COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Managing Editor: Alison McDonnell
Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands tel. + 31 71 5277549
e-mail: a.m.mcdonnell@law.leidenuniv.nl fax: + 31 71 5277600

Establishment and Aims
The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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FRAMING AND MANAGING CONSTITUTIONAL IDENTITY CONFLICTS: HOW TO STABILIZE THE *MODUS VIVENDI* BETWEEN THE COURT OF JUSTICE AND NATIONAL CONSTITUTIONAL COURTS

LUKE DIMITRIOS SPIEKER*

Abstract

In the last decade, constitutional identity review mechanisms have emerged in several Member States. The proliferation of these mechanisms increases the risk of jurisdictional conflicts and is a permanent threat to the primacy of EU law. As it is highly unlikely that the conflict over the "last word" will be settled soon, solutions for stabilizing the delicate modus vivendi between the ECJ and national constitutional courts are needed. This requires the identification of a common problem. The article seeks to establish a new framework for the comparison and systematization of identity review mechanisms in the Member States. First, it develops a typology of identity reviews in the EU judicial space, thereby making it possible to distinguish identity reviews that are particularly prone to conflict. The article then identifies essential features of national settings that might determine and foster the emergence of such conflict-prone identity reviews. These features serve as a basis for the development of tailor-made solutions to manage jurisdictional conflicts and stabilize the modus vivendi between the ECJ and national constitutional courts.

1. Introduction

"Constitutional identity… again?!" This will be the likely reaction of readers when looking at the title of this contribution. Indeed, the growing discourse on this evergreen of constitutional law places a huge question mark on any new contribution that adds another layer of complexity.

* PhD candidate and Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. I am grateful to the *Dienstagsrunde*, especially to Armin von Bogdandy, Laura Hering, Davide Paris, Theodor Shulman, and Silvia Steininger as well as Takis Tridimas and the editors of this Review for their comments, reactions and inspirations. This article was awarded the 2019 Common Market Law Review Prize for Young Academics.

In the EU context, roughly three strands of partially overlapping and still ongoing identity discourses can be discerned. The first strand emerged after the introduction of the notion of "national identity" in the Maastricht Treaty (Art. F) and centred on its meaning and contours, its interdisciplinary nature and future potential at the interface of EU and national constitutional law.[1] The second strand was triggered by the failed Constitution for Europe and the Lisbon Treaty which was eventually adopted. Adjudicating the domestic acts of ratification, several constitutional courts started to establish limits for further integration and announced review mechanisms concerning the protection of constitutional core values, principles or competences often summarized under the catchphrase of "constitutional identity".[2] The ensuing discourse concentrated especially on the legitimacy, scope and potential of these review mechanisms and their relation to the protection of "national identity" under EU law (Art. 4(2) TEU).[3] Further, first comparative studies were conducted.[4] The third strand commenced once these mechanisms were put into practice – such as in *Melloni*, *OMT* and, more recently, *Taricco*. These first experiences made one thing clear: identity reviews were not destined to remain a dead letter. The subsequent discourse revolved around this new form of dialogue as well as solutions to avoid or resolve potential jurisdictional conflicts.[5]

1. On this rather "German" discourse, see e.g. von Bogdandy, "Europäische und nationale Identität: Integration durch Verfassungsrecht?", 62 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2003), 156.

2. For a comparative overview, see e.g. Wendel, "Lisbon before the courts: Comparative perspectives", 7 EuConst (2011), 96; Cazet, "Les juges constitutionnels face au Traité de Lisbonne", 26 *Annuaire international de justice constitutionnelle* (2010), 43.

3. See e.g. Arnaiz and Llivina (Eds.), *National Constitutional Identity and European Integration* (Intersentia, 2013); Burgorgue-Larsen (Ed.), *L'identité constitutionnelle saisie par les juges en Europe* (Pedone, 2011). At the EU level, see Cloots, *National Identity in EU Law* (OUP, 2015).

4. See e.g. Calliess and van der Schyff (Eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press, 2019); Mannefeld, *Verfassungsrechtliche Vorgaben für die europäische Integration. Rechtsprechung des deutschen und des italienischen Verfassungsgerichts* (Mohr Siebeck, 2017), p. 120 et seq.; Bernardi (Ed.), *Controlimiti. Primato delle norme europee e difesa dei principi costituzionali* (Jovene, 2017), p. 91 et seq.; Claes and Reestman, "The protection of national constitutional identity and the limits of European integration", 16 GLJ (2015), 917; Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (LGDJ, 2013); Beneyto and Pernice (Eds.), *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Nomos, 2011).

5. On *OMT*, see e.g. special issues in 15 GLJ (2014), 107; 23 MJ (2016), 3. On *Taricco*, see e.g. Amalfitano (Ed.), *Primato del Diritto dell'Unione Europea e Controlimiti alla Prova della "Saga Taricco"* (Giuffrè, 2018); Bernardi and Cupelli (Eds.), *Il Caso Taricco e il Dialogo tra le Corti* (Jovene, 2017).

This contribution is placed at the end of this third strand. Today, we face a range of very diverse identity review mechanisms in several Member States. It is not their rather limited number that makes them difficult to grasp, but their embeddedness in diverse and unique constitutional settings. Thus, many comparative studies limit themselves to analyse each review in its country-specific context and do not provide a comprehensive analytic framework.[6] This lack of systematization, however, appears to be a significant shortcoming. While it is true that the distinct legal terminologies and specific constitutional contexts make the determination of common patterns difficult, it is equally true that only a common framing makes it possible to develop a common, Union-wide set of solutions for maintaining the fragile equilibrium between the ECJ and national constitutional courts.

Such common solutions are needed for two reasons. First, identity reviews bear the risk of jurisdictional conflicts. If an EU act violates a Member State's constitutional identity, the respective constitutional court can decide to suspend its direct effect in the domestic legal order.[7] This radically contradicts the ECJ*'s* mantra-like emphasis on primacy of EU law over *any* national law[8] and the adamant interdiction of Member State courts setting aside Union law on their own motion.[9] In this sense, identity reviews give expression to a deeper, probably irreconcilable conflict surrounding the "last word" in the EU judicial space – a dispute that seems impossible to resolve without one party unconditionally surrendering.[10] Since such a surrender seems unlikely, the relationship between the ECJ and national constitutional courts remains in a fragile state of abeyance – it is a delicate *modus vivendi* which needs to be stabilized. What exacerbates this need for stabilization is the high unpredictability of identity reviews. Constitutional identity is not only a very vague notion, but also an essentially fragmented concept that remains at the discretion of each State. This makes it difficult to predict when an EU act infringes one of the presumably 27 distinct constitutional identities. As such, identity concerns constitute a permanent Damocles sword over the primacy of EU law.

6. For a notable exception, see van der Schyff, "Member States of the European Union, constitutions, and identity" in Calliess and van der Schyff, op. cit. *supra* note 4, 305.

7. See e.g. German Federal Constitutional Court (BVerfG), 2 BvE 2/08, *Lisbon*, para 241.

8. Case C-11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114.

9. Case C-314/85, *Foto-Frost*, EU:C:1987:452.

10. See e.g. Bobic, "Constitutional pluralism is not dead", 18 GLJ (2017), 1395, 1417; Mayer and Wendel "Multilevel and constitutional pluralism" in Avbelj and Komárek (Eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012), pp. 127, 135; von Bogdandy and Schill, "Overcoming absolute primacy", 48 CML Rev. (2011), 1417, 1447; Lübbe-Wolff, "Who has the last word? National and transnational courts – Conflict and cooperation", 30 YEL (2011), 86, 99; Kumm, "Who is the final arbiter of constitutionality in Europe?", 36 CML Rev. (1999), 351, 384.

These considerations reaffirm the need for typologies of identity reviews and ways to stabilize the relationship between the ECJ and national constitutional courts. In this spirit, the article proceeds in three steps. The first step will outline a framework for the comparison and systematization of identity reviews in the Member States (section 2). It will sketch a common line of reasoning behind these seemingly divergent mechanisms and propose a typology of identity reviews in the EU judicial space. This typology makes it possible to distinguish particularly conflict-prone identity reviews from those which leave room for accommodation. Subsequently, this contribution will identify features relating both to the Member States' constitutional settings and the attitudes of the respective constitutional courts that might determine and foster the emergence of such conflict-prone identity reviews (section 3). These features may serve as starting points for the development of approaches to manage potential conflicts between the ECJ and national courts (section 4). Based on one of the identified features, this article argues that the most promising approach is a "relational style" of adjudication on both the EU and the national level. This relationality concerns the procedure, form and style of judicial decisions as well as substantive questions – especially the way in which constitutional identity claims are translated into EU law. The key suggestion is to leave Article 4(2) TEU aside and voice identity claims, where possible, as part of the Union's common values under Article 2 TEU.

2. Framing constitutional identity reviews

Before engaging in any systematization, it seems necessary to clarify the object and scope of this analysis. In the past years, a broad range of Member State courts have introduced limits and reviews for the application of EU law. Two general concepts can be distinguished: the *ultra vires* review reflecting Article 5(1) TEU and a relatively ambiguous group of constitutional limits vaguely mirroring Article 4(2) TEU. The *ultra vires* review is a rather clear-cut concept that limits actions emanating from the EU to its competences manifested in the Treaties. If the EU oversteps these competences, national courts may decide to suspend the application of the respective EU acts within their domestic legal system.[11] The second review mechanism is not as homogeneous. National courts can review whether a domestic transfer of competences to the EU or a Union act violates a set of constitutional core principles or competences often, but not necessarily, termed "constitutional identity".

11. See e.g. BVerfG, 2 BvR 2661/06, *Honeywell*; Supreme Court of Denmark (Højesteret), 15/2014, *Ajos*; Czech Constitutional Court (Ústavní soud), Pl. ÚS 5/12, *Slovak pensions*.

This study concentrates on the second type of mechanisms – identity reviews *sensu lato*.[12] Until today, such identity reviews have been established by the constitutional courts of Germany,[13] Italy,[14] the Czech Republic,[15] Poland,[16] Hungary,[17] Spain,[18] Belgium[19] and – in a rather distinctive manner – France.[20,21] The following section will demonstrate that it is possible to discern a common line of reasoning (2.1) and establish a typology of identity reviews in the EU judicial space (2.2). This typology permits a differentiation between soft-conflict and hard-conflict identity reviews, meaning those allowing for flexibility in jurisdictional conflicts and those that are in fact irreconcilable with the premises of the EU legal order.

2.1. *A common line of reasoning*

The extensive cross-referencing between the courts is evidence of judicial cross-fertilization, a common line of reasoning and potentially the emergence of a common, European doctrine.[22] Generally speaking, courts derive identity reviews in two steps: the national legal basis for the conferral of competences to the EU, which (explicitly or implicitly) contains limitations for said conferral, always provides the point of departure.[23] In a second step, the courts

12. Throughout this contribution, the term "identity review" will be used in this wider sense.

13. See *infra* under 2.1.

14. Italian Constitutional Court (Corte Costituzionale), 183/ 1973, *Frontini*, para 9; 170/1984, *Granital*, para 7; 232/1989, *Fragd*, para 3.1; more recently 284/2007, para 3; 102/2008, para 8.2.8.1.

15. Ústavní soud, Pl. ÚS 19/08, *Lisbon I*; Pl. ÚS 29/09, *Lisbon II*; Pl. ÚS 5/12, *Slovak pensions*.

16. Polish Constitutional Tribunal (Trybunał Konstytucyjny), K32/09, *Lisbon*, para 2.1.; SK45/09, *Brussels I*, para 2.5; K33/12, *ESM*, para 6.4.1.

17. Hungarian Constitutional Court (Alkotmánybíróság), 22/2016 (XII.5.) AB, *Refugee relocation*, para 60.

18. Spanish Constitutional Tribunal (Tribunal Constitucional), DTC 1/2004, Ground 2.

19. Belgian Constitutional Court (Cour Constitutionnelle), 62/2016, B.8.7.

20. French Constitutional Council (Conseil Constitutionnel), 2006-540 DC, *Loi relative au droit d'auteur*, para 19.

21. Limitations for the transfer of competences have been developed further by Latvian and Estonian courts, yet without any comparable review mechanisms, see Latvian Constitutional Court (Satversmes tiesa), 2008-35-01, para 17; Estonian Supreme Court (Riigikohus), 3-4-1-6-12, paras. 128, 222, 223; 3-4-1-5-08, paras. 29–31.

22. For such comparative references, see e.g. BVerfG, 2 BvR 2735/14, *Identitätskontrolle I*, para 47; Alkotmánybíróság, 22/2016 (XII.5.) AB, *Refugee relocation*, paras. 34–44. See further Wendel, "Comparative reasoning and the making of a common constitutional law", 11 I-CON (2013), 981.

