that sense public policy considerations aim to protect the domestic legal system

313 See also Floris de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50 Common Market Law Review 1545, 1560.

314 Pacta, quae contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati iuris est.

315 Kanstantsin Dzehtsiarou (ed), 'Defining European Public Order: An Impossible Task', *Can the European Court of Human Rights Shape European Public Order?* (Cambridge University Press 2021) 66ff.

316 Tim Corthaut, *EU Ordre Public* (New edition, Wolters Kluwer 2012) 11.

317 Bram Akkermans, 'Public Policy (Orde Public): A Comparative Analysis of National, Private International Law, and EU Public Policy' (2019) 8 European Property Law Journal 260, 263.

318 Catherine Kessedjian, 'Public order in European law' (2007) 1 Erasmus Law Review 25, 35.

against incorporation of any foreign element which would be radically at odds with the orientations and commitments of the said legal order. For instance, matrimony with a minor concluded elsewhere would not be recognized in a liberal constitutional order.[319] Surrogate motherhood and consequent adoption might be a matter of public policy consideration with different outcomes.[320] Accordingly, public policy shields the domestic legal order without a comprehensive definition of its meaning. In that sense it is similar to identity argument, which enables flexibility of meaning and protects the national legal order against the supranational EU law, when the latter may redefine basic societal norms and conventions.

Besselink argued that identity claims were nothing more than national public order considerations.[321] Accordingly, it comes as no surprise that the CJEU occasionally understands identity and public policy as almost interchangeable concepts. For example, in the *Omega*[322] decision, what is widely considered by the scholars as an identity classic,[323] one would search in vain for identity terminology. The CJEU omits any reference to identity, but states:

> 'Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting *public policy* by reason of the fact that that activity is an affront to human dignity.'[324]

319 Claire Fenton-Glynn, 'Freedom from Violence and Exploitation' in Claire Fenton-Glynn (ed), *Children and the European Court of Human Rights* (Oxford University Press 2020) 36: 'The domestic courts refused to recognise their marriage […] as it was manifestly incompatible with the Swiss *ordre public*, where having intercourse with a child under 16 is a crime'.

320 Martha A Field, *Surrogate Motherhood : The Legal and Human Issues* (2nd edn, Harvard University Press 1990) 78ff.

321 Besselink, 'National and Constitutional Identity before and after Lisbon' (n 14) 46; von Bogdandy and Schill (n 266) 1449.

322 Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614.

323 Pollicino (n 309) 94; Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) 74; Julien Sterck, 'Sameness and Selfhood: The Efficiency of Constitutional Identities in EU Law' (2018) 24 European Law Journal 281, 289.

324 Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614, para 41 (emphasis added).

Moreover, in the *Coman*[325] decision, concerning recognition of same-sex marriages, the CJEU directly applied public policy and national identity as two fully interchangeable concepts. The CJEU stated:

> '[E]ven on the assumption that a refusal, in circumstances such as those of the main proceedings, to recognise marriages between persons of the same sex concluded in another Member State constitutes a restriction of Article 21 TFEU, such a restriction is justified on grounds of *public policy* and *national identity*, as referred to in Article 4(2) TEU.'[326]

These are not the only examples. In the recent *Steiermark*[327] and *La Quadrature du Net*[328] decisions, one finds further connections of public policy with the last sentence of the European identity clause: namely, public policy and maintaining law and order and safeguarding internal security as national identity.

Regardless of the similarities in light of the above-cited theory and praxis, the concepts differ. First, in contrast to public policy considerations, national constitutional identity is a constitutional concept, which qualifies its standpoint, gives it its own normativity, and makes it harder to rebut. Accordingly, national constitutional identity may influence classical fundamental rights adjudication, as highlighted above. Finally, public policy considerations are by definition much more contingent: it is completely common for certain public order considerations from past decades no longer to fulfil that legal standard today.[329] By contrast, national constitutional identity assumes a constitutional rank and thereby some kind of unchangeability. Moreover, while public policy openly admits that it reflects current conventions of a respective society, national constitutional identity lacks that flexibility and openness.

