*Berliner Online-Beiträge zum Europarecht*
*Berlin e-Working Papers on European Law*

herausgegeben vom
edited by

Lehrstuhl für Öffentliches Recht und Europarecht
Chair of Public Law and European Law

Prof. Dr. Christian Calliess, LL.M. Eur
Freie Universität Berlin

Nr. 105

24.06.2015

Gerhard van der Schyff:

# Characterizing the Identity of Constitutional Orders: A Comparative National and EU Perspective

Zitiervorschlag:
*Verfasser,* in: Berliner Online-Beiträge zum Europarecht, Nr. 105, S. XX.

***Dr. Gerhard van der Schyff****

Dieser Beitrag wurde im Rahmen des Forschungsaufenthalts des Autors als Humboldt-Stipendiat 2015 am Lehrstuhl für Öffentliches Recht und Europarecht, Prof. Dr. Christian Calliess, verfasst. Ein auf diesem Beitrag basierender Aufsatz wird in der European Public Law 2016 veröffentlicht werden.

# Characterizing the Identity of Constitutional Orders: A Comparative National and EU Perspective

## Abstract

Although of increased importance, the concept of constitutional identity remains contested. The purpose of this contribution is to characterize the concept more closely from both a national comparative and EU perspective. The protection of constitutional identity, which is understood as the individuality of a given order, is analysed according to whether the dynamic or static protection of identity is emphasized by a given order. Particular attention is paid to identity in the European constitutional space by arguing that 'national identity' in article 4(2) TEU is to be read as protecting 'constitutional identity'. The question of whether the EU legal order possesses its own constitutional identity is also considered and answered in the affirmative, after which the protection of such identity is discussed as either conforming to a dynamic or static approach. The contribution ends by emphasising the need to focus on shared values in the European constitutional space in order to avoid the spectre of conflict between the constitutional identity of the EU and that of the various national orders.

## 1. Setting the Scene

'Identity' is increasingly becoming a device used in legal analysis and thought. Citizenship law and the rights of indigenous peoples are often studied as identity issues for instance.[1] Another active theatre in this regard relates to the identity of constitutional orders. Constitutional identity has become a focal point since first making its appearance in the judgments of various highest courts ranging from the Supreme Court of India to the Federal Constitutional Court of Germany.[2]

Although the use of the concept is undeniable, it is not entirely clear what

* Gerhard van der Schyff (G.vdr.Schyff@tilburguniversity.edu) is Associate Professor at the Department of Public Law, Jurisprudence and Legal History at the Law School of Tilburg University in the Netherlands. All views expressed are those of the author.

[1] E.g. Kim Rubenstein & Niamh Lenagh-Maguire, Citizenship and the Boundaries of the Constitution, in Ginsburg/Dixon (eds), Comparative Constitutional Law, 2011, p. 143 and in the same volume Claire Charters, Comparative Constitutional Law and Indigenous Peoples: Canada, New Zealand and the USA, p. 170.

[2] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225), paras 424, 506, 580, 619-621, 646, 1206, 1260; BVerfGE 123, 267 (*Lisbon*) 30 June 2009, paras 240-241; Peter M. Huber, The Federal Constitutional Court and European Integration, European Public Law 21 (2015), p. 83, 90-94.

constitutional identity entails, so much so that it has even been described as an essentially contested concept.[3] To this can be added the ongoing debate regarding the extent to which the constitutional identity of each Member State corresponds to the duty in article 4(2) TEU resting on the European Union to respect the 'national identities' of those states. While some scholars maintain that both concepts serve the same function, the opposite has been defended by others and seemingly also the German Federal Constitutional Court given some controversial remarks in its *OMT* judgment of 2014.[4] Constitutional identity is evidently an important concept, but one that is far from settled. Given the relevance and increased use of the term, the purpose of this contribution is to characterize the concept more closely. A clearer understanding of constitutional identity will not only assist comparative scholarship across national jurisdictions, but it will also help to determine its use within the European constitutional space. In studying constitutional identity, various approaches to the term will be considered and evaluated before discussing methods employed by a number of jurisdictions to protect such identity. After which the attention will be termed to constitutional identity in the European space, including its relationship with the concept of national identity in article 4(2) TEU and the issue of the EU legal order's constitutional identity and its protection. The possibility of conflict between the constitutional identities of the EU and those of the Member States will also be considered. As will be illustrated, these issues continue to generate conflicting case law and academic opinion that require analysis and comment in characterising constitutional identity.

## 2. Enter Identity as Individuality

The fact that constitutional scholars pay little attention to the identity of what they study has been lamented in the literature.[5] In order to be of any analytical worth though, identity as a concept would have to add depth to the study of constitutional law. This raises the question as to what dimension identity adds to such scholarship. Various conceptualisations of constitutional identity can be found such as identity as fact and content.[6] Turning to the first meaning of the term, constitutional identity is said to inhere in the simple fact that a polity or order possesses a constitution. The effect is to distinguish such an order from other entities that do not possess one, thereby giving rise to its identity. The second meaning relates to the type of order that a constitution creates, this allows one to distinguish identity differences between forms of state or government for example. While a given state might be a federal republic such as Germany, another might be a constitutional democracy such as the United Kingdom. When considered, these characterisations of constitutional identity represent a particularly thin conception of the term. This is because the first meaning above merges

[3] Michel Rosenfeld, Constitutional Identity, in Rosenfeld/Sajó (eds), The Oxford Handbook of Comparative Constitutional Law, 2012, p. 756.

[4] BVerfG 2 BvR 2728/13 (*OMT*), para. 29; Armin von Bogdandy & Stephan Schill, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, Common Market Law Review 48 (2011), p. 3, 13, 19, 25.

[5] Gary Jeffrey Jacobsohn, Constitutional Identity, The Review of Politics 68 (2006), p. 361.

[6] Michel Rosenfeld, Constitutional Identity, in Rosenfeld/Sajó (eds), The Oxford Handbook of Comparative Constitutional Law, 2012, p. 756, 757.

identity with the phenomenon 'constitutional order'. Constitutional identity in this sense is no more than the identifiable results of a polity possessing a constitution. The same can be said of the second meaning that equates identity with classifying a given constitutional order according to generally accepted categories of constitutional law.