23. See Art. 23(1) German Basic Law: "The establishment of the European Union, as well as changes in its treaty foundations . . . *shall be subject to paragraphs (2) and (3) of Article 79"*; Art. 10a(1) Czech Constitution: "*Certain* powers . . . may be transferred"; Art. 90(1)

link these limitations to constitutional eternity clauses,[24] other essential constitutional provisions,[25] inalienable principles derived from judicial interpretation or a mixture of all of these,[26] thereby providing them with substantive content.

The *Bundesverfassungericht's* (BVerfG) doctrine – as established in its *Lisbon* ruling[27] – is probably one of the most elaborated doctrines of constitutional identity review. Although this doctrine is embedded in the very specific context of the German Basic Law (Grundgesetz), the BVerfG has become one of the primary points of reference among European constitutional courts.[28] Moreover, it most visibly refers to other courts when justifying its

Polish Constitution: "delegate . . . competence . . . *in relation to certain matters*"; Art. E Hungarian Fundamental Law: "Hungary may exercise *some* of its competences . . . jointly with other Member States"; Art. 34 Belgian Constitution: "*specific* powers can be assigned . . . to institutions of public international law"; Art. 88-1 French Constitution: "The Republic shall participate in the European Union constituted by States which have freely chosen to exercise *some* of their powers in common". Art. 11 Italian Constitution and Art. 93(1) Spanish Constitution are less explicit in this regard.

24. See e.g. BVerfG, *Lisbon*, *supra* note 7, para 208.

25. The Polish *Trybunał* referred to a cumulative reading of several constitutional provisions; see Trybunał Konstytucyjny, *Lisbon*, *supra* note 16, para 2.1. The Spanish Constitutional Tribunal established "material limits . . . which implicitly result from the Constitution", see Tribunal Constitucional, DTC 1/2004, Ground 2.

26. The Italian *Corte Costituzionale* developed counter-limits ("controlimiti") for the admissible "limitations of sovereignty" under Art. 11 of the Italian Constitution, encompassing not only the "eternity clause" (Art. 139) but also implied limits like "supreme" or "fundamental principles", "inalienable rights of individuals" (e.g. Corte Costituzionale, 1146/1988, para 2.1.) and recently also "constitutional identity", see Corte Costituzionale, 73/2001, para 3.1; 24/2017, para 7; 115/2018, para 5. See e.g. Fabbrini and Pollicino, "Constitutional Identity in Italy" in Calliess and van der Schyff, op. cit. *supra* note 4, 201; Faraguna, *Ai confini della costituzione* (FrancoAngeli 2015). The Czech Constitutional Court combines Art. 1(1) of the Czech Constitution affirming State sovereignty and the eternity clause in Art. 9(2). The first provision prohibits transfers leading to a situation in which it is no longer possible "to speak of . . . a sovereign State". The second protects the "material core of the Constitution", meaning "the essential requirements of a democratic, law-based State"; see Ústavní soud, *Lisbon I*, paras. 109, 215. The Hungarian Constitutional Court connected the implied limits of Art. E with Art. B Fundamental Law (sovereign statehood) and an extra-constitutional notion of identity; see Alkotmánybíróság, 22/2016 (XII.5.) AB, *Refugee relocation*, paras. 59–60. The French and Belgian courts did not provide any further explanation.

27. For an extensive survey of literature, see Kaiser (Ed.), *Der Vertrag von Lissabon vor dem Bundesverfassungsgericht* (Springer, 2013), pp. 1597–1635.

28. See e.g. Grabenwarter, "The Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives", General Report, XVIth Congress of the Conference of European Constitutional Courts (2014), <www.venice.coe.int/files/Bulletin/SpecBull-CECC-e.pdf>, p. xxiv: "Many national reports submitted by other constitutional courts . . . mention the German Federal Constitutional Court as the most frequently cited foreign constitutional court, regardless of regional or linguistic factors". (All websites last visited 25 Jan. 2020).

identity review mechanism.[29] Therefore, the BVerfG's approach may serve as an example of how the derivation explained above is put into practice. The starting point is Article 23(1)(3) of the German Basic Law, which states that "the establishment of the European Union, as well as changes in its treaty foundations . . . shall be subject to paragraphs (2) and (3) of Article 79". Any conferral of competences must comply with Germany's eternity clause in Article 79(3) Basic Law, which shields certain principles from constitutional revision.

The scope of protection of Article 79(3) has two dimensions. While the provision contains a reference to principles like human dignity, democracy and the rule of law, it also protects the order of competences between the domestic and the EU level – albeit indirectly, since the provision does not explicitly refer to it. The initial "hook" for this second dimension is the democratic principle, which is tied to the issue of competences in a threefold manner. First, democratic self-determination presupposes a right of the constituent power to decide on a "change of identity" of the constitution. According to the Court, the termination of German sovereign statehood through a transfer of competences would surpass this threshold and is thus withdrawn from the reach of the legislature.[30] Second, democracy presupposes the right to vote. Yet the act of voting would lose its meaning if the elected body does not have a sufficient degree of power.[31] Therefore, Parliament has to retain "responsibilities and competences of substantial political importance"[32] in areas being "particularly sensitive for the ability of a . . . State to democratically shape itself".[33] Third, the democratic principle includes a right not to be subjected to any public authority that has not been legitimized by the voter.[34] This right can be violated when EU institutions assume new competences without any democratically determined transfer or when they exceed already transferred competences "in a manifest and structurally significant way" (thereby committing an *ultra vires* act).[35] Accordingly, the *ultra vires* review constitutes a "particular case" of the

29. See e.g. the comparative references in BVerfG, 2 BvR 2735/14, *Identitätskontrolle I*, para 47; BVerfG, 2 BvR 2728/13, *OMT II*, para 142; BvR 2728/13, *OMT I*, para 30. Critically, with regard to the validity of these references, see Claes and Reestman, op. cit. *supra* note 4, 941 et seq.

30. BVerfG, *Lisbon*, *supra* note 7 paras. 179, 228.

31. Ibid., paras. 174, 175, 210.

32. Ibid., para 246.

33. Ibid., paras. 252, 249 et seq.

34. Ibid., para 212; see further BVerfG, 2 BvR 2728/13, *OMT II*, para 128; 2 BvR 1685/14, *Banking Union*, para 115.

35. BVerfG, 2 BvR 2728/13, *OMT II*, paras. 79–84, 121, 129 et seq.

general protection of Germany's constitutional identity as far as it affects the democratic principle.[36]

These dimensions define the "constitutional identity" of the German Basic Law and imply a twofold function of the identity review mechanism: as a *review of the principles* enshrined in the eternity clause and as a *sovereignty* or *competence review*.

2.2. *The typology of constitutional identity review mechanisms*

Despite a similar line of reasoning, there is a great diversity among the reviews. They differ in at least three respects: the nature of the constitutional identities, the nature of the established limitations and the scope of the review mechanisms. As demonstrated in the following, these three categories cover the diversity of identity reviews in the EU judicial space. It would by far exceed the scope of this contribution to provide a precise and exhaustive classification of all identity reviews under this typology. Instead, this article seeks to develop a framework for comparison and to outline in broad strokes what a classification could look like. Further, identity reviews are judicial and thus relatively fluid concepts. As such, any quantitative classification would not only encounter methodological difficulties, but could also be accused of being arbitrary. Therefore, the proposed framework can only depict *rough tendencies* without aiming at quantifiable precision.

Nature of the identity. The first category concerns the nature of the national constitutional identity.[37] According to the prevalent doctrinal approach, constitutional identity is connected to principles of *universal* validity located *within* the constitution (e.g., human dignity, democracy or the rule of law). Conversely, the opposing approach derives identity from *pre-*, *supra-* or *extra*-constitutional factors relating to an *idiosyncratic* history, culture or ethnicity. The key example for such an idiosyncratic conception is the recently introduced Hungarian identity review. The Hungarian Constitutional Court linked constitutional identity to a pre-constitutional conglomeration

36. Ibid., para 153. On the relation of identity and *ultra vires* review, see BVerfG, BvR 2728/13, *OMT I*, para 27. See further Calliess, "Constitutional identity in Germany. One for three or three in one?" in Calliess and van der Schyff, op. cit. *supra* note 4, pp. 153, 175.

37. On the differences between "identity of the constitution" and "identity of the people", "constitutional" and "national" identity, see Martí, "Two different ideas of constitutional identity" in Arnaiz and Llivina, op. cit. *supra* note 3, p. 19; Martin, "L'identité de l'État dans l'Union européenne: Entre 'identité nationale' et 'identité constitutionnelle'", 91 *Revue française de droit constitutionnel* (2012), 1.

summarized under the term "historical constitution".[38] Constitutional identity "is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law".[39] Such points of reference beyond the constitutional text are not completely alien in Hungarian constitutional jurisprudence. After the fall of communism, Chief Justice Sólyom advanced the idea of an "invisible constitution" as an underlying system of constitutional principles and values for the interpretation and application of the 1989 transitional constitution.[40] The constitutional identity as interpreted by the *Alkotmánybíróság* resembles this "invisible" concept, but takes it one step further by anchoring it in a historical narrative.[41] A parallel, yet less extreme trend can be observed in the Czech Republic. Whereas the constitution's "material core" is derived from an eternity clause and contains "essential requirements for a democratic State governed by the rule of law", the Czech court insisted on the "natural law origin" of these principles: "the State does not provide them, but . . . must . . . only guarantee and protect them".[42] Further, it relied on a rather idiosyncratic identity conception in the *Slovak Pensions* case, which it drew "from the common constitutional tradition with the Slovak Republic . . . from a completely idiosyncratic and historically created situation that has no parallel in Europe".[43]

Figure 1: Nature of the identity

38. Alkotmánybíróság, 22/2016 (XII.5.) AB, *Refugee relocation*, para 69. On its content, see Concurring Opinion Judge Varga, para 110. Critically, Halmai, "Abuse of constitutional identity: The Hungarian constitutional court on interpretation of article E) (2) of the fundamental law", 43 *Review of Central and East European Law* (2018), 23; Kovács, "The rise of an ethnocultural constitutional identity", 18 GLJ (2017), 1703,1714.

39. Alkotmánybíróság, 22/2016 (XII.5.) AB, *Refugee relocation*, para 67. After the 7th amendment of the Hungarian Fundamental Law (29 June 2018), this conception has been expressly included in the constitution, see the "National Avowal" and Art. R(4).

40. Alkotmánybíróság, 23/1990 (X. 31.), Concurring Opinion Chief Justice Sólyom. See further Toth, "Lost in transition: Invisible constitutionalism in Hungary" in Dixon and Stone (Eds.), *The Invisible Constitution in Comparative Perspective* (Cambridge University Press, 2018), p. 541; Halmai, "Silence of transitional constitutions: The 'invisible constitution' concept of the Hungarian Constitutional Court", 16 I-CON (2018), 969.

41. See critically Alkotmánybíróság, 22/2016 (XII.5.) AB, *Refugee relocation*, Concurring Opinion Judge Stumpf, para 107.

42. Ústavní soud, *Lisbon I*, para 93.

43. Ústavní soud, Pl. ÚS 5/12, *Slovak Pensions*.

Nature of the limitation. The second category relates to the nature of the respective limitation. Some constitutional identity limitations can be overcome by way of constitutional revision. In these cases, constitutional identity functions as a *relative* threshold requiring or triggering constitutional amendments. On the other hand, several courts have established *absolute* limitations ultimately extending to constitutional amendments, which are subject to judicial review. On such a scale, Germany and Italy are allocated at the latter end. The German *Bundesverfassungsgericht*[44] as well as the Italian *Corte*[45] can review constitutional amendments.[46] Unfortunately, the situation in other Member States is far from clear. The Czech Constitutional Court derived limitations from an explicit eternity clause[47] and already confirmed its competence to conduct a "material core" review[48] that even extends, as a last resort, to constitutional amendments.[49] Yet the Czech court deliberately refused to establish a precise catalogue of core-sensitive domains: "These limits should be left primarily to the legislature to specify".[50] Such a wide legislative discretion blurs the absolute character of the established limitations and turns both eternity clause and constitutional identity into dynamic concepts. Although the Hungarian Constitutional Court established absolute limitations extending even to constitutional amendments,[51] its powers to substantively review such acts have been subject to vivid discussion[52] and

44. See e.g. BVerfG, 1 BvR 2378/98, *Großer Lauschangriff*, para 54; 2 BvR 1938, *Sichere Drittstaaten*, paras. 208 et seq.; 2 BvF 1/69, *Abhörurteil*, para 85; 2 BvF 1/71, *Besoldungsvereinheitlichung*, paras. 67 et seq., 1 BvR 1170, *Bodenreform I*, paras. 130 et seq.; *Bodenreform II*, paras. 80 et seq.