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325 Case C-673/16 *Coman* [2018] ECLI:EU:C:2018:385. See also Máire Ní Shúilleabháin, 'Cross-Border (Non-)Recognition of Marriage and Registered Partnership: Free Movement and EU Private International Law' in Elena Bargelli and Jens M Scherpe (eds), *The Interaction between Family Law, Succession Law and Private International Law: Adapting to Change* (Intersentia 2021) 17.

326 Case C-673/16 *Coman* [2018] ECLI:EU:C:2018:385, para 42 (emphasis added).

327 Joined Cases C-368/20 and C-369/20 NW *gegen Landespolizeidirektion Steiermark und Bezirkshauptmannschaft Leibnitz* (*Steiermark*) [2021] ECLI:EU:C:2021:821, Opinion of AG ØE, para 53.

328 Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others v Premier ministre and Others* (*La Quadrature*) [2020] ECLI:EU:C:2020:791, paras 134-138.

329 See e.g. BGH, Case XII ZB 463/13 10 December 2014.

To conclude, if national constitutional identity aims to tacitly replace or at least partially substitute for public policy considerations, that conceptual alternative entails its own challenges, as briefly highlighted above. From the other perspective, considering context and circumstances, national constitutional identity can occasionally be best understood as a substitute for public policy considerations.

8.2 Possibilities for Misuse and Considerations of Abandoning the Concept

The following sub-section highlights the considerations of some legal scholars who recently raised the question as to whether we might be better off abandoning the multifarious concept of national constitutional identity.[330] On the one hand, the ambiguity of the concept and recent attempts at abuse for illiberal purposes suggest its omission.[331] On the other hand, one can abuse any legal concept, and in the light of the progressive European harmonization, the Member States need a legal tool to protect their essential national features.[332]

Fabbrini and Sajó argued that 'legal scholars should abandon the fascination for this concept.[333] The above explored connection between national constitutional identity and the nationalist and nativist ideas speaks for this argument. Kelemen and Pech similarly suggested that national constitutional identity is inherently dangerous, and it should 'not be released in the marketplace of ideas.'[334]

Other scholars, like Kovács and Scholtes, also recognize the inherent dangers of identity, but aim to develop theoretical accounts which would exclude the abusive and ethno-cultural elements of the said concept.[335] Scholtes aimed to identify the various abusive avenues of the concept which might provide guidance on differentiating between the genuine and acceptable meaning of identity and its abused and misused components. In his attempt to develop an account of abusive identity claims, he identified three forms of identity misuse. On the substantive level, identity claims which

330 Fabbrini and Sajó (n 15) 472.
331 Kelemen and Pech, 'The Uses and Abuses of Constitutional Pluralism' (n 224).
332 Cf Wetz (n 3) 347.
333 Fabbrini and Sajó (n 15) 472.
334 Kelemen and Pech, 'Working Paper' (n 235) 7.
335 Kovács (n 4).

are substantively at odds with the implicit normative expectations of the constitutionalism. Moreover, his conceptual plane, the generative content of identity claims, aims to explore how the claims have come about – through politically packed courts, illegitimate constitutional drafting processes, or quite simply reaching beyond a constitution.[336] And finally, a relational content of abusive identity claims explores how the identity claims are being advanced. That is, broadly speaking, how constitutional arguments provide the reasons to situate its authority, i.e. how the claims engage and relate to competing constitutional claims in good faith.[337]

What is common to the three views above is the awareness that the concept of national constitutional identity carries an inherent danger of being misused and abused. The possibility of misuse and abuse is not only an implicit potential, but has become reality time and time again.[338] The main options between scholarly observations are thus either to abandon the concept altogether, or to delineate the scope of its meaning and the elements of its abuse in a way that would decrease the potential for abuse.

As is highlighted above, national constitutional identity serves as a federal mechanism to balance multilevel constitutional tensions. However, the concept of national constitutional identity cannot by itself provide a meaningful and sustainable balance between the progressive European harmonization and protection of national diversities. That balance must be achieved through continuous enquiries by all institutions and other agents in the respective Member States as a matter of substantive consideration, as well as due to the political agreements among Member States and the EU to find a common stance. These substantive considerations cannot be achieved via absolute and purely judicial positions of the national apex courts, simply by invoking a subject matter as identity issue.