Moreover and probably more importantly too, the two meanings also rely heavily on the notion of 'difference', be it in relation to orders that do not possess a constitution, or to orders that do possess constitutions but differ from each other because of content category. The temptation then exists to pose the question whether something such as constitutional identity would still exist if differences were to disappear. This problem can be overcome and depth added to constitutional identity as a field of study by shifting the focus from 'difference' to 'individuality' instead. This is because individuating an object does not mean that it has to be factually different from a related object in a strict sense.[7] An order can be distinct, while still being very similar to other orders. For instance, Germany and Austria are both republics that have abolished the nobility as a special class, yet the use of surnames that denote a noble heritage are allowed in Germany as opposed to Austria where such surnames are considered to be incompatible with the country's republican values.[8] While both these countries are no different in rejecting nobility based on republican government, the individuality of each is based on the 'trivial' detail of how they choose to shape that rejection.

On reading constitutional identity as 'individuality' the focus shifts to the distinct nature of a particular entity as such, instead of focussing squarely on the straightforward classification of an order or of differences between orders. Explained differently, individuality means that the attention is turned to studying those essential characteristics whose lacking would make it otherwise difficult or impossible to identify a constitution-based entity as it existed before.[9] A focus on individuality does not imply an emphasis on a constitutional order's entire information base, instead individuality is limited to those leading or foundational characteristics that confirm distinctiveness.[10] Returning to the example of Austria, while the country would still be a republic if it were to allow noble surnames again, it would not be the same republic as it would need to change its republican value system thereby redefining its individuality in the process. For Austria such a reshaping of its system proved a bridge too far when in the *Sayn-Wittgenstein* case one of its nationals acquired a German noble surname and wanted to have the name registered in the country.[11] In this matter the applicant's argument that the refusal to register her noble surname in Austria would impinge on her right to freedom of movement as an EU citizen in article 21(1) TFEU was rejected by

---

[7] Elke Cloots, National Identity in EU Law, 2015, p. 143.

[8] ECJ, Case C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693, paras 25, 43.

[9] See *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225), paras 620, 1206 where the character of the Indian Constitution was stressed in relation to its purpose and the country's history, a failure of which to respect would change the identity of the Constitution.

[10] This corresponds to the second and third meanings of the term identity as used by H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law, 5th ed. 2014, p. 39.

[11] ECJ, Case C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693, para. 76.

the European Court of Justice (ECJ) in favour of preserving Austria's republican interpretation of equality.

The decision of a constitutional order whether to (re)define itself also reveals identity as acceptance and ownership of that order. This does not entail that an order must necessarily have borrowed or produced all of its components, but it does mean that it should have incorporated conferred, inherited or imposed elements into the conception of itself. Colonial elements could therefore form part of a postcolonial order's identity provided such elements have been accepted by the new order. Constitutional identity is therefore not so much an objective description of an order as it is a subjective understanding of that order based on its own experience and context.[12] An insider's perspective is necessary in order to determine what amounts to identity and when that identity has been breached.[13] A constitutional narrative in this sense is not cut and cut dry either but the product of conflict as the case of South Africa shows in particular. The country's Constitutional Court has repeatedly affirmed the current democratic dispensation by reference to what it is intended to overcome, namely the past lack of justifiable state action and the denial of all to participate in democratic life.[14] The source of past conflict has so come to shape the Constitution's present-day identity and determine its future. For example, this process of self-examination has led the Court to identify universal suffrage irrespective of race as one of South Africa's foundational values that require careful vindication.[15]

### 3. From Dynamic to Static Protection of Constitutional Identity

When identity issues are discussed, the question as to the protection of such identity is never far away.[16] Although courts were primarily responsible for introducing the identity narrative to standard constitutional discourse it does not follow that its protection is limited to the realm of judicial review. The protection of its individuality is a function common to all constitutional orders and can be classified according to the extent to which popular democratic or majoritarian power is constrained through constitutional codification and judicial control in disposing of such identity.

The greater the traditional or theoretical faith placed in the democratic legitimacy of legislative decision-making, the more dynamic the protection of constitutional identity potentially becomes. For instance, the usual denial of higher law by the British constitutional order because of the acceptance of parliamentary sovereignty, means that the protection of its

---

[12] See Gary Jeffrey Jacobsohn, Constitutional Identity, 2010, p. 7 on identity as experience and Michel Rosenfeld, Constitutional Identity, in Rosenfeld/Sajó (eds), The Oxford Handbook of Comparative Constitutional Law, 2012, p. 756, 757 on identity as context.

[13] Compare Martin Nettesheim, Wo endet das Grundgesetz? – Verfassungsgebung als grenzüberschreitender Prozess, Der Staat 51 (2012), p. 313, 322.

[14] South African Constitutional Court, *Coetzee v. Government of the RSA; Matiso v. Commanding Officer, Port Elizabeth Prison*, 1995 (10) BCLR 1382 (CC), 1995 (4) SA 631 (CC), para. 35.

[15] South African Constitutional Court, *New National Party of SA v. Government of the RSA*, 1999 (5) BCLR 489 (CC), 1999 (3) SA 191 (CC), para. 120.

[16] Compare H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law, 5th ed. 2014, p. 39.

constitutional identity is dependent on simple majority rule.[17] Even statutes that are deemed by British courts to have 'constitutional' merit, such as the Human Rights Act 1998, can be amended or repealed by act of parliament, as long as parliament expresses its will in a clear and unambiguous manner.[18] 'Constitutional statutes' are therefore protected from implied repeal, but not against express repeal by parliament. From a constitutional law point of view, the possibility to dispose of constitutional identity would become less dynamic though, the more identity were to be constitutionalized thereby restraining democratic power. This would be the case if the United Kingdom were to codify its constitution in a single document and entrench it so that the constitution may only be changed by special legislative majority for instance. Allowing the judiciary to control such a document would constrain parliament even more, as it would no longer be the sole or perhaps even ultimate interpreter of the identity codified in the document.

It is important to note at this juncture that a constitutional order, such as the current United Kingdom order, can possess a clear identity even where such an identity is not codified or judicially protected. Identity elements can also be located outside a codification in other laws or conventions of a constitutionally important nature. In other words, constitutional identity is not a synonym for codified constitutions. The confidence rule in the Netherlands proves the point. This cornerstone of the Dutch parliamentary system, which holds that a government can only govern as long as it carries parliament's confidence, is a rule of unwritten constitutional law and therefore not protected by the Constitution's entrenchment provisions.[19] Yet, without the confidence rule, the Dutch constitutional landscape would be radically altered, thereby confirming its importance to the firmament of the country's constitutional identity. Constitutional identity, even crucial elements of such identity, can therefore be found wherever constitutional law broadly understood is present.[20] The acid test is not whether the courts will enforce a rule, but whether a rule can be said to function as a constitutive element of a given constitutional dispensation. In this way norms that are indispensable to a particular system, such as the Dutch confidence rule, can duly be recognized as forming part of a country's constitutional identity even where such rules can only be enforced and protected politically and might not even be codified.