45. See e.g. Corte Costituzionale, 1146/1988, para 2.1.; 238/2014, para 3.2. See further Paris and Bifulco, "The Italian Constitutional Court" in von Bogdandy, Grabenwarter and Huber (Eds.), *The Max Planck Handbooks in European Public Law. Vol III: Constitutional Adjudication* (OUP, 2020), § 9, 462.

46. However, neither the BVerfG nor the *Corte* has declared a constitutional amendment unconstitutional so far. See National Report – Germany, XVIIth Congress of the Conference of European Constitutional Courts (2017), <www.confeuconstco.org/reports/rep-xvii/allemand_EN.pdf>, pp. 41–42; National Report – Italy, XVIIth Congress of the Conference of European Constitutional Courts (2017), < www.confeuconstco.org/reports/rep-xvii/italy_EN.pdf>, p. 33.

47. Ústavní soud, *Lisbon I*, para 196.

48. Ústavní soud, Pl. ÚS 5/12, *Slovak pensions*.

49. Ústavní soud, Pl. ÚS 27/09, *Melčák*. See further Roznai, "Legisprudence limitations on constitutional amendments?", 8 *Vienna Journal on International Constitutional Law* (2014), 29.

50. Ústavní soud, *Lisbon I*, para 109.

51. Concurring Opinion Judge Varga, cited *supra* note 38, para 110: "values that make up the self-identity . . . are legal facts that cannot be waived neither by way of an international treaty *nor with the amendment of the Fundamental Law*".

52. See e.g. Halmai, "Unconstitutional constitutional amendments", 19 *Constellations* (2012), 182; Sólyom, "The Constitutional Court of Hungary" in von Bogdandy, Grabenwarter and Huber, op. cit. *supra* note 45, § 8, 410 et seq.

oscillating jurisprudence.[53] Today, the Fundamental Law explicitly limits the court's jurisdiction over constitutional amendments to procedural requirements.[54] While the court generally accepted this limitation,[55] it remains to be seen whether it will maintain this stance after the introduction of its identity review mechanism. Its current composition, however, makes a shift towards the substantive review of constitutional amendments rather unlikely. In this sense, any "absolute" limitations set by the Hungarian court could still be circumvented by way of constitutional revision.[56]

The same applies to France and Belgium. The French *Conseil Constitutionnel*, for example, stated that an EU directive's domestic implementation must not run counter to the French constitutional identity – "sauf à ce que le *constituant* y ait consenti".[57] Even though it repeated its doctrine several times,[58] it never clarified whether the notion of "constituant" referred to the *pouvoir de revision* or the *pouvoir constituant originaire* (the people).[59] In any case, an absolute limitation would hardly be enforceable since constitutional amendments are not subject to review by the *Conseil constitutionnel*.[60] Finally, the situation in Poland and Spain remains rather open. The Polish Constitutional Tribunal hinted at the possibility of overcoming the established limitations through constitutional amendments.[61] Yet the Tribunal refrained from clarifying whether it would be able to substantively review such amendments against constitutional identity

53. For a rejection of such powers, see Alkotmánybíróság, 61/2011 (VII. 13.) AB. For an implicit affirmation, see Alkotmánybíróság, 45/2012 AB, para 7.

54. Art. 24(5) Hungarian Fundamental Law.

55. Alkotmánybíróság, 12/2013. (V. 24.) AB. See also National Report – Hungary, XVIIth Congress of the Conference of European Constitutional Courts (2017), <www.confeuconstco.org/reports/rep-xvii/hungary_EN.pdf>, p. 11.

56. This has been general practice in Hungary. See Sonnevend, Jakab and Csink, "The constitution as an instrument of everyday party politics" in von Bogdandy and Sonnevend (Eds.), *Constitutional Crisis in the European Constitutional Area* (Hart, 2016), p. 33.

57. Conseil Constitutionnel, 2006-540 DC, *Loi relative au droit d'auteur*, para 19.

58. See e.g. Conseil Constitutionnel, 2010-605 DC, *Melki*, para 18; 2011-631 DC, *Loi relative à l'immigration*, para 45; 2017-749 DC, *CETA (AECG)*, paras. 14, 73; 2018-768 DC, *Loi relative à la protection du secret des affaires*, para 3.

59. On this discussion, see Dubout, "Les règles ou principes inhérents à l'identité constitutionnelle", 83 *Revue française de droit constitutionnel* (2010), 451, 482; Troper, "Identité constitutionnelle" in Mathieu (Ed.), *Cinquantième anniversaire de la Constitution française* (Dalloz, 2008), pp. 123, 127.

60. See e.g. Conseil Constitutionnel, 2003-469 DC, para 2, 3. On the similar situation in Belgium, see Gérard and Verrijdt, "Belgian Constitutional Court adopts national identity discourse", 13 EuConst (2017), 182.

61. Trybunał Konstytucyjny, SK 45/09, *Brussels I*, para 2.7.

reservations.[62] Similarly, the Spanish Constitution explicitly requires a constitutional amendment in case an international treaty violates the constitution.[63] However, it is also not clear whether such amendments are subject to the limitations established by the *Tribunal Constitucional* or whether they can be reviewed by that court. The *Tribunal* repeatedly stressed that there are no material limits to constitutional amendments, "as long as it is not prepared . . . through an activity that infringes democratic principles, fundamental rights or all other constitutional mandates, and its . . . achievement follows the procedures foreseen for constitutional reform".[64] Whether this implies the review of certain material limits is still open to debate.[65]

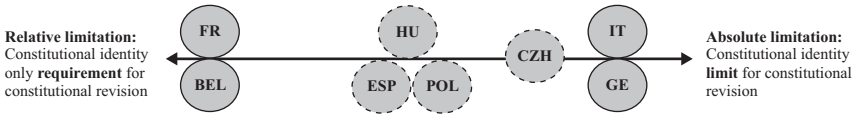

Figure 2: Nature of the limitation

Scope of the review mechanism. The third category concerns the scope of the review mechanisms. Again, two diverging models can be discerned. As seen above, some review mechanisms rest on two pillars: on the one hand, they enable the review of violations of the *principles* that make up the constitutional identity (e.g. democracy, the rule of law and fundamental rights); on the other hand, they allow the courts to assess possible losses of *sovereignty* (e.g. through transfer or any other "structurally significant" shift of competences). Such a twofold review mechanism can be found in Germany, Poland, Hungary[66] and – to some extent – in the Czech Republic, France and Spain.[67] These have to be distinguished from conceptions that concentrate

62. This question is still open, see National Report – Poland, XVIIth Congress of the Conference of European Constitutional Courts (2017), <www.confeuconstco.org/reports/rep-xvii/poland_EN.pdf>, pp. 22–23.

63. Art. 95(1) Spanish Constitution.

64. See e.g. Tribunal Constitucional, STC 42/2014, para 4 c); see also STC 114/2017, para 5 c); STC 259/2015, para 7; STC 103/2008, para 4; STC 48/2003, para 7.

65. See e.g. Ortega and Guijarro, "Constitutional change in Spain" in Contiades (Ed.), *Engineering Constitutional Change* (Routledge, 2013), pp. 299, 309.

66. See e.g. Trybunał Konstytucyjny, *Lisbon*, para 2.1.; Alkotmánybíróság, 22/2016 (XII.5.) AB, *Refugee relocation*, paras. 59–60.

67. See e.g. Ústavní soud, *Lisbon I*, para 109. The French *Conseil* distinguishes between the "fundamental conditions of . . . national sovereignty" as limits for the transfer of competences (2007-560 DC, *Lisbon*, para 9) and "constitutional identity" as a limit for the impact of EU law in the domestic sphere (2006-540 DC, *Loi relative au droit d'auteur*, para 19). The Spanish *Tribunal Constitucional* mentions "the respect for the sovereignty of the State, or our basic

only on the protected principles. The Italian *Corte Costituzionale*, for instance, developed its *controlimiti* doctrine primarily as a mechanism to protect fundamental rights.[68]

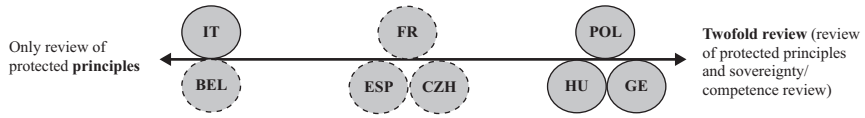

Figure 3: Scope of the review mechanism

Based on these categories and scales, it is possible to develop a typology of identity reviews and assess their potential for conflict with the EU legal order. The following typology is proposed, which allows identity reviews to be located on a spectrum between two extremes: soft-conflict and hard-conflict identity reviews.

Soft-conflict identity reviews encompass doctrines that set relative limits for the conferral of competences and the impact of EU law within the respective Member State. Reaching these limits triggers the need for constitutional amendments, which are not subject to review by the respective constitutional court. Further, these reviews aim at protecting a set of universally valid principles. Such reviews can lead to resolvable, "soft" jurisdictional conflicts. First, they can be managed within the Member States' legal order through constitutional amendments; in this sense, the respective constitutional orders have the potential and flexibility to accommodate the premises of the EU legal order. Second, the principles enshrined in the constitutional identity could also – due to their universality – be protected at the EU level or be articulated in terms of EU law.

Hard-conflict identity reviews set absolute limits for the conferral of competences and the impact of EU law in the domestic legal order. Not even constitutional amendments can overcome these limitations. Lacking the necessary flexibility, they are structurally irreconcilable with the primacy of the EU legal order. Further, some reviews are based on cultural or historical, extra-constitutional idiosyncrasies. This seems to exclude any equivalent protection at the EU level or articulation under EU law. Finally, these review mechanisms have a far-reaching scope, protecting not only a set of constitutional principles, but also State sovereignty or a set of crucial State competences.

constitutional structures and of the system of fundamental principles and values" as limits for the transfer of competences and affirmed its competence to intervene in exceptional situations. See Tribunal Constitucional, DTC 1/2004, Grounds 2, 4.

68. Fabbrini and Pollicino, op. cit. *supra* note 26.

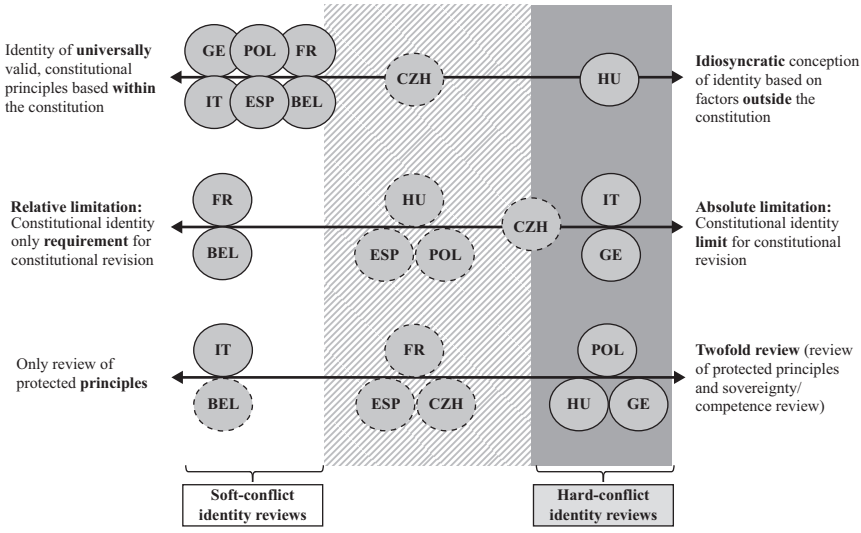

Figure 4: The typology of constitutional identity review mechanisms

Both soft-conflict and hard-conflict identity reviews should be understood as ideal types. The proposed typology is not limited to depicting a snapshot of current identity review mechanisms, but is open enough to capture future developments. As such, it might constitute a useful template for further comparative research and a warning sign for constitutional identity doctrines that evolve in more conflictual directions. Therefore, it comes as no surprise that not one of the review mechanisms established so far corresponds in its entirety to the model of hard-conflict identity reviews – fortunately, one should add.

Nevertheless, the framework allows general tendencies to be identified. Among the analysed mechanisms, the German and Hungarian doctrines in particular reveal a clear tendency towards hard-conflict identity reviews. While the identity reservations established by the French, Belgian and Spanish constitutional courts remain rather obscure, they tend – in light of their constitutional context – towards the type of soft-conflict identity reviews. The Italian, Czech and Polish reviews can be located somewhere in between these extremes. These general tendencies give rise to a more general assumption: the closer the analysed review mechanisms approach the ideal type of hard conflict reviews, the more they bear the potential for jurisdictional conflicts with the ECJ. For the sake of terminological clarity, the following analysis will

refer to mechanisms revealing such a tendency as *conflict-prone identity reviews*.