To sum up, the abusive potential of identity claims must be recognized and closely monitored, when the Member States claim national constitutional identity. Moreover, the concept itself, subject to ambiguities and inherent dangers, cannot provide a final answer on the appropriate balance between Member States and the Union. Moreover, the said tensions would not disappear if the identity concept were abandoned. It is the underlying

336 Scholtes (n 10) 551.

337 Ibid.

338 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, para 66; 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.

rationale which will eventually determine the outcome of multilevel constitutional tensions in each individual case.

8.3 Identity in the Light of Tradition, History and Culture

We use the language of tradition when we aim to describe the relevance of the past for the present. Tradition 'is the power of the past-in-the-present'.[339] Martin Krygier has identified three constitutive elements of tradition: pastness, authoritative presence and transmission. Tradition stems from the elements of the past – real or imagined. But 'the past speaks with many voices'.[340] One must therefore decide which parts of the past ought to enter into tradition, which requires an authoritative presence. In relation to the reasons why English Law is unwritten, Maitland suggested that 'what is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts'.[341] Finally, traditions depend on connecting the past and the present, either in a formalized and institutionalized fashion as in the institutions of law and religion, or in the absence of it.[342]

Traditions, or more concretely, constitutional traditions are thus nothing more than connecting to the past and applying the optional elements of the past in the present. However, traditions do not equal the past, but extracting and adopting it. The following example presents an illustrative model of constitutional tradition which can bring us to different results, all in the name of constitutional tradition.

The traditional understanding of the institution of marriage was always as the union between a man and a woman. For example, in Germany the Basic Law stated, without any concrete reference to man and woman, that under Article 6(1) 'marriage and family enjoy the special protection of the state'.[343] The FCC stated that in 1949, when the respective article was

339 Massimo Fichera and Oreste Pollicino, 'The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?' (2019) 20 German Law Journal 1097, 1118.
340 Martin Krygier, 'Law as Tradition' (1986) 5 Law and Philosophy 237, 242.
341 Ibid. 249.
342 Ibid. 250.
343 German Basic Law, art. 6(1): 'Ehe und Familie stehen unter dem besonderen Schutze der staatlichen Ordnung.'

drafted, nobody could potentially have in mind that this norm would also include same-sex marriages.[344] However, a different interpretation is also entirely plausible. Since marriage has always been an intimate and legal connection between two persons who are closely connected, deciding to share some parts of their life together, mutually respecting one another and sharing their affection, then it is this core which is the essence of the tradition of marriage, not the gender of it. In other words, same-sex marriage still respects the tradition of marriage.[345]

What follows from the example above? It illustrates how the argument of tradition includes the above-cited authoritative presence, which is inherently subjective. Traditions are not objective narratives which have a defined and static form. On the contrary, traditions are subjectively made connections with the past; one adopts a historical narrative of one's own choosing.[346]

National constitutional identity is often understood in the light of tradition. Tradition justifies the meaning of it. However, as indicated above, tradition cannot by itself explain decisions in the present. Accordingly, when one argues that national constitutional identity reflects the elements of (legal) tradition, that clearly signals that one authoritatively defines the identity concept by constructing the elements of the past by personal choice.

In addition, when we speak about tradition and history, we cannot refer to *an absolute* tradition and history, because every observer selects their own historical facts to carry forward into the present. Every historical observation is a particular narrative which remains highly subjective and embedded in the preconceptions of the observer. Equally, culture means ideas, social behaviour, the way of life of a social group or community.[347]

344 Daniel Toda Castán, 'Marriage Equality and the German Federal Constitutional Court: the Time for Comparative Law' (*Verfassungsblog*, 11 July 2017) <https://verfassungsblog.de/marriage-equality-and-the-german-federal-constitutional-court-the-time-for-comparative-law/> accessed 24 February 2023.