Where identity elements are codified, the protection of such elements becomes more stable or static the more complicated or burdensome the procedure for constitutional change is

---

[17] David Feldman (ed.), English Public Law, 2004, p. 44-45

[18] See *Thoburn v. Sunderland City Council*, [2002] EWHC 195 (Admin), paras 62-64.

[19] M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen & R.J.G.M. Widdershoven, *Beginselen van de democratische rechtsstaat: Inleiding tot de grondslagen van het Nederlandse staats- en bestuursrecht*, 7th ed. 2012, p. 250.

[20] See Stephen Guardbaum, The Place of Constitutional Law in the Legal System, in Rosenfeld/Sajó (eds), The Oxford Handbook of Comparative Constitutional Law, 2012, p. 169, 170-173; Gerhard van der Schyff, The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU, European Law Review 37 (2012), p. 563, 576 on the broad meaning of constitutional law.

designed to be.[21] This is because the dynamism associated with the exercise of political power purely regulated by majority will is constrained for lack of ready opportunities at amendment. For instance, according to section 74 of the Constitution of South Africa the foundational values entrenched in section 1 may only be amended with the support of three quarters of the members of the National Assembly, instead of the usual two-thirds majority required for the amendment of other sections. In this way the diachronic quality of the country's foundational values is enhanced by increasing the procedural burden on the legislative branch before it may effect its will. These values are further protected in that only the Constitutional Court may rule on the constitutionality of any amendment and by the important fact that South African courts must apply these values to their everyday decisions.[22]

Static protection becomes even more stabilising where entrenchment provisions extend *substantive* protection to the content of constitutional provisions instead of simply presenting *procedural* hurdles to be cleared in amending the text of a provision. With reference to the mentioned section 74, the interesting argument has been made that constitutional provisions other than section 1 are also subject to amendment by a three-quarters majority, instead of the two-thirds majority provided for in the Constitution.[23] This would be the case, so the argument goes, to the extent that such other provisions provide flesh to the bones of the foundational values protected in section 1. The further enhanced majority would be necessary to vindicate the spill-over of the values in section 1 wherever such values are realized in the Constitution. There is more to this argument than meets the eye, as its effect is not only procedural but also substantive in nature. This interpretation shifts the focus from only satisfying procedural requirements in deciding the validity of a constitutional amendment, to protecting the content of a provision in a real way. Carried to its logical extremity, protecting the content of a provision would result in denying any change whatsoever to a provision, thereby giving a provision's content a near sacred quality.

For instance, article 79(3) of the German Constitution rules that a number of core constitutional values may not be amended, including the inviolability of human dignity and the country's democratic and federal structure.[24] The effect is to exclude any changes to these cornerstones of what have been recognized as German constitutional identity.[25] Opinion differs on whether the provision creates a lock for all time though, or whether the German people as constituent power can change article 79(3) in replacing the current Constitution with

---

[21] See also Christoph Bezemek, Constitutional Cores: Amendments, Entrenchments, Eternities, and Beyond Prolegomena to a Theory of Normative Volatility, Journal of Jurisprudence 11 (2011), p. 517, 519, 521-523.

[22] See secs 2, 8(1), 167(4)(d) of the Constitution of South Africa.

[23] E.F.J. Malherbe, Die wysiging van die Grondwet: die oorspoel-imperatief van artikel 1, Tydskrif vir die Suid-Afrikaanse Reg (1999), p. 191.

[24] For similar provisions, see art. 121 of the Constitution of Norway (constitutional amendments may never 'contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution'), and art. 9(2) of the Czech Republic (protecting the 'substantive requisites of the democratic, law-abiding State' from any amendment).

[25] German Federal Constitutional Court, BVerfGE 89, 155 (Maastricht) 12 October 1993, paras 171-172; BVerfGE 123, 267 (Lisbon) 30 June 2009, para. 216.

an entirely new Constitution as allowed in article 146.[26] The democratisation of South Africa in the 1990s provides such an example of a Constitution's identity binding not only the drafters of its successor document, but also the people as constituent power. In a novelty, the country's 1993 'interim' Constitution included a set of identity-like 'Constitutional Principles' that had to be reflected in the country's 'final' Constitution.[27] The latter Constitution took effect in 1997 only after the Constitutional Court certified that core values such as constitutional supremacy and the separation of powers had indeed been sufficiently incorporated in the final text.[28]

The radical effect of unamendable protection of constitutional identity is not always dependent on a constitution expressly providing that its substance may not be amended though, as the case of India proves. Although the Indian Constitution does not protect its identity in so many words, let alone proscribe any change to such identity, landmark cases such as *Minerva Mills, Ltd. v. Union of India* have distilled and confirmed a core identity referred to as the 'basic structure' of the Constitution that may not be changed, even though the prescribed legislative procedure for constitutional amendment have been satisfied. In the striking words of the bench in this case:

> Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore you cannot destroy its identity.[29]

Interestingly and comparably a number of opinions in *R. (Jackson) v. Attorney General* seem to indicate that were parliament to severely abuse its sovereignty by abolishing all forms of judicial review of government action for instance, British judges might refuse to obey an act of parliament and so reject unconditional parliamentary sovereignty.[30] On this account by some judges of their office's power, even a cornerstone such as parliamentary sovereignty is subject to effective legal protection as a deeper constitutive element of British constitutional identity.[31] Parliamentary sovereignty might therefore not be the central reality or purpose of the British constitutional order, as even the seemingly limitless reach of parliamentary power can only regulate and not remove core elements from that order. For this supposition to hold

---

[26] This question was left open in German Federal Constitutional Court, BVerfGE 123, 267 (Lisbon) 30 June 2009, para. 217. See also Martin Nettesheim, Wo endet das Grundgesetz? – Verfassungsgebung als grenzüberschreitender Prozess, Der Staat 51 (2012), p. 313, 347-352.

[27] See further Francois Venter, Aspects of the South African Constitution of 1996: An African Democratic and Social Federal Rechtsstaat?, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 57 (1997), p. 51, 59.

[28] South African Constitutional Court, *Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744, 1996 (10) BCLR 1253; *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1997 (2) SA 97, 1997 (1) BCLR 1.

[29] Supreme Court of India, *Mills, Ltd. v. Union of India* [1980] AIR, para. 21.

[30] UK House of Lords, *R. (Jackson) v. Attorney General* [2005] UKHL 56, [2006] 1 AC 262, paras 102 (Lord Steyn), 159 (Baroness Hale). But see the views of Lord Bingham in paras 9 and 27.