3. Common features fostering conflict-prone identity reviews

After establishing which identity reviews are particularly difficult to accommodate in relation to the EU legal order, the following part will explore and identify common features that determine or foster the emergence of such mechanisms. Exploring these characteristics might provide a basis for approaches to mitigate particularly conflictual review mechanisms and manage or even prevent constitutional identity conflicts. Under this premise, the following part will analyse such features relating both to the Member States' constitutional settings (3.1) and the conduct and attitude of the respective courts (3.2).

3.1. *Constitutional settings*

At first glance, the way Member States receive EU law within their domestic legal sphere could be a distinguishing factor. Though the traditional dichotomy has become blurred,[69] most States reveal a tendency either towards dualism or monism. Under the dualist regime, an international act can be reviewed for its constitutionality via the national transposition. Yet even in systems tending towards monism, the act of ratification (as in Poland, for instance) or the implementation of EU acts, such as directives (see e.g. France), are subject to constitutional review. Thus, the distinction between monism and dualism is not by itself a distinguishing parameter.

Far more important is the position of the respective court *vis-à-vis* the legislative branch. First, identity reviews in general can only be established if the national act of ratification, implementation or transposition is subject to judicial review.[70] This alone, however, is not enough. As already indicated above, identity reviews simultaneously restrict the legislature's discretion to confer competences on the EU.[71] Accordingly, the respective courts must be in a position to impose far-reaching limitations on the legislative branch. This requires a strong constitutional review of legislation (and perhaps even of constitutional amendments). The situation in Denmark provides an illustrative

69. For a critique of the distinction, see von Bogdandy, "Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law", 6 I-CON (2008), 397, 399.

70. Which is excluded e.g. in the Netherlands and Luxembourg, see Art. 120 Dutch Constitution and Art. 95ter(1) Luxembourg Constitution.

71. See *supra* section 2.2. ("*Nature of the limitation*").

example. The Danish Supreme Court developed an *ultra vires* review based on the perception that Parliament should be the supreme author of the law. If the Court invalidated a national law conflicting with EU law for which the accession act does not provide a legal basis, it would interfere with the powers of Parliament and thus cross the line drawn by the separation of powers.[72] Similarly, constitutional review in France is deeply influenced by the doctrine of "légicentrisme" (absolute parliamentary supremacy) and mistrust concerning any form of "gouvernement des juges".[73] This explains a reluctance to impose absolute limitations on the legislature's discretion, and makes the development of conflict-prone identity reviews highly unlikely.

A second, determinant factor could be the existence of eternity clauses in Member State constitutions. However, eternity clauses do not themselves constitute a necessary precondition for identity reviews. Although eight Member State constitutions contain eternity clauses,[74] only four have developed constitutional identity review mechanisms. Conversely, identity reviews have also emerged in Member States without any explicit eternity clause (e.g. in Hungary or Poland). The more general key question is, therefore, whether there are any absolute limits on legislative discretion to confer competences or amend the constitution, irrespective of whether these limits follow from an eternity clause, a set of constitutional principles or limitations beyond the text of the constitution.

Third, constitutional identity review mechanisms highly depend on the respective conception of sovereignty. In a nutshell, there are two extreme poles of sovereignty theories: While some presume that final authority has to be allocated to one specific actor (i.e. the State),[75] there is also a plurality of modern approaches that refer to concepts like divided sovereignty[76] or constitutional pluralism.[77] On this scale, Germany, Poland, Italy, and Hungary tend more towards the former model. Especially the German and Polish

72. Højesteret, 15/2014, *Ajos*. See further Krunke, "Constitutional identity in Denmark: Extracting constitutional identity in the context of a restrained Supreme Court and a strong legislature" in Calliess and van der Schyff, op. cit. *supra* note 4, p. 114.

73. See e.g. Favoreu et al. (Eds.), *Droit constitutionnel*, 21st ed. (Dalloz, 2019), p. 305 et seq.; Canivet, "Les limites de la mission du juge constitutionnel", 69 *Cités* (2017), 41; Badinter, "Une si longue défiance", 74 *Pouvoirs* (1995), 7.

74. These are Germany, Italy, France, the Czech Republic, Greece, Portugal, Romania and Cyprus, see Besselink et al., *National Constitutional Avenues for Further EU Integration* (European Parliament, 2014), p. 263 et seq.; Roznai, *Unconstitutional Constitutional Amendments* (OUP, 2017), p. 236 et seq.

75. See e.g. Grimm, *Sovereignty* (Columbia University Press, 2015), p. 46 et seq.

76. See e.g. Habermas, *Zur Verfassung Europas* (Suhrkamp, 2011), p. 69 et seq.

77. See e.g. Walker, "The idea of constitutional pluralism", 65 *Modern Law Review* (2002), 317 and Walker, "Constitutional pluralism revisited", 22 ELJ (2016), 333. See further the literature cited *supra* note 10.

Constitutional Courts seem to echo *Georg Jellinek*'s classic doctrine of three constitutive State elements[78] and his idea that sovereignty is the competence to decide on the allocation of competences ("Kompetenz-Kompetenz").[79] In stark contrast, the Czech Constitutional Court has opted for a concept of shared or pooled sovereignty. The transfer of competences should not be seen as a weakening of sovereignty, but as "strengthening it within the joint actions of an integrated whole".[80] The Czech Court has favoured a balanced and general view that also takes into consideration a State's gain of power due to its participation in decision-making at the European level.[81] Such a conception naturally provides for much more flexibility.

To conclude, we can identify three constitutional features that might determine or foster the emergence of conflict-prone identity reviews: the existence of a strong constitutional review (1), a set of absolute restrictions on legislative discretion (2) and a rather "traditional" model of sovereignty (3).

3.2. *Judicial attitudes*

These three characteristics are not just given constitutional circumstances, but to a large extent the product of judicial activity. This is evidenced by the way in which the Hungarian identity review emerged. Although the constitutional settings did not necessarily support the development of this mechanism, this did not prevent the Hungarian Constitutional Court from developing such an instrument. Then again, some Member States that possess all aforementioned characteristics do not formulate constitutional identity reservations at all. Portugal can serve as an illustrative example. While the Portuguese *Tribunal Constitucional* faces a constitutional framework with a detailed eternity clause in place (Art. 288 of the Portuguese Constitution) and has had plenty of opportunities to establish a constitutional identity review,[82] it has refrained from doing so. Instead, the Court assumes that the core values of the

78. Jellinek, *Allgemeine Staatslehre*, 4th ed. (Springer, 1922), p. 394 et seq.; Trybunał Konstytucyjny, *Lisbon*, para 2.1: "The attributes of sovereignty include: having the exclusive power of jurisdiction as regards the territory of a given state and its citizens"; similarly, BVerfG, *Lisbon*, para 298.

79. Jellinek, op. cit. *supra* note 78, p. 496; Trybunał Konstytucyjny, *Lisbon*, para 2.1.: "as long as they maintain . . . the competence to 'determine competences', they remain . . . sovereign subjects"; similarly, BVerfG, *Lisbon*, para 233.

80. Ústavní soud, *Lisbon I*, paras. 97–108; Ústavní soud, *Lisbon II*, paras. 146–147.

81. Ústavní soud, *Lisbon I*, para 110.

82. On the plethora of cases concerning austerity measures in the context of EU financial assistance, see Violante, "The Portuguese Constitutional Court and its austerity case law" in Pinto and Teixeira (Eds.), *Political Institutions and Democracy in Portugal* (Palgrave Macmillan, 2019), p. 121.

Portuguese Constitution are shared by the EU legal order, thereby excluding a conflict between both spheres.[83]

This leads to a rather sobering observation: ultimately, the emergence of conflict-prone identity reviews depends on the respective court's *attitude*. If a constitutional court is determined to create such an instrument, it will find ways to interpret the three identified constitutional features accordingly. This insight raises both hopes and concerns. On the one hand, it renders the emergence of conflict-prone identity reviews less predictable. On the other hand, it demonstrates that conflict-prone identity reviews are not inescapable dead-ends. As their underlying constitutional features are open to judicial interpretation (even express eternity clauses need to be interpreted regarding their *telos*, content or scope), they are not set in stone but subject to change and development.

Despite these silver linings, it seems rather unlikely that the constitutional courts falling in the ambit of this analysis will change their attitude towards the establishment of constitutional identity reservations or their underlying constitutional features any time soon. Besides the fact that identity reviews present a powerful judicial tool and might express legitimate concerns, any attempt to modify their underlying features would necessitate major adjustments in the national constitutional settings with potentially unforeseeable costs. Altering absolute constitutional limitations, for example, might cause repercussions beyond the established identity reviews and impact the judicial review of constitutional amendments. Such reviews, however, might be essential to shield constitutional orders against their internal deconstruction. The situation in Hungary, where constitutional amendments are used by the governing majority to circumvent inconvenient decisions of the Constitutional Court, demonstrates the predicaments of a lack of review in this regard.[84] Seen in this light, it seems risky – and not necessarily desirable – to touch upon these features.

Yet judicial attitudes do not determine only the initial *establishment* of constitutional identity reservations, but also their subsequent *articulation vis-à-vis* other actors – especially the Court of Justice. The key question on this subsequent level is the following: does the respective court articulate its constitutional identity concerns in a cooperative, dialogical or rather an uncooperative, confrontational manner? This can be illustrated with two examples: the Italian Constitutional Court has been praised for its dialogical

83. Portuguese Constitutional Court, Case 575/2014, para 25. See further Coutinho and Piçarra, "Portugal: The impact of European integration and the economic crisis on the identity of the constitution" in Albi and Bardutzky (Eds.), *National Constitutions in European and Global Governance* (Asser Press, 2019), pp. 591, 602.

84. See *supra* note 46.

attitude throughout the *Taricco* saga.[85] Though the Court flagged its concerns regarding the Italian constitutional identity, it also affirmed the importance of primacy of EU law, demonstrated why the ECJ judgment in question was not in harmony with *European* standards and made proposals for how to remedy the situation.[86] Obvious counterexamples are not only the German Constitutional Court's *OMT* reference[87] but also its decision in *Identitätskontrolle I*, which concerned the surrender, under the European Arrest Warrant Framework, of a person convicted *in absentia* in Italy. Although it eventually interpreted the EAW Framework Decision in conformity with the requirements set out in the Basic Law, the German Court still felt the need to demonstrate the potential force of its constitutional identity review. Further, the BVerfG's approach arguably deviated from the ECJ's stance in *Melloni*.[88] Nevertheless, it did not refer the case to the ECJ, thus preventing any kind of direct dialogue.[89]

This last feature seems to present the most promising path for mitigating conflict-prone identity reviews and managing constitutional identity conflicts. Adaptions in the way constitutional courts *articulate* their constitutional identity concerns necessitate neither a decision on the "last word" nor a revocation of the established identity review mechanisms. As it requires the smallest degree of adjustments in the national constitutional settings, it is by far the most flexible feature. Further, it directly concerns the interaction with the ECJ and thus the relationship in which potential conflicts could arise.

85. See e.g. Rauchegger, "National constitutional rights and the primacy of EU law: *M.A.S.*", 55 CML Rev. (2018), 1521, 1544; Bonelli, "The *Taricco* saga and the consolidation of judicial dialogue in the European Union", 25 MJ (2018), 357; Rossi, "*M.A.S. e M.B.* e la torre di Babele: alla fine le Corti si comprendono . . . pur parlando lingue diverse" in Amalfitano, op. cit. *supra* note 5, p. 153. See, however, the less "relational" follow-up to Case C-42/17, *M.A.S.*, EU:C:2017:936 in Corte Costituzionale, 115/2018.

86. Paris, "Carrot and stick. The Italian Constitutional Court's preliminary reference in the case *Taricco*", 37 *Questions of International Law* (2017), 5.

87. See e.g. Kumm, "Rebel without a good cause: Karlsruhe's misguided attempt to draw the CJEU into a game of 'chicken' and what the CJEU might do about it", 15 GLJ (2014), 203; Thiele, "Friendly or unfriendly act? The 'historic' referral of the Constitutional Court to the ECJ regarding the ECB's OMT program", 15 GLJ (2014), 241. But see Editorial, "An unintended side-effect of Draghi's bazooka: An opportunity to establish a more balanced relationship between the ECJ and Member States' highest courts", 51 CML Rev. (2014), 375.

88. Case C-399/11, *Melloni*, EU:C:2013:107, para 20.

89. Critically, see Nowag, "EU law, constitutional identity, and human dignity: A toxic mix?", 53 CML Rev. (2016), 1441, 1451; Burchardt, "Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht", 76 ZaöRV (2016), 527, 535 et seq., 538–539. For an interesting attempt to justify the BVerfG's interpretation of the EAW Framework Decision, see Lenaerts, "La vie après l'avis: Exploring the principle of mutual (yet not blind) trust", 54 CML Rev. (2017), 805, 819–822.

