

Ancilla Iuris

*Constitutional Identity of the EU Legal Order:
Delineating its Roles and Contours*

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Abstract

European integration can be described as the product of multilevel interaction between the European Union (EU) legal order, and the legal orders of the Member States. The notion of the EU level's constitutional identity has received little attention to date. This stands in contrast to the constitutional identities at the Member State level which have been studied increasingly in recent years. Consequently, this contribution studies the question whether the EU legal order possesses a constitutional identity of its own. The position is taken that this legal order can and should be perceived in terms of constitutional identity, thereby rejecting doubts on whether this is possible and whether the paradigm of identity is suitable for conducting analysis. The contribution ends by outlining the ways in which the EU level's constitutional identity can be discovered by distinguishing between diachronic identity and synchronic identity.

I.
A PARTIAL VIEW OF
CONSTITUTIONAL IDENTITY

Gary J. Jacobsohn has observed that constitutional theorists have relatively little to say about the identity of what they study.¹ When it comes to European integration, which can be described as the product of multilevel interaction between the European Union (EU) legal order and the Member State legal orders, the picture is relatively mixed. In studying this interaction there has been specific attention for the constitutional identities at the Member State level in both scholarship and case law. This has been driven by article 4(2) Treaty on European Union (TEU) which enjoins the EU to respect the “national identities” of its Member States, and by national constitutional orders which in reaction to or independent of the provision formulate their respective identities.² By comparison, the notion of a constitutional identity at the EU level has received little attention to date. The possibility of the EU legal order possessing such an identity is even doubted by some.³ Where discussed, the setting has either been pre-Lisbon Treaty, or has been capable of further contextualization with regard to

the paradigm of identity.⁴ Often, the idea has been taken to be self-evident, or its treatment brief.⁵ The term has not gathered much judicial traction either. It has only been referred to in one Opinion and one View of the Court of Justice of the European Union (CJEU), and in none of its judgments so far.⁶

Because of these apparent lacunae and lingering doubts about the very idea, the aim of this contribution is to investigate the applicability of constitutional identity as an explicit paradigm in analyzing the EU legal order. It will become apparent that not only can this order be perceived in terms of identity, but that the concept should also be applied in configuring its constitutional content. In addressing this issue, the notion of constitutional identity will be considered first (Part II), after which its roles in the context of the EU order will be established (Part III). The contribution will conclude by sketching some possible contours of this order's identity (Part IV) along the axes of diachronic identity (Part IV.1), understood as autonomy, and synchronic identity (Part IV.2), understood as EU citizenship. In discussing constitutional identity, insights will be drawn from the experience of states in translating the application of the concept to the EU level. The statist experience is useful, given that the topic is usually discussed in the context of states.

II.
CLARIFICATION OF
CONSTITUTIONAL IDENTITY

In understanding the notion of constitutional identity, the thinking of *H. Patrick Glenn* on legal traditions is useful as a starting point. He distinguishes three layers of identity, the first of which concerns the “total information base” or “overall identity” of a tradition, the second layer refers to the “primary” or “leading” version of a tradition at a given moment, while the third layer concerns the “underlying” or “basic” elements which are foundational to a tradition.⁷ Simply equating constitutional identity with a constitution as such, in the sense of the first layer, would create a synonym without adding any real

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1 G.J. Jacobsohn, The Formation of Constitutional Identities, in: Ginsburg/Dixon (eds.), *Comparative Constitutional Law* (2001), 129.

2 On art. 4(2) TEU and relevant case law, see A. von Bogdandy/S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, *Common Market Law Review* (2011), 1417; C. Calliess/G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (2020).

3 M. Rosenfeld, *Constitutional Identity*, in: Rosenfeld/Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (2012), 756, 765.

4 See W. Sadurski, *European Constitutional Identity?*, Sydney Law School Research Paper 2006, No. 06/37; D. Sarmiento, *The EU's Constitutional Core*, in: Saiz Arnaiz/Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (2013), 177; G. Martinico, *Building Supranational Identity: Legal Reasoning and Outcome in Kadi I and Opinion 2/13 of the Court of Justice*, *Italian Journal of Public Law* (2016), 235.

5 See P. Faraguna, *Constitutional Identity in the EU—A Shield or a Sword?*, *German Law Journal* (2017), 1623, 1633-1634; G. van der Schyff, *Exploring Member State and European Union Constitutional Identity*, *European Public Law* (2016), 227, 234-237.

6 View of Advocate General Kokott regarding Opinion procedure 2/13, ECLI:EU:C:2014:2475, para. 168; Opinion of Advocate General Szpunar in *LG v. Rina SpA, Ente Registro Italiano Navale* (C-641/18) ECLI:EU:C:2020:3, para. 141, 144.