[31] On this tug of war on parliamentary sovereignty as a political or legal doctrine, see Jeffrey Goldsworthy, The Sovereignty of Parliament: History and Philosophy, 1999, p. 236; John Laws, Law and Democracy, Public Law (1995), p. 72, 81.

though, the politically dynamic nature of the United Kingdom's uncodified constitution must be rejected in favour of a common law constitution under the ultimate care of the courts.[32] This question proves to be a bone of contention though and may not be settled anytime soon, if ever. What the example does show though irrespective of the specific outcome in the United Kingdom, is that even an uncodified constitution might conceivably possess unamendable identity features.

## 4. Member State Constitutional Identity in the EU

Identity implies not only a bearer, such as a constitutional order, but also an audience. This audience can be located in a specific order, or outside that order. In the quest for European integration, some national courts interpret the essential identity of their constitutional orders as setting an ultimate limit to European integration. In this sense judicial identity review can control the extent to which a state may enter into new treaty obligations, or as a last resort it may even address the European level by preventing the interpretation and application of EU law in a manner irreconcilable with a given state's constitutional core. In developing such lines of thought, the Italian Constitutional Court took the initial lead through its 'controlimiti' jurisprudence and have since been followed by other courts in various countries including France, Spain, the Czech Republic, Poland and especially Germany with its well-developed case law in this regard.[33]

In declaring their willingness to protect identity, courts in these countries formulate identity in a variety of ways such as reference to the 'basic values and principles of the constitution' in Spain or 'the essential attributes of a democratic state governed by the rule of law' in the Czech Republic to mention but two examples.[34] The effect is to constitutionalize and judicialize the respective states' relationship with the EU by extending substantive protection to national constitutional identity. In 2014 the United Kingdom Supreme Court also added its voice to the debate by noting that there is much to be said for national judges interpreting EU law in a manner that is compatible with the constitutional order's identity.[35] In this regard the Court noted that when incorporating EU law into the domestic order the country's parliament might not have intended for the abrogation of fundamental rule of law principles 'whether contained in other constitutional instruments or recognized at common law'.[36] Although a noteworthy trend not all EU Member States have chosen the path of

---

[32] Rejecting the possibility, see Tom Bingham, The Rule of Law, 2010, p. 167-168.

[33] Italian Constitutional Court, 183/73 *Frontini*, 27 December 1973; 170/84 *Granital*, 8 June 1984; French Constitutional Council, no. 2006-540 DC, 27 July 2006, para. 19; no. 2006-543 DC, 30 November 2006, para. 6; Spanish Constitutional Tribunal, Declaration 1/2004, 13 December 2004, para. II.2; Czech Constitutional Court, Pl ÚS 19/08, 26 November 2008, para. 120; Polish Constitutional Tribunal, SK 18/04, 11 May 2005, paras 4.1, 10.2; SK 32/09, para. 2.1; German Federal Constitutional Court, BVerfGE 123, 267 (Lisbon) 30 June 2009, paras 239-241.

[34] Spanish Constitutional Tribunal, Declaration 1/2004, 13 December 2004, para. II.2; Czech Constitutional Court, Pl ÚS 66/04, 3 May 2006, para. 82.

[35] UK Supreme Court, *R. (HS2 Action Alliance Ltd) v. Secretary of State for Transport* [2014] UKSC 3, para. 111.

[36] Ibid., para. 207.

judicially protecting their orders' constitutional identity in the process of European integration. The Netherlands for example knows no judicial review of its Constitution, in addition EU law is generally considered to operate in the national order on its own terms and not as dictated by the Constitution.[37]

Characterising the protection of Member State identity is importantly not only a national concern in the European constitutional space. This is because the concept of identity has migrated to the EU level where it is protected in article 4(2) TEU. The relevant parts of this provision enjoin the EU to respect Member States' 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. The forerunners to the current article were formulated differently, in 1992 article F(1) TEU enjoined respect for Member States' national identities 'whose systems of government are founded on democracy', while this condition was omitted by the Treaty of Amsterdam in 1997 only calling for the respect of 'national identities' in article 6(3) TEU. When the TEU was drafted the reference to 'identity' was included because the parties could not agree on whether to orientate the EU along federal lines. The concept of identity had to emphasize the fact that although the TEU took European integration to a higher level, the Member States were still important components of the overall process.[38] Real attention however only turned to identity after the Treaty of Lisbon cast respect for identity in its current form in 2009, this is arguably because article 4(2) TEU is judicially enforceable in contrast to its earlier incarnations.[39] With article 4(2) TEU the subject of increasing case law and scholarly debate, some observers read the provision as confirming the jurisprudence of national constitutional courts allowing them to apply their orders' identity over EU law in some cases of constitutional conflict.[40] This proposition is to be seriously doubted as a matter of EU law though. The case law of the ECJ provides no ground for assuming such a radical change in the working of EU law, while Declaration 17 annexed to the EU Treaties for the

---

[37] See Maartje de Visser, Changing the Conversation in the Netherlands?, in Claes/De Visser/Popelier/Van de Heyning (eds), Constitutional Conversations in Europe, 2012, p. 343 345; Gerhard van der Schyff, Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?, German Law Journal 11 (2010), p. 275.

[38] Frank Schorkopf, Nationale Verfassungsidentität und europäische Solidarität: Die Perspektive des Grundgesetzes, in Calliess (ed.), Europäische Solidarität und nationale Identität: Überlegungen im Kontext der Krise im Euroraum, 2013, p. 99, 107; Monica Claes, National Identity: Trump Card or Up For Negotiation?, in Arnaiz/Llivinia (eds), National Constitutional Identity and European Integration, 2013, p. 109, 116.

[39] On the enforceability of art. 4(2) TEU, see Monica Claes, National Identity: Trump Card or Up For Negotiation?, in Arnaiz/Llivinia (eds), National Constitutional Identity and European Integration, 2013, p. 109, 117. Discussing enforcement of art. 4(2) TEU 'outside the ECJ', see Elke Cloots, National Identity in EU Law, 2015, p. 39-58.