Based on this feature, what could a workable, realistic approach for managing constitutional identity conflicts look like?

4. Managing constitutional identity conflicts

I propose to follow Marta Cartabia, president of the Italian *Corte Costituzionale*, in what she termed a "relational style"[90] of constitutional adjudication. Even though it established the direct dialogue by means of preliminary reference rather late,[91] the *Corte* engages – according to its own understanding – in a "relational" way with the ECJ. This concept of "relationality" is used to describe the way in which courts interact with other institutions: are they behaving in a solipsistic or a cooperative manner? Do they take a confrontational or a dialogical stance? Are they demonstrating attentiveness and empathy with regard to other actors?[92]

Before advancing specific suggestions, it should be recalled in which situations constitutional identity conflicts could arise. Identity reviews can operate in several constellations. First, constitutional courts can review the *initial* transfer of competences, that is, the act of ratification or consent. *After* the transfer, the reference to constitutional identity allows the review of EU acts (or the domestic acts of implementation)[93] or justification of derogations from EU law obligations (e.g., under the AFSJ or fundamental freedoms).[94] Generally, only the latter situations can lead to the disapplication of EU law in the domestic legal sphere, clash with the ECJ's jurisdiction and trigger a jurisdictional conflict.

If a question of constitutional identity arises in one of these constellations, how could the potential jurisdictional conflict be managed in a "relational" manner? The following section will advance suggestions for how to realize such a "relational" dialogue between the courts on the procedural, formal and stylistic (4.1.) as well as on the substantive plane (4.2.).

90. Cartabia, "Of bridges and walls: 'Italian style' of constitutional adjudication", 8 *Italian Journal of Public Law* (2016), 37, 42. See also Barsotti et al. (Eds.), *Italian Constitutional Justice in Global Context* (OUP, 2016), p. 234 et seq.; von Bogdandy and Paris, "Building Judicial Authority", MPIL Research Paper No. 2019-01.

91. Corte Costituzionale, 103/2008 and 207/2013.

92. Cartabia, op. cit. *supra* note 90, 42–43.

93. See e.g. BVerfG, 1 BvR 256/08, *Data Retention Directive*; 2 BvR 987/10, *EFSF*; 2 BvR 2728/13, *OMT I*; 2 BvR 2728/13, *OMT II*; 2 BvR 859/15, *PSPP*; see also Corte Costituzionale, Order 24/2017; Ústavní soud, Pl. ÚS 5/12, *Slovak Pensions*, para VII; Trybunał Konstytucyjny, SK 45/09, *Brussels I*, para 2.1. et seq.; see further e.g. Conseil Constitutionnel, 2006-540 DC, *Loi relative au droit d'auteur*, para 19.

94. BVerfG, 2 BvR 2735/14, *Identitätskontrolle I* and Tribunal Constitucional, STC 26/2014.

4.1. *"Relationality" in procedure, form and judicial style*

A sound concept of "relationality" could consist of four key obligations placed on national courts. First, when these courts face a conflict between EU law and their respective constitutional identity, they have to avail themselves of the preliminary reference procedure.[95] Second, the recourse to constitutional identity must remain the last resort and be handled with self-restraint.[96] Third, the respective national courts will have to retain a margin of discretion by deliberately leaving the notion of constitutional identity open.[97] Although this ambiguity entails obvious risks, it also presents a chance for flexibility needed in constitutional conflicts. Fourth, once the ECJ has provided its answer, the national court should not examine whether the ECJ has given the one and only "correct" answer, but rather examine whether it transgressed the limits of legally sound discretion.[98]

Once a preliminary reference reaches the ECJ, a careful and strategic allocation of competences – a form of labour sharing – seems to be the most "relational" approach. The key question is who decides what. Generally, preliminary references will either concern the validity of an EU act that potentially violates a Member State's constitutional identity or national measures that contradict EU law and may be justified by a recourse to identity concerns. Supposing a national constitutional court relies on Article 4(2) TEU, an assessment before the ECJ will revolve around two central elements: the content of the respective identity and the proportionality either of the EU act or the national measure derogating from EU law obligations.

With regard to the content, a fruitful dialogue presupposes some sort of margin of appreciation of constitutional courts.[99] Nevertheless, some have argued that there can be no absolute deference to national interpretations, since such a solution could not be squared with the primacy, coherence and uniform application of EU law.[100] In this spirit, the ECJ has already decided in

95. Such an obligation has (theoretically) been accepted e.g. in BVerfG, 2 BvR 2735/14, *Identitätskontrolle I*, para 46; Trybunał Konstytucyjny, SK 45/09, *Brussels I*, para 2.6. See also Paris, "Limiting the 'counter-limits'", 10 *Italian Journal of Public Law* (2018), 205, 217.

96. See already Ústavní soud, *Lisbon I*, paras. 109, 216; Alkotmánybíróság, 22/2016 (XII.5.) AB, *Refugee relocation*, para 46; BVerfG, *Lisbon*, para 340.

97. Goldmann, "Constitutional pluralism as mutually assured discretion", 23 MJ (2016), 119, 128; Paris, op. cit. *supra* note 95, 210.

98. Goldmann, op. cit. *supra* note 97, 133; Schill and Krenn, "Art. 4 EUV" in Grabitz, Hilf and Nettesheim (Eds.), *Das Recht der Europäischen Union*, 67th ed. loose-leaf (Beck, 2019), para 55.

99. Similarly, see e.g. von Bogdandy and Schill, op. cit. *supra* note 10, 1452.

100. A.G. Cruz Villalón, Opinion in Case C-62/14, *Gauweiler*, EU:C:2015:7, para 59; A.G. Maduro, Opinion in Case C-213/07, *Michaniki*, EU:C:2008:544, para 33 and Case C-53/04, *Marrosu and Sardino*, EU:C:2006:517, para 40. Similarly, see Skouris, "L'identité nationale:

several cases that the respective national identity was not affected.[101] In my view, allowing national courts to unilaterally determine the content of their respective identity would hardly pose an existential threat to the Union. This holds true as long as the question of *content* is separated from the question of *normative relevance*.[102] Such a division between content and normative relevance is not unprecedented in EU law. In the context of restrictions to fundamental freedoms, for example, it is longstanding jurisprudential practice. To name but one case, the Court famously stated in *Henn and Darby* that "it is for each Member State to determine in accordance with its own scale of values . . . the requirements of public morality".[103] Though being an autonomous notion of EU law, the meaning and content of "public morality" under Article 36 TFEU is determined by the Member States. However, this deference concerns the content of "public morality" and does not necessarily extend to its normative relevance. Even if the ECJ accepts the reasons brought forward by the Member States as legitimate interests or objectives, this does not relieve them from being measured in a proportionality test. This approach can be observed for several notions, such as "public health", "public security" or "public policy", where the ECJ's jurisprudence oscillates between margins of appreciation of a varying degree.[104] A similar kind of deference could be adopted with regard to the content of "national identity" under Article 4(2) TEU.

Second, a labour sharing approach could be applied to the proportionality test as well. In this spirit, the Italian *Corte* has proposed "leaving to the national authorities the ultimate assessment concerning compliance with the supreme principles of the national order".[105] So far, the ECJ's case law varies between leaving the final assessment to the Member States[106] and a complete

qui détermine son contenu et selon quels critères?" in *Liber Amicorum Antonio Tizzano* (Giappichelli, 2018), pp. 912, 916.

101. Case C-58/13, *Torresi*, EU:C:2014:2088, para 58; Case C-393/10, *O'Brien*, EU:C:2012:110, para 49. A.G. Bot went even one step further, arguing in *M.A.S.* and *Melloni* that the fundamental rights at issue were not part of the respective constitutional identity. See A.G. Bot, Opinion in Case C-42/17, *M.A.S. and M.B.*, EU:C:2017:564, para 179; Case C-399/11, *Melloni*, EU:C:2012:600, para 140.

102. Wendel, op. cit. *supra* note 2, 135.

103. Case C-34/79, *Henn and Darby*, EU:C:1979:295, para 15.

104. For a comprehensive account, see Zglinski, "The rise of deference: The margin of appreciation and decentralized judicial review in EU free movement law", 55 CML Rev. (2018), 134; de Witte, "Sex, drugs & EU law: The recognition of moral and ethical diversity in EU Law", 50 CML Rev. (2014), 1545.

105. Corte Costituzionale, 24/2017, para 6.

106. Case C-391/09, *Runevič-Vardyn*, EU:C:2011:291, para 91; Case C-379/87, *Groener*, EU:C:1989:599, para 21.

proportionality test (even to the disadvantage of national identities).[107] As Tridimas has pointed out, this "degree of specificity is not a random exercise but a conscious judicial choice".[108] A viable solution could be a careful use of "outcome", "guidance" and "deference cases", i.e. a variable degree of specificity according to the potential outcome of the proportionality test. The ECJ could exercise the entire proportionality test if identity concerns seem likely to prevail and leave doubtful cases to the national courts, while simultaneously providing detailed standards for further assessment.

4.2. *"Relationality" in substance: Reformulating "identity" as "common value" concerns*

The concept of "relationality" pertains not only to procedure, form and judicial style but also to substantive questions. Constitutional identity claims are first and foremost claims under national constitutional law. In order to establish a dialogue with the ECJ, these claims need to be translated into EU law. What norms can facilitate such a translation? Identity reviews, it must be recalled, can operate both as a sovereignty or competence review as well as a review of certain constitutional principles. Translating the former into the language of EU law seems relatively straightforward. As the BVerfG has already demonstrated with regard to measures taken during the financial crisis (*ESM*, *EFSF*, *OMT*, *PSPP* and *Banking Union*), identity concerns can be depicted as a dispute regarding the competences of EU institutions under the Treaties. With regard to identity reviews as review of specific constitutional principles (e.g. the core of fundamental rights, democracy or the rule of law), the first provision which comes to mind is Article 4(2) TEU. In the following, it is demonstrated why Article 4(2) TEU is an insufficient mouthpiece for voicing constitutional identity claims (4.2.1). Instead, we will explore the potential and advantages of articulating such claims within the shape and frame of Article 2 TEU (4.2.2 and 4.2.3) before sketching the remaining function of Article 4(2) TEU (4.2.4).

4.2.1. *Article 4(2) TEU as an insufficient mouthpiece for voicing constitutional identity claims*

A closer look reveals that Article 4(2) TEU is a rather inadequate way of voicing constitutional identity concerns. This is due to three reasons. First, the status of "national identities" under Article 4(2) TEU does not correspond to

107. See e.g. Case C-202/11, *Las*, EU:C:2013:239; Case C-473/93, *Commission* v. *Luxembourg*, EU:C:1996:263, para 36.

108. Tridimas, "Constitutional review of Member State action: The virtues and vices of an incomplete jurisdiction", 9 I-CON (2011), 737, 749.

the status of constitutional identities in the Member States. At first glance, the two regimes seem to go "hand in hand".[109] Yet on the rare occasions in which the ECJ actually dealt with identity claims under Article 4(2) TEU, it treated them as mere public policy exceptions stripped of any distinguishing value[110] or as a component in the proportionality test.[111] This trivialization stands in stark contrast to the outstanding position constitutional identities occupy in the Member States.[112] Their distinctive quality seems lost in translation. For this reason, the BVerfG departed from the doctrine of equivalence and stated in *OMT I* that the EU conception of national identity "does not correspond to the concept of constitutional identity" under the Basic Law.[113]

Second, the ECJ has shown great reluctance to engage with constitutional identities.[114] One can easily understand why: when operating with Article 4(2) TEU, the Court seems to walk on a tightrope between Scylla (a narrow interpretation that exposes the primacy of EU law to the risk of rejection by national constitutional courts) and Charybdis (a broad interpretation that likewise undermines the primacy of EU law). Accordingly, there are good reasons for the Court to keep Article 4(2) TEU a dead letter. This scarce use has led legal scholarship to examine cases in which the Court expressed a silent sensitivity towards national specificities.[115] In *Omega*, for example, the

109. BVerfG, *Lisbon*, para 240; similarly, Trybunał Konstytucyjny, *Lisbon*, para 2.1.; Alkotmánybíróság, 22/2016 (XII.5.) AB, *Refugee relocation*, para 62.

110. See e.g. Case C-438/14, *Bogendorff*, EU:C:2016:401, para 65; Case C-673/16, *Coman*, EU:C:2018:385, para 42 et seq.; Case C-208/09, *Sayn Wittgenstein*, EU:C:2010:806, para 84.