7 H.P. Glenn, *Legal Traditions of the World* (2010), 39.

value to the term. For the term to have an independent meaning, it becomes useful to understand it in the sense of the second, and especially the third layer discussed by *Glenn*. This also ties in with how the term has come to be used in comparative constitutional law and cases. Various highest courts in Europe and beyond have come to regard constitutional identity as capturing the essentials of the constitutions under their jurisdictions. For instance, the German Federal Constitutional Court links the topic to the “core content” of the constitution, while further afield the Indian Supreme Court warned that amendments could not denude the constitution of its identity which it linked to its basic elements.⁸

In understanding the concept of constitutional identity further, it is important not to confuse it with *exclusivity* or *uniqueness*, as that would narrow it down too much, thereby restricting its useful application. The purpose of investigating a particular identity should not be to discern its exclusive or unique qualities, in the sense that they are not shared by other constitutions, as *Tímea Drinóczi* and others seemingly contend or imply.⁹ Instead, the notion of identity enquires into the *individuality* of a particular constitution.¹⁰ This ties in with identity as self-expression and -conception.¹¹ Identity on this reading is not the sum of exclusive difference, but the sum of the experience that has shaped a constitution in a fundamental manner.¹² Whether such an identity is indeed exclusive or not can be observed, but this is not a requirement for finding identity. The possibility that Austria’s brand of republicanism, which prevents the use of noble particles in surnames, might be unique among its peers can be noted, but possessing an identity is not dependent on this being the case.¹³ Identity, as it is understood here, can be said to combine a constitution’s content and context in

shaping its particular identity.¹⁴ In other words, an inquiry into identity goes beyond describing constitutional content, by focusing on how such content is animated by its context in a fundamental way.

In bringing these strands together, constitutional identity can be understood as comprising the core or fundamental elements or values of a constitution as an expression of its individuality.¹⁵ It is important to note that constitutional identity does not harbor preconceived notions as to a constitution’s type of individuality. In the case of European integration, for instance, it does not by definition denote a “closed” or “open” attitude among national constitutional identities when it comes to receiving EU law.¹⁶ While the constitutional identity of the Czech Republic claims complete primacy over EU law in the event of conflict, Austria’s identity only claims such primacy in the event some parts of its identity are compromised, the identity of the Netherlands recognizes the primacy of EU law in full, and in Belgium the question is open.¹⁷

Views, such as those expressed by *Federico Fabbrini* and *András Sajó*, that the concept is fundamentally flawed and will eventually lead to “European disintegration” cannot be supported.¹⁸ As the mentioned examples show, the identities of various national constitutions are too varied in their response to the primacy of EU law to base such a general statement on. Further doubts that constitutional identity possesses certain almost natural qualities, or malignancies for that matter, comes from its international practice and study. American scholarship, for example, has advanced the concept as a general way to better analyze and understand constitutions and their development.¹⁹ Also, in Indian case law the basic structure doctrine, as the functional equivalent of constitutional identity, has long been associated with substantive checks on popular democratic excess in amending the consti-

8 BVerfGE 123, 267 of 30 June 2009 (Lisbon Treaty), para. 240; Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225, para. 564, 569.

9 *T. Drinóczi*, Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach, *German Law Journal* (2020), 105, 127, speaking of “individual and unique values and principles exclusively featuring that particular state”. Similarly *F. Fabbrini/O. Pollicino*, Constitutional Identity in Italy: European Integration as the Fulfilment of the Constitution, *EUI Working Paper LAW 2017/06*, 15, “constitutional authorities in Italy have never articulated a set of core or fundamental elements or values which are only exclusive of a single state”. See too the “uniqueness approach” of *A. Kaczorowska-Ireland*, What is the European Union Required to Respect under Article 4(2) TEU?: The Uniqueness Approach, *European Public Law* (2019), 57, 58, 63–70.

10 *G. 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* (2012), 563, 569–570.

11 *G.J. Jacobsohn*, Constitutional Identity, *Review of Politics* (2006), 361, 386 writing that “an expressive component is present in all constitutional identities” and “expressiveness might be viewed as a synonym for the concept of identity and not merely a component of it”.

12 On identity as experience, see *Jacobsohn*, (fn. 11), 363, 365.

13 This corresponds to the facts in *Sayn-Wittgenstein v. Landeshauptmann von Wien* (C-208/09) ECLI:EU:C:2010:806. See *G. Lienbacher/M. Lukan*, Constitutional Identity in Austria: Basic Principles and Identity Beyond the Abolition of the Nobility, in: *Calliess/Van der Schyff* (eds.), (fn. 2), 41, 54–55.