[40] E.g. Mattias Kumm & Victor Ferreres Comella, The Primacy Clause of the Treaty and the Future of Constitutional Conflict in the European Union, International Journal of Constitutional Law 3 (2005), p. 473, 479, 492; Armin von Bogdandy & Stephan Schill, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, Common Market Law Review 48 (2011), p. 1417, 1444, but see Barbara Guestaferro, Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Function of the Identity Clause, Yearbook of European Law 31 (2012), p. 263, 309-311; Elke Cloots, National Identity in EU Law, 2015, p. 181-184.

first time confirm the primacy of EU law as laid down by the Court's case law.[41] If anything the primacy of EU law has been strengthened by the current Treaties. Therefore although an important provision, it is probably safe to say that article 4(2) TEU does not change the position as confirmed in the *Foto-Frost* judgment that only the ECJ can declare EU law invalid.[42]

Another question regarding article 4(2) TEU that requires more extensive treatment concerns to what extent 'national identity' in the provision corresponds to the 'constitutional identity' of each Member State. Turning first to the ECJ, an analysis of its case law shows that claims based on the provision are generally cast in constitutional terms before the Court, after which the bench evaluates the merits of the claim in deciding whether to allow the claim can succeed or not.[43] In the *Sayn-Wittgenstein* case for example, Austria defended its particular conception of equality as part of its 'constitutional identity' in refusing to recognize noble surnames, after which the Court found that in this regard Austria had validly pursued a 'fundamental constitutional claim' in terms of article 4(2) TEU.[44] More recently in the case of *Digibet and Albers* the Court stated that article 4(2) TEU required that Germany's federal structure, which as explained above forms part of the country's constitutional identity, had to be respected by EU law.[45] As a result EU law could not call the division of competences between the German federal states or *Länder* into question. From these and similar cases it can be deduced that the concept of 'national identity' serves to protect the 'constitutionality identity' of EU Member States. This conclusion is also supported in the literature, with some contributions expressly justifying the link while others take the link as self-evident by using the terms interchangeably or as synonyms.[46]

However, a section of academic opinion continues to doubt the equivalence of the two terms.[47] In questioning equivalence, the argument goes that although the two terms exhibit significant overlap, national identity as the focus of article 4(2) TEU can also be found outside constitutions. In support of this contention, reference is made to legislation that although not codified in the country's Constitution are nonetheless essential for Belgium's

---

[41] Declaration no. 17 Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, 13 December 2007.

[42] ECJ, Case C-314/85, *Foto-Frost* [1987] ECR 4199, para. 17. See also art. 19(1) TEU and art. 263 TFEU.

[43] E.g. ECJ, Case C-202/11, *Las* of 16 April 2013, nyr, paras 24, 26-27; Case C-58-13, 59-13, *Torresi* of 17 July 2014, nyr, paras 33 54-55, 58.

[44] ECJ, Case C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693, paras 32, 74, 78, 92-94.

[45] ECJ, Case C-156/13, *Digibet and Albers* of 12 June 2014, nyr, para. 34.

[46] Justifying equivalence, see Leonard F.M. Besselink, National and Constitutional Identity before and after Lisbon, Utrecht Law Review 6 (2010), p. 36, 44; Armin von Bogdandy & Stephan Schill, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, Common Market Law Review 48 (2011), p. 1417, 1424-1425, 1427; Gerhard van der Schyff, The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU, European Law Review 37 (2012), p. 563, 567-569; Leonard F. M. Besselink, The Parameters of Constitutional Conflict after Melloni, European Law Review 39 (2014), p. 531, 547-548.

[47] Monica Claes, National Identity: Trump Card or Up For Negotiation?, in Arnaiz/Llivinia (eds), National Constitutional Identity and European Integration, 2013, p. 109, 123-124; Elke Cloots, National Identity in EU Law, 2015, p. 3, 165-170.

federal structure and its language regime.[48] To this is added that fundamental rules, doctrines and principles that are not constitutionally entrenched should also be considered as forming part of national identity as protected in article 4(2) TEU. In this context the United Kingdom is mentioned as a country that does not have a single document called the Constitution. This position against equivalence is clearly based on the fear that interpreting national identity in article 4(2) TEU as constitutional identity will under-protect the identity of Member States. However as explained above, constitutional identity can arguably be found wherever constitutional law broadly conceived is present in an order, thereby including law and practice not codified or entrenched in a constitutional document. As a matter of fact, for constitutional identity to exist it does not even need to be judicially enforceable. A generous concept of what amounts to constitution law can therefore address the concern that essential identity elements might not always be guaranteed were national identity in article 4(2) TEU to be equated with constitutional identity.

The second line of doubt centres on the fact that article 4(2) TEU does not expressly refer to 'constitutional identity' but only to 'national identity'.[49] This can be taken to imply that the provision does not intend to protect constitutional identity as such. The contention that national and constitutional identities are separate things is certainly correct. Although in a constant tension, as constitutional law can be said to arise from and also regulate national culture, one can still distinguish national identity from constitutional identity.[50] Yet, this does not have to mean that article 4(2) TEU focuses on national and not constitutional identity. This is because although the identity of a 'nation' can certainly differ from that of a 'constitution', it can be argued that article 4(2) TEU establishes a sequence. As a result of this national identity can only be respected under the provision to the extent that it inheres in the foundational structures of a given constitutional order. This means that national identity can only be respected where it has also become the identity of that constitutional order. On this reading, Member State constitutional identity is the subject of article 4(2) TEU.

This contention also finds support in *Runevič -Vardyn and Wardyn*.[51] The case concerned the claim that Lithuania had to recognize the Polish spelling of the applicant's surname, instead of registering the surname according to the spelling rules of Lithuanian as the country's constitutionally recognized official language. The applicant was a member of Lithuania's Polish minority, but did not have Polish nationality.[52] The ECJ's judgment proceeded from and accepted that article 4(2) TEU protected Lithuanian as the country's official language, which in turn had been described as an important 'constitutional asset' by the country's government.[53] The focus did not rest on the national linguistic identity of the

[48] Elke Cloots, National Identity in EU Law, 2015, p. 166 fn. 193.

[49] Elke Cloots, National Identity in EU Law, 2015, p. 167.

[50] Michel Rosenfeld, Constitutional Identity, in Rosenfeld/Sajó (eds), The Oxford Handbook of Comparative Constitutional Law, 2012, p. 756, 758.

[51] ECJ, Case C-391/09 *Runevič -Vardyn and Wardyn* [2011] ECR I-03787.

[52] ECJ, Case C-391/09 *Runevič -Vardyn and Wardyn* [2011] ECR I-03787, para. 15.

[53] ECJ, Case C-391/09 *Runevič -Vardyn and Wardyn* [2011] ECR I-03787, paras 84, 86.