111. Case C-438/14, *Bogendorff*, para 64; Case C-202/11, *Las*, para 29; Case C-208/09, *Sayn Wittgenstein*, para 83; Case C-391/09, *Runevič-Vardyn*, para 87. On the rather limited effects of Art. 4(2) TEU, see further Garben, "Collective identity as a legal limit to European integration in areas of core State powers", 58 JCMS (2020), 41–55; Guastaferro, "Beyond the exceptionalism of constitutional conflicts: The ordinary functions of the identity clause", 31 YEL (2012), 263, 308 et seq.

112. See e.g. Cruz Villalón, "La identidad constitucional de los Estados miembros: dos relatos europeos", 17 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* (2013), 501.

113. BVerfG, 2 BvR 2728/13, *OMT I*, para 29; see, however, BVerfG, 2 BvR 2735/14, *Identitätskontrolle I,* para 44: "The identity review . . . . is rather inherent in the concept of Art. 4 sec. 2 sentence 1 TEU"; similarly, BVerfG, 2 BvR 2728/13, *OMT II*, para 140; 2 BvR 859/15, *PSPP*, para 55.

114. The ECJ assessed national identity reservations in very few cases. See Case C-673/16, *Coman*; Case C-51/15, *Remondis*, EU:C:2016:985, para 40; Case C-276/14, *Gmina Wrocław*, EU:C:2015:635, para 40; Case C-438/14, *Bogendorff*; Case C-391/09, *Runevič-Vardyn*; Case C-58/13, *Torresi*; Case C-156/13, *Digibet*, EU:C:2014:1756, para 34; Case C-202/11, *Las*; Case C-393/10, *O'Brien*; Case C-208/09, *Sayn Wittgenstein*; Case C-473/93, *Commission* v. *Luxemburg*; Case C-379/87, *Groener*.

115. Se e.g. Case C-213/07, *Michaniki*, EU:C:2008:731; Case C-428/06, *UGT Rioja*, EU:C:2008:488; Case C-36/02, *Omega*, EU:C:2004:614; Case C-88/03, *Portugal* v. *Commission (Azores)*, EU:C:2006:511. For a comprehensive account, see Cloots, op. cit. *supra*

ECJ was seen to embrace the absolute concept of human dignity required by the BVerfG.[116] According to my understanding, however, the Court did not rely on a particular German conception of human dignity. On the contrary, it referred to a concept inherent in the EU legal order. "There can . . . be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status".[117] This seems to follow a more general tendency in the ECJ's case law when dealing with specific interests of the Member States. The Court only very occasionally allows national particularities to enter the realm of EU law in an unfiltered fashion.[118] Instead, the Court relies as far as possible on conceptions inherent in the EU legal order before engaging with the permeability towards national specificities.

Finally, the notion of constitutional identity is inherently divisive. Although some commentators hoped that Article 4(2) TEU would allow for a "common European discourse" on the sensitive issue of constitutional identity,[119] Article 4(2) TEU turned out to be more of an identity "battleground" than a platform for discourse. Identity has been compared to a shield and a sword pointed towards the EU,[120] to a *norme de résistance*[121] at the discretion of national constitutional courts. This has to do with the inherent nature of identities. Generally, the term "identity" has a twofold meaning: it can express convergence, equivalence and "sameness" or – in total opposition to the former – idiosyncrasies, distinctiveness or "selfhood".[122] In light of its very function, the notion of constitutional or national identity is attached to the latter meaning. Understood as "selfhood", identity is defined in opposition to others; it is essentially constituted by negation.[123] In this sense, constitutional identities are inherently dividing and separating.

note 3, p. 63 et seq.; Azoulai," The European Court of Justice and the duty to respect sensitive national interests" in Dawson, de Witte and Muir (Eds.), *Judicial Activism at the European Court of Justice* (Elgar, 2013), pp. 167, 176 et seq.

116. See e.g. Schwarze, "Balancing EU integration and national interests in the case law of the Court of Justice" in *The Court of Justice and the Construction of Europe* (Asser Press, 2013), pp. 257, 260–261.

117. Case C-36/02, *Omega*, para 34. Similarly, Besselink, Case note on C-208/09, *Ilonka Sayn-Wittgenstein*, 49 CML Rev. (2012), 671, 680.

118. See e.g. de Witte, op. cit. *supra* note 104, 1562 et seq.

119. von Bogdandy and Schill, op. cit. *supra* note 10, 1435, 1440.

120. Konstadinides, "Constitutional identity as a shield and as a sword", 13 CYELS (2011), 195.

121. Millet, op. cit. *supra* note 4, p. 17.

122. See further Sterck, "Sameness and selfhood: The efficiency of constitutional identities in EU law", 24 ELJ (2018), 281; Viala, "Le concept d'identité constitutionnelle" in Burgorgue-Larsen, op. cit. *supra* note 3, pp. 7, 9.

123. Rosenfeld, "Constitutional Identity" in Rosenfeld and Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012), pp. 756, 759.

4.2.2. *Reformulating "identity" as "common value" concerns*

In light of these considerations, I propose to cease relying on "identity" in the sense of Article 4(2) TEU[124] and to concentrate instead on notions *common* to the EU and Member States, like the common constitutional traditions under Article 6(3) TEU or common values under Article 2 TEU. Instead of expressing identity as "selfhood", their key concern is articulating convergence, equivalence and "sameness". As such, these notions can foster a much more relational dialogue. Whereas some propose relying on the notion of "common constitutional traditions",[125] this contribution argues that the Union's common values enshrined in Article 2 TEU should become the new point of reference. This provision states at a prominent position: "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 …."

The following part will demonstrate that such a reformulation of identity as common value claims is possible both substantively and procedurally. Substantively, this presupposes a congruence of the Union's common values and of the constitutional identities of the Member State on a normative, conceptual and substantial level.

From a normative perspective, Article 2 TEU *requires* a certain degree of congruence between the EU's common values and the Member States' constitutional identities.[126] This claim for congruence is established in a twofold manner. On one hand, the Member States' constitutional orders are

124. With different arguments, see also Kelemen and Pech, "The uses and abuses of constitutional pluralism: Undermining the rule of law in the name of constitutional identity in Hungary and Poland", 21 CYELS (2019), 59; Fabbrini and Sajó, "The dangers of constitutional identity", 25 ELJ (2019), 457; Schönberger, "Identitäterä: Verfassungsidentität zwischen Widerstandsformel und Musealisierung des Grundgesetzes", 63 *Jahrbuch des öffentlichen Rechts der Gegenwart* (2015), 41; Burgorgue-Larsen, "L'identité constitutionnelle en question" in Burgorgue-Larsen, op. cit. *supra* note 3, p. 155.

125. Pollicino and Fichera, "The dialectics between constitutional identity and common constitutional traditions", 79 GLJ (2019), 1097.

126. von Bogdandy, "Founding Principles" in Bast and von Bogdandy (Eds.), *Principles of European Constitutional Law*, 2nd ed. (Hart, 2010), pp. 11, 25. See also Klamert and Kochenov, "Article 2 TEU" in Kellerbauer, Klamert and Tomkin (Eds.), *The Treaties and the Charter of Fundamental Rights – A Commentary* (OUP, 2019), para 4; Levits, "L'Union européenne en tant que communauté des valeurs partagées" in *Liber Amicorum Antonio Tizzano* (Giappichelli, 2018), pp. 509, 514; Delledonne, "Homogénéité constitutionnelle et protection des droits fondamentaux et de l'État de droit dans l'ordre juridique européen", 53 *Politique européenne* (2016), 86; Mangiameli, "The Union's homogeneity and its common values" in Blanke and Mangiameli (Eds.), *The European Union after Lisbon* (Springer, 2012), p. 21; Schorkopf, *Homogenität in der Europäischen Union* (Duncker & Humboldt, 2000), paras. 23 et seq.

the main source for the determination of the Union's common values under Article 2 TEU. As Voßkuhle has noted, "the values contained in Article 2 TEU are . . . like a system of communicating vessels to the constitutional cultures of the Member States. If we intend to decipher the contents of European values, their interdependence on national counterparts must be taken into account".[127] In this process, the Member States' constitutional identities are obviously the primary point of reference. On the other hand, Article 2 is not only a gateway for domestic constitutional law into the EU legal order.[128] Rather, it establishes a veritable "value interaction".[129] The Member States contribute the essential building blocks (bottom up) and are subsequently bound by a set of values that are common to the EU and its Member States (top down). As long as the Member States are part of the Union, Article 2 TEU defines a common constitutional identity from which they cannot derogate. Such an understanding is not only indicated by the wording of Article 2 TEU, but also by Articles 7 and 49(1) TEU. This obligation also extends to the Member States' constitutional or national identities under Article 4(2) TEU, which may not contradict the Union's values.[130]

Conceptually, the Union's values and constitutional identities reveal rather similar features. An appeal to constitutional identities often implies absolute constitutional limitations.[131] It aims at protecting essential core guarantees[132]

127. Voßkuhle, *The Idea of the European Community of Values* (Thyssen-Lectures, 2017), p. 110. Similarly, Lenaerts, "Die Werte der Europäischen Union in der Rechtsprechung des Gerichtshofes", 44 EuGRZ (2017), 639, 640. See also A.G. Cruz Villalón, Opinion in Case C-62/14, *Gauweiler*, para 61; A.G. Maduro, Opinion in Case C-127/07, *Société Arcelor Atlantique et Lorraine*, EU:C:2008:292, para 16.

128. For some, this is the central purpose of Art. 4(2) TEU. See von Bogdandy and Schill, op. cit. *supra* note 10, 1431, 1435; Wendel, *Permeabilität im europäischen Verfassungsrecht* (Mohr Siebeck, 2011), p. 572 et seq.; Schnettger, "Article 4(2) TEU as a vehicle for national constitutional identity in the shared European legal system" in Calliess and van der Schyff, op. cit. *supra* note 4, pp. 13–16.

129. Calliess, "The transnationalization of values by European law", 10 GLJ (2009), 1367, 1378.

130. See e.g. European Parliament, Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (2012/2130(INI)), Rec. M. See also Opinion in Case C-62/14, *Gauweiler*, para 61; Voßkuhle, op. cit. *supra* note 127, p. 117; Rossi, "2, 4, 6 (TUE) . . . l'interpretazione dell' 'Identity Clause' alla luce dei valori fondamentali dell'Unione" in *Liber Amicorum Antonio Tizzano* (Giappichelli, 2018), pp. 858, 866; Villani, *Valori comuni e rilevanza delle identità nazionali* (Editoriale Scientifica, 2011), p. 9; von Bogdandy and Schill, op. cit. *supra* note 10, 1430.

131. See *supra,* under 2.2.

132. See e.g. BVerfG, *Lisbon*, para 240 ("inviolable core"), 261 ("core principles"); Ústavní soud, *Lisbon I*, paras. 93, 94, 110; *Lisbon II*, para 112 ("material core"); Trybunał Konstytucyjny, *Lisbon*, para 2.1 ("the heart of the matter").

and is thus triggered only in exceptional situations.[133] The same holds true for Article 2 TEU, which stands at the top tier of the hierarchy of EU law.[134] The ECJ's decision in *Kadi* already articulated this position with regard to the former Article 6(1) TEU (Nice), stating that a provision of primary law "cannot . . . authorize any derogation from the principles . . . enshrined in Article 6(1) EU".[135] Article 2 TEU can thus be understood as manifesting an untouchable core of EU law.[136] Some go even as far as interpreting Article 2 TEU as an absolute limitation for future Treaty revisions.[137] By implication, this means that the Union's core values cannot be balanced with other considerations of EU primary law (like fundamental freedoms). If truly "untouchable", their protection is absolute.[138] At the same time, Article 2 TEU cannot be understood as imposing very detailed standards. The Treaty drafters' intention,[139] the high procedural and substantial thresholds of Article 7 TEU as well as the legally guaranteed constitutional autonomy of the Member States, support a restrained reading. Accordingly, Article 2 TEU

133. See e.g. BVerfG, 2 BvR 2735/14, *Identitätskontrolle I*, para 45 ("in exceptional cases and under narrowly defined conditions"). Similarly, see Ústavní soud, *Lisbon I*, paras. 84, 120, 139; Trybunał Konstytucyjny, SK45/09, *Brussels I*, para 2.7.

134. See e.g. Rosas and Armati, *EU Constitutional Law: An Introduction*, 3rd ed. (Hart, 2018), pp. 53–55. Similarly, with regard to the former Art. I-2 of the European Constitution, Art. 6(1) TEU (Nice) and Art. F TEU (Amsterdam), see Tridimas, *The General Principles of EU Law*, 2nd ed. (OUP, 2007), p. 16; Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker&Humblot, 2000), p. 341 f.; Gaudin, "Amsterdam: L'échec de la hiérarchie des normes?", 35 RTDE (1999), 1. Critically concerning any hierarchies in EU primary law, see Nettesheim, "Normenhierarchien im EU-Recht", 41 EuR (2006), 737, 740 et seq.