345 This example was mentioned by M. Rosenfeld at the Roundtable of IACL - Constitutional Identity, St Petersburg, Russia 10-13 June 2021.

346 Cf Michaela Hailbronner, 'Value Formalism' in Michaela Hailbronner (ed), *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press 2015) 99ff.

347 Werner Delanoy, 'What Is Culture?' in Guido Rings and Sebastian Rasinger (eds), *The Cambridge Handbook of Intercultural Communication* (Cambridge University Press 2020) 17: 'culture is a multifaceted concept, which makes it hard to run a tightly unified case about it.'

There is no way to define a collective body with a single, objective narrative, because there are multitudes of dimensions.

National constitutional identity as a legal concept cannot encapsulate one history, one culture and one tradition of a given society. Yet, the terminology of history, culture and tradition appears constantly in national constitutions and Treaties. For example, the sixth recital in the Preamble to the Treaty on European Union states that the Member States respect 'their history, their culture and their traditions'. Furthermore, Article 6(3) TEU states that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to Member States, shall constitute the general principles of the Union's law.[348]

One should be cautious when referring to history,[349] culture and traditions; not because they do not exist, nor to relativize their sociological role, but in order to reject the temptation to adopt them judicially as single narratives which allegedly, objectively and actively shape and influence the interpretation of constitutional law. For example, in the words of Kirchhof:

> 'The Basic Law is the expression and memory of the German people (Volk) that is formed by inherited morality. As a result constitutional identity becomes open to components which refer and include pre-legal elements: the constitution relies not only on decisions, but "on cultural tradition and responsibility to reality".'[350]

To sum up, when the apex courts determine the meaning of national constitutional identity by referring to historical narratives, cultural specificities and traditions, one cannot accept these justifications as objective and given. Rather, these arguments are a pretext and a cloak for value-based decisions, creating the meaning of identity.

348 TEU [2012] OJ C326/13, art 6(3).

349 Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806, para 75: 'restrictions on the rights of free movement which would result for Austrian citizens from the application of the provisions at issue in the main proceedings are therefore justified in the light of the history'.

350 Fabbrini and Sajó (n 15) 465. See also Paul Kirchhof, 'Die Identität der Verfassung' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts Band II: Verfassungsstaat* (3rd edn, CF Müller 2004) § 19.

9 Conclusion

Identity is a highly complex and multifarious concept which eludes clear definition and evaluation by predictable, coherent and objective criteria.[351] One of the reasons for evading clarity is because of identity's multi-layered nature and its numerous dimensions concerning its meaning and function. This complexity at the same time allows the concept of identity to be flexible, complementary and open to new meanings being ascribed to it. In that sense identity offers certain advantageous possibilities, which can also be seen as identity's deficiencies.

To explicate the many dimensions of the concept of identity, this chapter started by peeling back the onion, addressing every layer of the dilemma. First, it analyzed the meaning of national constitutional identity strictly from the EU's perspective. The first section outlined the genesis of the European identity clause from the Maastricht Treaty to the Treaty of Amsterdam, Treaty of Nice, the proposed Treaty Establishing a Constitution for Europe, to the current Lisbon Treaty. It showed how the initial programmatic diction evolved into a concrete norm regulating the relationship between the Union and Member States. Moreover, the section demonstrated how the WG V group, entrusted to investigate the issues of delimitation of competences, investigated the core national responsibilities and eventually proposed the current diction of the European identity clause by concisely omitting the second part of the core Member States' competences, the basic public policy choices and social values of the Member States. The explanatory value of the cited *travaux préparatoires* is twofold. It explained the broad application of the European identity clause by the CJEU, for example including the issue of national language, completely absent from the clause and mentioned elsewhere in the Lisbon Treaty. Furthermore, it showed how the European identity clause was never meant to be a dero-

351 Uwe Pörksen, *Plastic Words: The Tyranny of a Modular Language* (Penn State University Press 2004) 22, 26, 41; Cf Wischmeyer (n 210) 420.

gation clause which justifies a complete prohibition of the EU's measures impacting on these core areas of the Member States' responsibilities.[352]

The following section then explained the terminological interchangeability between national and constitutional identity and their incoherent application in theory and practice.[353] While national identity alludes to sociological dimensions, usually excluded from legal relevance, the European identity clause only mentions national identities. Concurrently, the meaning of the said clause suggests something else.[354] Moreover, national apex courts are variously and sometimes interchangeably using both terms. The section showed how the mere application of national or constitutional identity does not solve the problem of its undeterminable meanings.