14 On content and context as identity, see *Rosenfeld*, (fn. 3), 757.

15 *C. Calliess/G. van der Schyff*, Constitutional Identity Introduced, in: *Calliess/Van der Schyff* (eds.), (fn. 2), 3, 7.

16 Compare the views of *Sadurski*, (fn. 4), 4, 21.

17 See the respective case studies in *Calliess/Van der Schyff* (eds.), (fn. 2), by *D. Kosaj/L. Vyhánek*, Constitutional Identity in the Czech Republic: A New Twist on an Old-Fashioned Idea?, 85, 100–101; *Lienbacher/Lukan* (fn. 13), 42, 56; *E. Cloots*, Constitutional Identity in Belgium: A Thing of Mystery, 59, 84. On the Netherlands, see *G. van der Schyff*, EU Member State Constitutional Identity: A Comparison of Germany and The Netherlands as Polar Opposites, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2016), 167, 181–182.

18 *F. Fabbrini/A. Sajó*, The Dangers of Constitutional Identity, *European Law Journal* (2019), 457, 466–467. Also disputing that the concept is flawed, see *M. Belov*, The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States, *Perspectives on Federalism* (2017), 72, 84 noting that its use should not limit the primacy of EU law by “domestic political elites for tactical reasons”. See also *J. Scholtes*, Abusing Constitutional Identity, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3698001 (forthcoming in the *German Law Journal*) (last accessed 29 April 2021), 1, 3, 15, 18.

19 Consider *G.J. Jacobsohn*, Constitutional Identity (2010).

tution.²⁰ In short, discussing and evaluating a particular constitutional identity should not be confused with the concept as such. There is consequently no reason for constitutional identity to be avoided, or for alternative concepts to be explored such as the term “constitutional tradition”, as mooted by some in the context of the EU.²¹

III. ROLES OF THE EU LEGAL ORDER'S CONSTITUTIONAL IDENTITY

In order to determine the roles fulfilled by the EU legal order's constitutional identity, it should be clear that the order does indeed possess an identity. Whether this is the case though is considered an open question by *Michel Rosenfeld*.²² The question is uncontroversial regarding the Member States, but no so regarding the EU. While it is accepted that the EU possesses legal personality, according to article 47 TEU, such acceptance does not extend in equal measure to it possessing a constitutional identity. The crux of the case against the EU legal order in this regard is that it supposedly lacks a constituent power with which to ground a constitution and by implication an identity. The argument goes that constitutional law needs to be derived from the people who are the sole legitimate source of power.²³ While the TEU and the Treaty on the Functioning of the European Union (TFEU), the EU's primary legal sources, exhibit various functional characteristics of constitutions by regulating and establishing public power through higher law, doubts linger about these sources' constituent power.²⁴ For example, the German Federal Constitutional Court holds the view that the states are the “Masters of the Treaties”, thereby excluding the people from view.²⁵ If the position is accepted though that a constitution must be the product of the people, a precondition which also raises doubts,

the case can still be made that the Treaties amount to a constitution.²⁶

On this account the TEU and TFEU operate as constitutional treaties which establish a political and legal entity which transcends the traditional confines of confederations, while not establishing a new federal state either. Instead an “association of constitutions”, sometimes termed a “federation of states”, is created as an intermediate construct between states and confederations.²⁷ The effect is to pool sovereign powers at the EU level.²⁸ These powers are then exercised through institutions founded by the Treaties according to the type of competence laid down there, be it exclusive, shared with the Member States or supporting of them.²⁹ Within this constellation Member State sovereign powers are not dissolved, as in a federation, but reduced in certain fields in favor of the EU level.³⁰ Sovereign power, regardless of the level, emanates from the people as such. In respect of the EU level, the establishment of an EU citizenship in the Treaty of Maastricht takes on a particular significance. This concept confirms that European integration moved beyond the unification of Member States for implementing common policies, as “it configures a body having specific features, with respect to which the concept of a ‘Europe of citizens’ takes on a founding and constitutional nature”.³¹ In contrast to the German Court's confederal stance, the states are only the instruments of the people who are the real masters of the Treaties, as much as the people are the masters of their respective national constitutional orders.³² The EU therefore forms a distinct constitutional order within the multilevel space it shares with the constitutional orders of the Member States. This view is not contradicted by the failure of the Treaty establishing a Constitution for Europe (Treaty-Constitution), or the European Council's subsequent rejection of the constitutional “concept” and “framework” in amending the TEU and TFEU

20 *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225, para. 307-311.