Lithuanian people as such, for had this been the case the Court would also have had to recognize Polish as the identity of that community for the purpose of article 4(2) TEU – something that the Court did not do. This proves that article 4(2) TEU only recognizes national identity to the extent that it has been expressed as constitutional identity. In order to protect national identity as a purely cultural value though, attention must be turned to provisions such as article 3(3) TEU and article 22 of the Charter of Fundamental Rights of the European Union, but not to article 4(2) TEU that is intended to protect constitutional identity.

Another challenge to interpreting national identity in article 4(2) TEU as protecting constitutional identity seems to emanate from the *OMT* judgment delivered by the German Federal Constitutional Court in 2014. If indeed confirmed, this would be particularly strange, as in its 2009 judgment on the Lisbon Treaty the Court justified its invention of identity control in part by reference to article 4(2) TEU. In the Lisbon Judgment the Court argued that article 4(2) TEU protected Member State constitutional identity, and that its own protection of German constitutional identity was necessary to safeguard such identity in addition to the EU's duty of respect under the provision.[54] In the *OMT* judgment though, only five years later, the Court seemingly contradicted its earlier stance by denying that national identity in article 4(2) TEU corresponds to Germany's concept of constitutional identity.[55] This is because the Court called the two concepts 'fundamentally different'.[56]

Interestingly this important observation by the Court has been commented on very little to date. Although its argumentation is somewhat cryptic, the Court appears to reject equivalence based on the fact that German constitutional identity cannot be amended or interfered with as a result of article 79(3) of the German Constitution, as already explained above. This means that German identity must prevail even in the event of a conflict with EU law. Also according to the judgment, only the German Court may decide when European integration has reached its ultimate limit in the country's constitutional identity. The ECJ on the other hand insists on the primacy of EU law, even where it contradicts national constitutional law.[57] Viewed from this angle, the real difference of opinion does not concern constitutional identity as the *object* of protection in article 4(2) TEU, but on which Court may definitively decide whether EU law contradicts constitutional identity and what the consequences of such a finding will be. This is because both Germany and the EU each claim primacy for itself in this arena. Although the *OMT* judgment raises important questions regarding the application of EU law, the judgment should not be read as threatening the position that the term national identity in article 4(2) TEU is aimed at protecting national constitutional identity.

[54] German Federal Constitutional Court, BVerfGE, 123, 267 (Lisbon) 30 June 2009, paras 240, 332.

[55] German Federal Constitutional Court, BVerfG, 2 BvR 2728/13 (OMT) 14 January 2014, para. 29.

[56] Ibid.

[57] ECJ, Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, 1129.

## 5. EU Constitutional Identity and Member State Constitutional Identity

Thus far the discussion of constitutional identity in the European constitutional space has illustrated the protection of Member State constitutional identity as a national concern, but also as an EU concern by virtue of article 4(2) TEU. In order to characterize constitutional identity in this space properly, a second identity must be added to the equation, namely the constitutional identity of the EU itself.

Although the Treaty establishing a Constitution for Europe failed, it does not mean to say that the EU does not possess a distinct constitutional order. The discussion of national constitutional orders has shown that a codified constitution is not a precondition for the existence of constitutional law. The EU clearly possess a constitutional order as far as the TEU and TFEU create a framework for governance comprising institutions and a system of and checks and balances, including the protection of fundamental rights. Moreover, the EU's constitutional character has been recognized by the ECJ in the *Les Verts* decision, while the Court's recent Opinion on the EU's foreseen accession to the European Convention on Human Rights (ECHR) referred to the Treaties as creating a 'basic constitutional charter'.[58] The fact that the EU has a constitutional order implies also that it possesses an identity of its own, without which it would lose its individuality or essence. Article 2 TEU must be central to efforts at understanding and articulating this identity, as the provision clearly aims at grounding the entire constitutional order, it reads:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

In German literature this provision has been referred to as the EU's 'Verfassungskern' or constitutional core.[59] Various attempts have been made to distil from these values an absolute minimum, including the argument that the provision advances three normative ideals captured by the general categories of democracy, rights and solidarity from which further values can be deduced.[60] In contextualising this core reference needs to be made to the purpose of the EU, such as 'creating an ever-closing union among the peoples of Europe' as stated in article 1 TEU and the pursuit of peace and the economic and social well-being of its people according to article 3 TEU. The EU's identity is clearly not limited to that of a pure economic community, but has evolved especially since the Lisbon Treaty to that of a sophisticated 'Wertegemeinschaft' or value-based community that reaches beyond mere economic

---

[58] ECJ, Case 294/83 *Les Verts* [1986] ECR 1365, para. 23; Opinion 2/13 of 18 December 2014, paras 163, 165.

[59] Christian Calliess, Art. 2 EUV, in Calliess/Ruffert (eds), EUV/AEUV Kommentar, 4th ed. 2011, p. 31.

[60] Daniel Sarmiento, The EU's Constitutional Core, in Arnaiz/Llivina (eds), National Constitutional Identity and European Integration, 2013, p. 177, 180.

integration.[61] In this way the EU has become what may be described as a 'Staaten- und Verfassungsverbund' or a state and constitutional pact.[62] The EU is not simply a constellation of states amounting to no more than the sum of its components, but a constellation with its own distinct constitutional order.

As with national constitutional identity, the EU's constitutional identity also calls for protection. This raises the question as to the EU's classification according to the dynamic and static protection of its identity. Viewed from the angle of the Treaties constituting the EU the protection of its identity is decidedly static, as such identity is not subject to the dynamism of frequently shifting political majorities. Changes to the content of the Treaties, such as article 2 TEU, are far and few between because of the cumbersome procedure of treaty amendment.[63] Securing the identity of the EU is not simply a question of formal treaty drafting and amendment procedures though, as the EU can also protect its own identity. For instance, article 7 TEU allows for a Member State to be sanctioned where it has breached the values enshrined in article 2 TEU.[64]

To this can be added the judicial function and the central importance that the ECJ plays in accordance with article 19(1) TEU as the ultimate interpreter of EU primary and secondary law, and by implication the vindication of its constitutional core. This emphasizes the static protection of EU identity even more, as opposed to equating its protection with political will unfettered by procedural constraints and judicial control. In this regard the doctrine of primacy of EU law over national (constitutional) law provides the EU with a strong instrument with which to enforce its identity and ensure the uniformity of its application in each of the 28 Member States. The plausible argument could be made that this doctrine has itself become a part of the EU's constitutional identity, as the relationship between EU and Member State law and hence the very constitutional structure of the EU would be very different without it. In other words, in addition to encompassing an authoritative catalogue of values, the EU's identity possesses a distinct structural individuality too. For instance Protocol Number 8 to the Treaties requires that the 'specific characteristics of the Union and Union law' must be preserved upon the EU acceding to the ECHR.[65] This the ECJ has interpreted as including the primacy of EU law as dictated by the very nature of

---

[61] Christian Calliess, Art. 2 EUV, in Calliess/Ruffert (eds), EUV/AEUV Kommentar, 4th ed. 2011, p. 30-31; Christian Calliess, Europa als Wertegemeinschat: Integration und Identität durch europäisches Verfassungsrecht?, Juristen Zeitung 59 (2004), p. 1033.