The subsequent section situated the European identity clause in the broader context of the Lisbon Treaty, and investigated the recent case law developments by the CJEU as identity's inherent limits. Concretely, it showed how the EU cannot protect one value to lose another;[355] in other words, how the respect for national constitutional identities is inherently limited by the common commitments as articulated under Article 2 TEU. Moreover, the section situated respect for national constitutional identity as a general principle of EU law,[356] which must be read and applied only together with the other EU principles, regulations, the relationship between the EU and the Member States, in accord.[357]

Moving away from a strictly EU perspective, the chapter continued by assessing national constitutional identity claims in the light of their degree of constructiveness. It highlighted how identity can serve as a pre-emptive deterrent and sign of constructive engagement. However, its application may signal a much stronger disagreement, showing dissent and even open resistance. The section demonstrated how the level of intensity of disagreements within the multilevel constitutional orders does not necessarily correspond with the identity claims' objectives. On the contrary, a constructive

352 Matteo Bonelli, 'National Identity and European Integration Beyond "Limited Fields"' (2021) 27 European Public Law 557. Final Report of the Working Group V, WG V 14, CONV 375/1/02, REV 1, p. 11.
353 Faraguna, 'Taking Constitutional Identities Away from the Courts' (n 80) 499.
354 See also Schnettger (n 48) 16.
355 Case C-490/20 *Pancharevo* [2018] ECLI:EU:C:2021:296, para 101.
356 Pernice (n 9) 193.
357 Blanke and Mangiameli (n 6) 205.

engagement with the CJEU can even motivate the CJEU to change its previous position and accommodate the respective identity claims.[358]

The chapter then highlighted further multifarious functions of identity.[359] It illustrated how identity terminology invites the so-called pre-constitutional features into the constitutional narrative. This Schmittian understanding of national constitutional identity stands at odds with liberal constitutional commitments and the protection of individual and minority rights. Moreover, identity argument may hide the majoritarian argumentation and directly influence the established constitutional adjudication, based on the protection of individual fundamental rights. The so-called *identitarian adjudication* posits identity on an equal footing with human rights, which skews and hinders the full realization of fundamental rights.[360] Finally, one can understand national constitutional identity only as a protection of core constitutional commitments. The section showed how the said understanding carries little value in relation to EU law, since the Member States and the EU share the same basic commitments.[361]

Identity is not created only by the national apex courts, although they are the primary agents, but occasionally also by others. The section illustrated the contributions of the legislature, the executive and legal scholarship, which often facilitate the relevance and development of national constitutional identity.

The last section's objective was to unveil the deficiencies of national constitutional identity. The section demonstrated the connectedness of public policy with identity and its shortcoming in potentially replacing one with another. Furthermore, it highlighted several arguments why identity is prone to misuse and abuse, and investigated scholarly appeals to abandon the concept altogether. Finally, it critically rejected the frequently made connections between national constitutional identity and the notions of tradition, culture and history, exposing how these arguments are a pretext for subjective determination of the meaning of identity.

The chapter critically exhibited many dimensions of identity – its functions, protagonists and deficiencies. The many facets and modalities of identity do not hinder the increasing popularity of the concept. Since national constitutional identity as a legal concept remains the reality of

358 Case C-42/17 *Taricco II* [2017] ECLI:EU:C:2017:936.
359 Wetz (n 3) 39.
360 Cf Zorkin (n 246) 253.
361 Besselink, 'The Persistence of a Contested Concept' (n 93) 600.

contemporary constitutional law, the critical observations above aim at a constructive illumination of the potentials and shortcomings. The chapter's objective was to contribute to a scholarly assessment of how to conduct a proper understanding and evaluation of identity in constitutional law, and how not to.