135. Joined cases C-402 & 415/05 P, *Kadi*, EU:C:2008:461, paras. 303–304.

136. See e.g. Voßkuhle, op. cit. *supra* note 127, p. 116; Klamert and Kochenov, op. cit. *supra* note 126, para 1; Villani, op. cit. *supra* note 130, p. 9.

137. See e.g. Schorkopf, "Europäischer Konstitutionalismus oder die normative Behauptung des 'European way of life'. Potenziale der neueren Werterechtsprechung des EuGH", 72 NJW (2019), 3418, 3422; Passchier and Stremler, "Unconstitutional constitutional amendments in European Union law", 5 *Cambridge Journal of International and Comparative Law* (2016), 337, 354 et seq. See already Cruz Vilaça and Piçarra, "Y a-t-il des limites matérielles à la révision des Traités instituant les Communautés europeennes?", 29 CDE (1993), 3, 29.

138. Lenaerts, "Limits on limitations: The essence of fundamental rights in the EU", 20 GLJ (2019), 779, 793.

139. European Convention, Praesidium: Presentation of an initial draft set of Articles of Part I of the Constitutional Treaty, CONV 528/03, 11: "This Article can thus only contain a *hard core* of values meeting two criteria at once: on the one hand, they must be so fundamental that they lie at the very heart of a peaceful society . . . on the other hand, they must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom".

should be interpreted as drawing "red lines" that are only reached in exceptional circumstances.[140]

Finally, there is a high degree of substantial convergence between Article 2 TEU and constitutional identities. It would go far beyond the scope of this contribution to undertake a comprehensive comparison between the content of the Union's common values and the Member States' constitutional identities. It seems, however, that Article 2 TEU and the constitutional identities of the Member States encompass – *en gros* – the same foundational principles: democracy, the rule of law and the essence of fundamental rights.[141] Several constitutional courts have expressly affirmed this identity and have suggested, moreover, that a violation of their constitutional identity would be a violation of Article 2 TEU and *vice versa*.[142] Even the much-criticized Hungarian constitutional identity, based on its "historical constitution", generally mirrors – at least on paper – the values enshrined in Article 2 TEU.[143] Certainly, the new Hungarian Fundamental Law is highly problematic with regard to the Union's common values and increasingly alienates Hungary from the Union in many respects.[144] Still, many of the examples cited as parts of the Hungarian "historical constitution" could equally be addressed under Article 2 TEU.[145] The specific realization of each Union value can of course vary to a considerable extent among the Member States. Yet both Article 2 TEU and constitutional identities are conceptually limited to the protection of a hard

140. See in more detail von Bogdandy and Spieker, "Countering the judicial silencing of critics. Article 2 TEU values, *Reverse Solange*, and the responsibilities of national judges", 15 EuConst (2019), 421–422.

141. For a comparative assessment, see e.g. Schill and Krenn, op. cit. *supra* note 98, para 28. See also von Bogdandy and Schill op. cit. *supra* note 10, 1432, 1436, 1439 et seq;

142. See e.g. Ústavní soud, *Lisbon I*, para 120 ("identity of values"), paras. 208, 209; Trybunał Konstytucyjny, *Lisbon*, para 2.2 ("full axiological compatibility"); SK45/09*, Brussels I*, para 2.10 ("significant axiological concurrence"). See also Tribunal Constitucional, DTC 1/2004, Ground 3: "The competences whose exercise is transferred to the European Union could not, without a breakdown of the Treaty itself, act as a foundation for the production of Community regulations whose content was contrary to the values, principles or fundamental rights of our Constitution".

143. Alkotmánybíróság, 22/2016 (XII.5.) AB, *Refugee relocation*, para 65: "important components – *identical with the constitutional values generally accepted today* – can be highlighted as examples: freedoms, the division of powers, republic as the form of government . . . " (emphasis added).

144. See only Editorial Comments, "Hungary's new constitutional order and 'European unity'", 49 CML Rev. (2012), 871.

145. See the Concurring Opinion of Judge Varga in Alkotmánybíróság, 22/2016 (XII.5.) AB, *Refugee relocation*, para 110 who lists as part of the Hungarian historical constitution e.g. "freedoms and the limitation of power (the Golden Bull), respect for autonomies under public law (Tripartitum), freedom of religion (the Laws of Torda), lawful exercising of power (Pragmatica Sanctio), parliamentarism, equal rights (Laws of April 1848), separation of powers, acknowledging judicial power, protection of minorities (Laws of the Compromise)".

core and not necessarily every specific realization thereof.[146] If it eventually appears that an element of a Member State's constitutional identity does not find its expression under Article 2 TEU, Article 4(2) TEU still remains a second option (see also below in 4.2.4).

On the procedural level, a crucial precondition for articulating identity concerns under Article 2 TEU is the capacity of constitutional courts to embrace EU law and values as a yardstick for review. In many Member States, Union law is neither object nor yardstick of constitutional review.[147] Indeed, many courts face an exhaustive list of enumerated competences and Union law does not expressly feature therein.[148] Nevertheless, most of them have sufficient interpretative room to take EU law into consideration.[149] The BVerfG's decision on the *Right to be forgotten I,* of 6 November 2019 may serve as an illustration.[150] After its *Solange II* decision, the BVerfG specifically excluded Union law as a yardstick for the review of national measures until the presumption of an equivalent fundamental rights protection at the EU level is refuted.[151] This general rejection has now been overruled.[152] The German Constitutional Court expressly acknowledged that it will embrace EU fundamental rights as a yardstick if the case under review is governed by legal provisions that are fully harmonized under EU law. This approximates the *Bundesverfassungsgericht* to those courts which already embrace EU law as a yardstick for review.[153]

146. See *supra* note 132.

147. Paris, "Constitutional courts as European Union courts", 2 MJ (2017), 792, 795.

148. See e.g. Art. 93 German Basic Law; Art. 55 French Constitution; Art. 88 Czech Constitution. Although Art. 188 Polish Constitution and Art. 24 Hungarian Fundamental Law are drafted more openly, the constitutional courts excluded (Alkotmánybíróság, 72/2006(XII.15.)AB) or significantly limited EU law as a yardstick of review (Trybunał Konstytucyjny, P 37/05, para III.4.2.).

149. See with much evidence Paris, op. cit. *supra* note 147, 801, 809 et seq.

150. BVerfG, 1 BvR 276/17, *Recht auf Vergessen II*, paras. 50 et seq.

151. BVerfG, BvR 197/83, *Solange II*, para 132; 2 BvL 1/97, *Bananenmarktordnung,* para 57. See further BVerfG, 1 BvR 1054/01, *Sportwetten*, para 77; 1 BvF 1/05, *Emissionshandel*, para 68.

152. BVerfG, 1 BvR 276/17, *Recht auf Vergessen II*, paras. 50, 67.

153. See already *Corte costituzionale*, 232/1975, para 8 and more recently Sentenza 20/2019, paras. 2.1, 2.3. See also Belgian Cour Constitutionnelle, 29/2018, B.9., B.10.3.-5. On the potentials of embracing EU law as a yardstick, see e.g. Burgorgue-Larsen, "La mobilisation de la Charte des droits fondamentaux de l'Union européenne par les juridictions constitutionnelles", 2 *Titre VII* (2019), 31; Di Martino, "Giurisdizione costituzionale e applicabilità della Carta dei diritti fondamentali dell'Unione europea", *Diritto pubblico comparato ed europeo* (2019), 759, 776 et seq.; Bäcker, "Das Grundgesetz als Implementationsgarant der Unionsgrundrechte", 50 EuR (2015), 389; critically, see Komárek, "Why national constitutional courts should not embrace EU fundamental rights" in de Vries, Bernitz and Weatherill (Eds.), *The EU Charter of Fundamental Rights as a Binding Instrument* (Hart, 2015), p. 75.

4.2.3. *Potentials and potential objections*

Most certainly, any turn to values by national constitutional courts will be critically observed. Therefore, it seems necessary to clearly articulate the advantages and potentials of such an approach and to anticipate possible objections and risks. Probably, the most crucial question will be: what's in it for national constitutional courts? Why should they refer to the Union's common values instead of Article 4(2) TEU?

First, Article 2 TEU corresponds much better to the paramount importance of constitutional identities in the national legal orders. Since this provision stands at the top tier of its hierarchy, all EU law – even primary law – has to be interpreted in conformity with it.[154] Unlike Article 4(2) TEU, Article 2 TEU is not operated as a mere public policy exception. As such, reformulating identity as EU value concerns leads to a considerably more effective expression and protection of constitutional identities at the EU level. If a national constitutional court aims at expressing a principle of *highest* constitutional value, it can best do so by submitting its interpretation of the corresponding value under Article 2 TEU.

Second, engaging with Article 2 TEU would allow national courts to play a crucial role in the construction of the Union's very foundations. Since they are responsible for the authentic interpretation of their constitution and thus for the individual building blocks of which Article 2 TEU is composed, national constitutional courts are an indispensable partner for the Court of Justice.[155] By embracing this role, they could actively participate in the shaping of the Union's common value basis, take ownership of these values and have a significant impact on the further course of the European integration project.[156] This would counter the concerns regarding their increasing marginalization in the EU judicial space.[157]

Third, a turn from identity to values would prevent constitutional identity doctrines developed by for instance the German or Italian constitutional courts from becoming a template for captured courts in backsliding Member States. As can be observed in Hungary and Poland, appeals to national identity

154. Potacs, "Wertkonforme Auslegung des Unionsrechts", 51 EuR (2016), 164.

155. See already A.G. Maduro, Opinion in Case C-127/07, *Société Arcelor Atlantique et Lorraine*, EU:C:2008:292, para 17.

156. Voßkuhle, "Multilevel cooperation of European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund", 6 EuConst (2010), 175, 197. For this self-understanding, see also Voßkuhle, "'European integration through law': The contribution of the Federal Constitutional Court", 58 *European Journal of Sociology* (2017), 145.

157. For such concerns, see e.g. Komárek, "National constitutional courts in the European constitutional democracy",12 I-CON (2014), 525.

are key in justifying illiberal developments that violate European standards.[158] The Polish White Paper on the reforms of the judiciary, for example, justifies the attacks on judicial independence with a recourse to the Polish constitutional identity protected under Article 4(2) TEU.[159] Similarly, Hungary's current anti-migration policy heavily relies on the aim of preventing an "alteration of its cultural identity".[160] The Hungarian Constitutional Court took up this identity conception in its decision on EU refugee relocations, which laid the groundwork for a Hungarian identity review mechanism.[161] The Court's reasoning, however, is largely based on a comparative analysis – especially on references to identity review mechanisms in other Member States.[162] This comparative basis would be considerably weakened if other constitutional courts started turning to common values instead of constitutional identity. Since national courts cannot unilaterally define the Union's *common* values, Article 2 TEU lends itself much less to potential abuses and manipulation. A continuing recourse to constitutional identity, however, might support and strengthen illiberal imitations and manipulations in backsliding Member States. Some even argue that the German and Italian constitutional courts carry – due to their dominant position in the EU legal space – a "special responsibility" not to infuse doctrines into the European legal discourse that are prone to abuse.[163]

Fourth, national courts might find a much more responsive counterpart in the Court of Justice. Shifting from Article 4(2) TEU to Article 2 TEU also means shifting the dialogue onto a more level playing field. As discussed above, national courts claim an interpretative authority with regard to their constitutional identities. While such a prerogative cannot be considered unfounded, it makes the handling of Article 4(2) TEU rather difficult for the

158. See e.g. Kelemen and Pech, op. cit. *supra* note 124; Kochenov and Bárd, "The last soldier standing? Courts versus politicians and the rule of law crisis in the new Member States of the EU", 1 *European Yearbook of Constitutional Law* (2019), 243, 258 et seq.

159. White Paper on the Reform of the Polish Judiciary (7 March 2018), <www.premier.gov.pl/mobile/en/news/news/the-government-presents-a-white-paper-on-the-reforms-of-the-polish-justice-system.html>, paras. 168–174, 189, 206–207.

160. Viktor Orbán, Speech at the 28th Bálványos Summer Open University (22 July 2017), <www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/viktor-orban-s-speech-at-the-28th-balvanyos-summer-open-university-and-student-camp>.

161. See e.g. Halmai, op. cit. *supra* note 38, 37 et seq.; Kovács, op. cit. *supra* note 38, 1714 et seq.

162. See e.g. the comparative analysis in Alkotmánybíróság, 22/2016 (XII.5.) AB, *Refugee relocation*, paras. 34–44, 49. See further Bakó, "The Zauberlehrling unchained?", 78 ZaöRV (2018), 863.