[62] Christian Calliess, Art. 1 EUV, in Calliess/Ruffert (eds), EUV/AEUV Kommentar, 4th ed. 2011, p. 15-18.

[63] The simplified treaty revision procedure as stipulated in art. 48(6)-(7) TEU does not affect the main identity bearing provisions of the TEU, which are subject to the ordinary treaty amendment procedure in art. 48 (2)-(5) TEU.

[64] According to art. 7(3) TEU the Council may suspend certain Treaty rights applicable to a Member State, such as its voting rights in the Council, after a breach of art. 2 TEU by that State of has been determined according to art. 7(2) TEU.

[65] Art. 1 of Prot. (No. 8) relating to Art. 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

such law.[66]

In addition to highlighting the EU's structural identity, the doctrine of primacy as a judicial creation proves that EU constitutional identity is not limited to the strict words of the Treaties, but can also be implied by the order.[67] This raises the interesting question whether the ECJ could decide that the Treaties may not be amended in a way that infringes the EU's constitutional identity even though the Treaties do not expressly provide for such a power. This would be much in the same way as the Indian Supreme Court ruled in *Kesavananda Bharati v. State of Kerala* that the Constitution presupposed an unalterable basic structure, but now directed at the EU Member States as such and not the national legislature as in the case of India.[68] This idea may not be as far-fetched as it sounds given the ECJ's constitutional creativity and dare in seminal judgments such as *Kadi and Al Barakaat*, *Rottmann* and *Ruiz Zambrano* for instance.[69] The fact that the ECJ characterizes the Treaties as providing EU law with an 'independent source', thereby asserting its authority as ultimate *interpreter* of such law above that of national actors, might very well provide a basis for the ECJ to stake its claim as the ultimate *protector* of the values and structures contained in the Treaties too.[70] When amending the Treaties, Member States would then be faced by judicially-enforced substantive limits aimed at protecting the identity of the EU constitutional order. In the event that Member States would not be able to reconcile themselves with such judicial review or its outcome, the possibility recognized in article 50(1) TEU to withdraw from the EU would be left to them.

The purpose here is not to canvas the view that the ECJ should protect the Treaties in this way though, but to point to the possible conflict that such constitutional questions may cause in the European space due to various national orders and the EU claiming the last word in case of such disputes.[71] The *OMT* case noted above illustrates this quite well too with the German Federal Constitutional Court refusing to recognize the primacy of EU law in respect of national constitutional identity.[72] While a 'normal' conflict between EU law and national law might be solved by recourse to the primacy of EU law, a conflict between EU constitutional identity or law on the one hand and national constitutional identity on the other might not.

---

[66] ECJ, Opinion 2/13 of 18 December 2014, paras 166-167.

[67] ECJ, Case 6/64, *Costa* [1964] ECR 585, 593-594.

[68] Supreme Court of India, *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225), paras 619-621.

[69] ECJ, Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008] ECR I-06351 (establishing primacy of primary EU law over international law);Case C-34/09, *Ruiz Zambrano* [2011] ECR I-01177 (exercise of EU citizenship rights irrespective of previous exercise of freedom of movement); Case C-135/08, *Rottmann* [2010] ECR I-1449 (scrutiny of national citizenship law on the basis of EU law).

[70] On the TEU and TFEU as an 'independent source' of EU law, see ECJ, Opinion 2/13 of 18 December 2014, para. 166.

[71] This is also known as the Kompetenz-Kompetenz question, see further German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009, para. 150.

[72] See also the Opinion of 14 January 2015, para. 49 to ECJ, Case 62/14 *Gauweiler* given in the matter by Advocate General Cruz Villalón.

The more states and their highest courts assert their mastery over the EU treaties, to use a phrase coined by the German Federal Constitutional Court, by controlling the limits of EU law and integration in light of their own orders' identities, the more real the prospect of conflict becomes.[73] This sways the pendulum more to the states in the 'Staaten- und Verfassungsverbund' than to the common constitutional pact between the states in the form of the EU, while the opposite would hold true the more the primacy of EU law were to be emphasized as the guiding norm in settling constitutional conflict without sufficient recognition of the national constitutional identities at play. The former would emphasize the EU as a traditional international organisation composed of sovereign states, while the latter would emphasize the EU as a distinct supranational actor in the field of constitutional law.

Definitively solving the spectre of constitutional conflict between the EU and its Member States would require the founding of a new state with an accepted legal hierarchy. Yet, apart from this not being realistic at the moment, casting the EU as a new national power contradicts the very idea of the EU as an instrument with which to stimulate regional cooperation and control national power. Also, the alternative of creating a special tribunal to adjudicate disputes between EU and Member State organs in the event of serious conflict cannot rule out that a party might still claim the last word as is the case now. If there is an 'answer' to the problem to constitutional conflict in the EU, it is probably not one based on institutional design but on purposive or teleological interpretation of national and EU constitutional identity.[74]

This begs the question as to the purpose served by protecting such identity in order to guide its interpretation. In this regard the nature of European integration cannot support a blind insistence on the protection of national sovereignty as if the EU did not exist. Many of the so-called Europe clauses in various Member State constitutions allow or emphasize the opening up of the respective national constitutional orders to European influence for instance.[75] To this end the French Constitutional Council has ruled that article 88-1 of its Constitution allows the country to participate in establishing a 'permanent European organisation' and enshrines 'the existence of a European Union legal system incorporated into

---

[73] On this concept of state mastery of the Treaties, see German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009, paras 231, 235, 271, 334; 2 BvR 2661/06 (*Honeywell*) 6 July 2010, para. 57; Peter M. Huber, The Federal Constitutional Court and European Integration, European Public Law 21 (2015), p. 83, 86-87. Although not dealing with constitutional identity as such, the Czech Constitutional Court in Pl ÚS 5/12, 31 January 2012 declared a rule of EU law to be ultra vires and therefore inapplicable. See Jan Komárek, Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires, European Constitutional Law Review 8 (2012), p. 323.

[74] Compare Miguel Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional, European Journal of Legal Studies 1 (2003), p. 1 on the use of teleological interpretation in EU law.