163. Pollicino, "Metaphors and identity based narrative in constitutional adjudication: When judicial dominance matters", IACL-AIDC Blog (27 Feb. 2019), <blog-iacl-aidc.org/2019-posts/2019/2/27/metaphors-and-identity-based-narrative-in-constitutional-adjudication-when-judicial-dominance-matters>.

ECJ (see above in 4.2.1). Determining the Union's common values, however, is structurally different from ascertaining identity under Article 4(2) TEU. National courts and the ECJ have an equally important role to play. In this sense, perceiving the determination of the Union's common values as a shared task unburdens the dialogue from any issues of final authority.

Three objections are likely to be raised against these arguments. The first one boils down to the reproach that the values enshrined in Article 2 TEU cannot be applied and reviewed by courts. The ambiguous notion of "values", their vagueness, and the ECJ's limited jurisdiction under Article 269 TFEU have led many to doubt whether Article 2 TEU establishes justiciable legal effects.[164] In light of current jurisprudential developments, such doubts can hardly be sustained. Although Article 2 TEU did not play a central role in the ECJ's case law for some time,[165] it has begun to feature increasingly. In Opinion 2/13,[166] *ASJP*,[167] *Achmea*,[168] *L.M.*,[169] *Wightman*[170] and *Commission* v. *Poland,*[171] values take centre stage. *ASJP* in particular can be seen as a stepping stone towards the operationalization of Article 2 TEU.[172] In the crucial passage, the ECJ states that "Article 19 TEU . . . gives concrete expression to the value of the rule of law stated in Article 2",[173] thus hinting at

164. See e.g. Möllers and Schneider, *Demokratiesicherung in der Europäischen Union* (Mohr Siebeck, 2018), p. 125; Levits, op. cit. *supra* note 126, p. 521; Kochenov and Pech, "Monitoring and enforcement of the rule of law in the EU", 11 EuConst (2015), 512, 520. Arguing for the judicial applicability of Article 2 TEU, see Hilf and Schorkopf, "Art. 2 EUV" in Grabitz, Hilf and Nettesheim, op. cit. *supra* note 98, para 46; Cannizzaro, "Il ruolo della Corte di giustizia nella tutela dei valori dell'Unione europea" in *Liber Amicorum Antonio Tizzano* (Giappichelli 2018), p. 158; Baratta, "La 'communauté de valeurs' dans l'ordre juridique de l'Union européenne", (2018) R.A.E., 81, 86–90.

165. For an overview, see Nicolosi, "The contribution of the Court of Justice to the codification of the founding values of the European Union", 51 Rev.der.com.Eur. (2015), 613.

166. Opinion 2/13, *Accession of the EU to the ECHR*, EU:C:2014:2454, para 168.

167. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, paras. 30–32.

168. Case C-284/16, *Achmea*, EU:C:2018:158, para 34.

169. Case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire) (L.M.)*, EU:C:2018:586, paras. 35, 48, 50.

170. Case C-621/18, *Wightman*, EU:C:2018:999, paras. 62–63.

171. Case C-619/18, *Commission* v. *Poland (Indépendance de la Cour suprême)*, EU:C:2019:531, paras. 42, 43, 47, 58; Case C-192/18, *Commission* v. *Poland (Indépendance des juridictions de droit commun)*, EU:C:2019:924, paras. 98, 106.

172. See von Bogdandy et al., "Guest Editorial: A potential constitutional moment for the European rule of law", 55 CML Rev. (2018), 983, 990; Pech and Platon, "Judicial independence under threat: The Court of Justice to the rescue in the ASJP case", 55 CML Rev. (2018), 1827, 1848; Nanclares, "La Unión Europea como comunidad de valores", 43 *Teoría y Realidad Constitucional* (2019), 121, 135–138.

173. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, para 32. Similarly, Case C-619/18 R, *Commission* v. *Poland (Indépendance de la Cour suprême)*, para 47; Case C-192/18, *Commission* v. *Poland (Indépendance des juridictions de droit commun)*,

a combined application of Article 2 TEU with other, specific Treaty provisions.[174] The ECJ's subsequent reactions to the deconstruction of an independent Polish judiciary further demonstrate that the Court is willing to activate, concretize and enforce the Union's values.

A second objection might be that reformulating identity as value concerns risks simply replacing one highly conflictual discourse ("identity") with another ("values"). Indeed, professing and defending values can easily acquire a paternalistic dimension and is therefore prone to triggering antagonism and polarization.[175] Though this observation might be true for moral or ethical values, this is not necessarily the case for the values enshrined in Article 2 TEU. As already indicated above, democracy, the rule of law and fundamental rights cannot be understood as mere ethical convictions. Many argue that the values enshrined in Article 2 TEU are – despite their denomination as "values" – *legal principles*.[176] This assumption finds support not only in the current jurisprudential developments, but also in the Treaties themselves: the values of Article 2 TEU are laid down in the operative part of a legal text, they are applied in legally determined procedures by public institutions (e.g. Art. 49(1) TEU), and their disregard leads to sanctions which are of legal nature (e.g. Art. 7 TEU).[177] While governments in backsliding Member States try to shift the debate on whether they are complying with fundamental values into the sphere of moral and ideological convictions,[178] we should avoid confusing this discourse with the one on the Union's *legal* values. Certainly, the two discourses – moral and legal – may intersect. Nevertheless, they remain distinct spheres. This insight seems to shift the discussion on Article 2 TEU back into the more rational realm of the law.

Finally, any reformulation of identity as value concerns under Article 2 TEU seems to require a consensus on what these values actually are. Given the illiberal turn in Hungary and Poland, but also the developments in Romania,

para 98; Joined Cases C-585, 624 & 625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême),* EU:C:2019:551, para 167.

174. For a detailed analysis, see Spieker, "Breathing life into the Union's common values: On the judicial application of Article 2 TEU in the EU value crisis", 20 GLJ (2019), 1182.

175. von Bogdandy, "Tyrannei der Werte?", 79 ZaöRV (2019), 503, 506–507.

176. See e.g. von Bogdandy, op. cit. *supra* note 126, p. 22; Mangiameli, op. cit. *supra* note 126, p. 22; Tridimas, op. cit. *supra* note 134, p. 15; Streinz, "Principles and values in the European Union" in Hatje and Tichý (Eds.), *Liability of Member States for the Violation of Fundamental Values* (Nomos, 2018), p. 11.

177. In more detail Spieker, op. cit. *supra* note 174, 1200.

178. See e.g. Viktor Orbán, Speech at a conference held in memory of Helmut Kohl (16 June 2018), <www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-a-conference-held-in-memory-of-helmut-kohl>; ibid., Speech on the 170th anniversary of the Hungarian Revolution of 1848 (15 March 2018), <www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/orban-viktor-s-ceremonial-speech-on-the-170th-anniversary-of-the-hungarian-revolution-of-1848>.

Bulgaria, Malta or Italy, such a consensus may seem to be crumbling. Yet especially in times when the Union's value basis becomes shaky, it seems more than irresponsible to leave the meaning of these values in abeyance. Instead, it would appear to be of overarching importance to engage in a process of clarifying and consolidating these foundations.[179] Otherwise, illiberal democracies might start influencing our understanding of the Union's common values and become an acceptable form of government.[180] References by national courts concerning the content and meaning of the values enshrined in Article 2 TEU do more than simply foster this process of consolidation; as explained above, they are an essential part of it. It should come as no surprise that this process will very likely produce disagreements. Nevertheless, it is Article 2 TEU that provides a platform for voicing and settling such conflicts – not Article 4(2) TEU.

4.2.4. *The subsidiary function of Article 4(2) TEU*

If national constitutional courts follow this proposal and start articulating their identity as value concerns, what else remains for Article 4(2) TEU? Inspiration for its remaining function can be found in the case law of the French *Conseil Constitutionnel*. Before introducing the notion of constitutional identity, the *Conseil* stated that the domestic transposition of EU Directives could only be reviewed against a "disposition expresse contraire de la Constitution".[181] According to the official commentary, this notion referred to those provisions, which are protected in the French legal order but not under EU law. If a principle is common to *both* legal orders, it is ultimately up to the EU legal order to provide protection.[182] Following such an approach, Article 4(2) TEU would have a subsidiary function by protecting only those constitutional characteristics that are distinctive and unique to a Member State and not protected by the EU legal order,[183] such as the internal organization of federal States,[184] languages[185] or laws abolishing nobility.[186]

179. Lenaerts, "New horizons for the rule of law within the EU", 21 GLJ (2020), 29.

180. von Bogdandy, op. cit. *supra* note 175, 505; Iliopoulou-Penot, "La justification de l'intervention de l'Union pour la garantie de l'Etat de droit au sein des pays membres", 24 R.A.E. (2019), 7, 12 et seq.

181. Conseil Constitutionnel, 2004-496 DC, para 7; 2004-498 DC, para 4.

182. See *Commentaire* on Decision 2004-498 DC and the Conclusions du Commissaire du gouvernement Mattias Guyomar, Conseil d'État, N° 287110, *Societé Arcelor Atlantique*. See further Millet, "Plaider l'identité constitutionnelle de l'État devant la Cour de justice", 38 *Quaderni costituzionali* (2018), 831, 836.

183. Kaczorowska-Ireland, "What is the European Union required to respect under Article 4(2) TEU?: The uniqueness approach", 25 EPL (2019), 57.

184. Case C-156/13, *Digibet*; Case C-51/15, *Remondis*.

185. Case C-391/09, *Runevič-Vardyn*; Case C-202/11, *Las*.

186. Case C-208/09, *Sayn Wittgenstein*; Case C-438/14, *Bogendorff*.

At first sight, such an approach could fuel the abuse of constitutional identity – especially in Member States with highly idiosyncratic, exclusionary identity conceptions. Yet there is a safety-net in place. As stressed above, Article 2 TEU defines a common constitutional identity from which Member States cannot derogate. This limitation applies equally in case of a restrained interpretation of Article 4(2) TEU. Therefore, any recourse to Article 4(2) TEU is only permissible insofar as it respects the values enshrined in Article 2 TEU.[187]

5. Conclusion

The threefold aim of this contribution was by no means a modest one: to frame the European landscape of constitutional identity reviews and distinguish particularly problematic mechanisms; to identify common features that foster the emergence of such reviews; and – based on these features – to advance suggestions for mitigating and managing potential conflicts between the ECJ and national constitutional courts.

In order to pinpoint particularly conflict-prone identity reviews, this study developed a framework for their comparison that allows the individual review mechanisms to be located on a spectrum between two ideal types: soft-conflict and hard-conflict identity reviews. While the French, Belgian and Spanish review mechanisms tend towards soft-conflict identity reviews, it is especially the German and Hungarian doctrines which reveal a strong tendency towards the hard-conflict type. Several features in the national constitutional settings might support the establishment of these conflict-prone reviews: the existence of a strong constitutional review, a set of absolute limitations on legislative discretion and a rather traditional conception of State sovereignty. Yet, the decisive feature is the attitude of constitutional courts. As it is unlikely that constitutional courts will change their attitude towards the established constitutional identity doctrines any time soon, the most promising path is to concentrate on the courts' attitude towards the *articulation* of these reservations.

The idea this study sought to support is that of a "relational" dialogue between Member State courts and the ECJ. Such relationality concerns not only the procedure, form and style of judgments, but also substantive questions – especially the way in which identity concerns are translated into EU law. This contribution argued for the reformulation of constitutional identity as common value concerns. Instead of relying on Article 4(2) TEU, constitutional courts should turn to Article 2 TEU. Such a reformulation could

187. See s*upra* note 130.

not only lead to a much more effective protection of the Member States' constitutional identities at the EU level, but would also allow national constitutional courts to gain an important role in the shaping of the Union's value basis.

In the early 2000s, Joseph Weiler stated that "mobilizing in the name of sovereignty is passé; mobilizing to protect identity by insisting on constitutional specificity is à la mode".[188] In future, this quote might require rephrasing: "Mobilizing in the name of national identity is passé; mobilizing to protect the common European values is à la mode." Reframed under Article 2 TEU, constitutional identity reviews could lead to a fruitful cooperation between the courts. Indeed, justified challenges by constitutional courts can point to defects and trigger necessary reactions on the EU level.[189] In this sense, a constructive, mutually stimulating and cross-fertilizing relationship between the ECJ and national constitutional courts should not be misunderstood as tiptoeing on a judicial minefield – it is a cornerstone and driving force of the European integration project.

188. Weiler, "A constitution for Europe? Some hard choices", 40 JCMS (2002), 563, 569.

189. On important functions of these conflicts, see e.g. Martinico, "The 'Polemical' spirit of European constitutional law: On the importance of conflicts in EU law", 16 GLJ (2015), 1343.

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