[75] For an instructive overview of such provisions, see the case studies in Leonard F.M. Besselink, Monica Claes, Šejla Imamoviç & Jan Herman Reestman, National Constitutional Avenues for Further EU Integration, 2014. To be found at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET%282014%29493046 (last accessed 2 May 2015).

the national legal order which is distinct from international law'.[76] Mention may also be made of case law doctrines such as *Europarechtsfreundlichkeit* or 'friendliness to Europe' in Germany, which seeks to set the tone for national relations with the EU.[77] Although not all participants may be willing to admit as much, the relationship between the EU and its Member States is probably best conceived of as a sharing of public authority and sovereignty.[78] Or in the recent words of the ECJ, 'a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States'.[79]

Similarly article 4(2) TEU is not intended to protect states simply for the sake of their sovereignty, nor is the articulation of an EU identity geared to founding a new sovereign state either.[80] Instead, the focus falls on shared values such as a concern for human dignity, fundamental rights, democracy and the rule of law. Article 2 TEU confirms the commonality of these values by identifying the constitutional traditions of the Member States as the source of the EU's identity.[81] This is further confirmed by article 6(3) TEU that recognizes fundamental rights resulting from the common constitutional traditions of the Member States as a source for general principles of EU law. The European project is thus about developing and protecting a common identity, while not losing sight of the fact that in some instances national participants are and must be allowed to distinguish themselves from each other and the common whole in how they choose to express these values. In order to prevent, contain or resolve conflict on these issues, the European space's national and supranational constitutional actors must depart from a common interpretative position that emphasizes the need for mutual and loyal cooperation as required by article 4(3) TEU and as confirmed in various national orders.[82]

In practice this means conceptualising identity as governed by principles that allow for accommodation and compromise, instead of hard-and-fast rules that exclude reasonable alternatives and emphasize difference.[83] For example in the *Melloni* judgment the ECJ essentially practised the doctrine of primacy as a rule and then largely for its own sake in

---

[76] French Constitutional Council, no. 2004-505 DC, 19 November 2004, paras 6, 11; no. 2007-560 DC of 20 December 2007, paras 7, 9.

[77] German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009, paras 225, 240. On the matter of an open Constitution in respect of the EU, see also Christian Calliess, How much of the German Constitution can the EU take?, in Guérot/Hénard (eds.), What does Germany think About Europe?, (2011), p. 47, 52.

[78] See also Christian Calliess, Art. 2 EUV, in Calliess/Ruffert (eds), EUV/AEUV Kommentar, 4th ed. 2011, p. 15.

[79] ECJ, Opinion 2/13 of 18 December 2014, para. 167.

[80] See further Adelheid Puttler, Art. 4 EUV, in Calliess/Ruffert (eds), EUV/AEUV Kommentar, 4th ed. 2011, p. 61; Elke Cloots, National Identity in EU Law, 2015, p. 170-174.

[81] See also ECJ, Opinion 2/13 of 18 December 2014, para. 168; Wojciech Sadurski, European Constitutional Identity?, Sydney Law School Legal Studies Research Paper 06/37 (2006), http://ssrn.com/abstract=939674 (last accessed 30 April 2015), p. 8-18.

[82] See also W.T. Eijsbouts & Monica Claes, From Confederacy to Convoy: Thoughts about the Finality of the Union and its Member States, European Constitutional Law Review 6 (2010), p. 1-5.

[83] On the difference between rules and principles, see Robert Alexy, A Theory of Constitutional Rights, 2002, p. 47-48.

enforcing a European arrest warrant, while not making use of the opportunity afforded by article 4(2) TEU to allow Spain to practise a higher standard of fundamental rights protection than required by the EU minimum in the case.[84] Accommodating Spain would not have endangered the general primacy of EU law, but it would have affirmed the importance of national constitutional identity as protected by Spain's constitutional court. Similarly, national orders must also be prepared to come to terms with the implications of Europe's shared constitutional space. This would mean reducing or even avoiding rhetoric that frames national constitutional identity as presenting absolute limits to European integration as much as possible.[85] In this regard the German Federal Constitutional Court can be criticized for being too national and unilateral in its thinking on constitutional identity in the *OMT* case for instance. Instead of creating near confusion as to the conceptual equivalence between German constitutional identity and national identity in article 4(2) TEU, the German Court in this matter could have framed the determination and protection of such identity as a joint national and EU project.[86] The Court's current approach of emphasising its own ultimate constitutional authority threatens to sow the seeds for constitutional division and distrust between it and the ECJ and so overshadow its earlier expressed wish to practise *Europarechtsfreundlichkeit*.

## 6. Constitutional Identity in Context

As an analytical device constitutional identity can aid the study of a particular constitutional order and the comparison of orders by focussing on the individuality of each order. In this way the constitutional essence of an order is emphasized based on its own experience and account of that experience. Viewed from this angle every constitutional order possesses an identity that can be protected in various ways, even though an order might not use the term 'identity' as such. This applies to all constitutional orders irrespective of whether an order has a codified constitution or not, as constitutional identity is not a synonym for, or limited to codified constitutions. On this characterisation not only national orders but also a supranational order such as the EU possesses constitutional identity. Inherent in the possession of constitutional identity is the possibility of conflict, as the articulation and protection of individuality constitutes a normative process directed at a particular audience with the aim of sustaining the relevant identity. In this sense identity can be a shield or a sword with which to defend or occupy, but the concept does not necessarily have to be characterized in such belligerent language. The needs of a specific constitutional context are key in this regard. The multilevel reality of the EU illustrates that identity can also be

[84] ECJ, Case C-399/11, *Melloni* of 26 February 2013, nyr. See also Leonard F. M. Besselink, The Parameters of Constitutional Conflict after Melloni, European Law Review 39 (2014), p. 531, 547-552; Elke Cloots, National Identity in EU Law, 2015, p. 342-343, 346-347

[85] See Advocate General Cruz Villalón's warning against the dangers for the European project of Member States insisting on their national constitutional identities as 'absolute reservation', para. 59 of Opinion of 14 January 2015 in ECJ, Case C-62/4, *Gauweiler*. See also Peter M. Huber, The Federal Constitutional Court and European Integration, European Public Law 21 (2015), p. 83, 93-94 explaining how national courts have avoided conflict with EU law through interpretation.

[86] See also Franz C. Mayer, Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference, German Law Journal 15 (2014), p. 112, 131.

conceived as an invitation to engage in dialogue on the extent to which shared values ought to be realized collectively or emphasized nationally. In the case of European integration the vitality and success of the project might even be said to depend on this conception and practise of national and EU constitutional identity.