21 *F. Fabbrini/O. Pollicino*, Constitutional Identity in Italy: Institutional Disagreements at a Time of Political Change, in: Calliess/Van der Schyff (eds.), (fn. 2), 201, 220.

22 *Rosenfeld*, (fn. 3), 765.

23 On the relationship between a constituent power and a constitution, see generally *H. Lindahl*, Authority and the Globalisation of Inclusion and Exclusion (2018), 399; *D. Grimm*, Types of Constitutions, in: Rosenfeld/Sajó (eds.), (fn. 3), 98, 103-104; *K. Tuori*, European Constitutionalism, in: Masterman/Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (2019), 521, 526.

24 On the Treaties' constitutional characteristics, see the discussion by *M.L. Fernandez Esteban*, The Rule of Law in the European Constitution (1999), 7-15 of the situation prior to the Lisbon Treaty, which can be applied to the post-Lisbon situation as well; *Van der Schyff*, (fn. 5), 235. On the mentioned doubts, see *Rosenfeld*, (fn. 3), 765, 773; *D. Grimm*, Constitutionalism: Past, Present, and Future (2016), 275; *P.L. Lindseth*, European Solidarity and National Identity: An American Perspective, in: Calliess (ed.), *Europäische Solidarität und nationale Identität: Überlegungen im Kontext der Krise im Euroraum* (2013), 57, 58, 61.

25 BVerfGE 123, 267 of 30 June 2009 (Lisbon Treaty), para. 150, 231, 235, 298, 334.

26 See *M. Zuleeg*, The Advantages of the European Constitution, in: Von Bogdandy/Bast (eds.), *Principles of European Constitutional Law* (2009), 763, 764.

27 *C. Grabenwarter*, National Constitutional Law Relating to the European Union, in: Von Bogdandy/Bast (eds.), (fn. 26), 83, 128; *S. Rummens/S. Sottiaux*, Democratic Legitimacy in the Bund or “Federation of States”: The Cases of Belgium and the EU, *European Law Journal* (2014), 568, 571-576.

28 *I. Pernice*, Multilevel Constitutionalism in the European Union, *European Law Review* (2002), 511.

29 See the list in art. 2-6 TFEU.

30 See too *C. Calliess/A. Schnettger*, The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism, in: Calliess/Van der Schyff (eds.), (fn. 2), 348, 351.

31 *S. Mangiameli*, Article 2 [The Homogeneity Clause], in: Blanke/Mangiameli (eds.), *The Treaty on European Union (TEU): A Commentary* (2013), 136. On citizenship in general, see *E. Hirsch Ballin*, *Citizens' Rights and the Right to be a Citizen* (2014).

32 *Pernice*, (fn. 28), 518; *I. Pernice*, Multilevel Constitutionalism and the Crisis of Democracy in Europe, *European Constitutional Law Review* (2015), 541, 544.

through the Treaty of Lisbon.³³ Instead, what the current state of the Treaties shows is that the EU legal order has not yet developed to the stage where it is grounded by a *formal* constitution, as the successor to its current *substantive* constitution.³⁴

Contrary to *Rosenfeld's* doubts, there are grounds for investigating the constitutional identity of the EU legal order. What has been termed the “European constitution” is in fact two interlocked constitutional orders, each capable of study in their own right as they are together.³⁵ Considering the constitutional identity of the EU legal order is necessary as it fulfils at least *three* main and inter-related roles. These roles, namely those of rationalization, codification and benchmarking, are each addressed below in turn.

Constitutions have come to occupy a greater space in their environments than ever before when measured in range as well as in depth. The successive waves of constitution-making since the Second World War have meant an exponential growth in constitutional regulation. In this regard, “total” constitutions, to use *Mattias Kumm's* term, have been arising which control political and legal conflict and guarantee fundamental rights that not only protect their bearers against public power, but also allows them to act against such power.³⁶ The multiplication, or even inflation, of constitutional law amplifies the need to cut to the core of modern-day constitutions. In this way constitutions can be better described, understood, applied and developed by distilling their focal points. This exercise can be explained as the *systemization* or *rationalization* role of constitutional identity and also applies to the EU legal order. For example, some of the criticism levelled at the failed Treaty-Constitution centered on it being too voluminous by delving far more into regulatory detail and other matters than would normally be expected of formal constitutions.³⁷ The EU's current constitutional base, the TEU and TFEU, can also be said to be particularly detailed and expansive in range, to which may be added the Charter of Fundamental Rights of the EU (CFREU) given that article 6(1) TEU accords it the same legal value as the Treaties.³⁸ This exemplifies the need

for identity analysis to extract the core elements and values of the EU's constitution. Over time, conscious work in this regard could lead to a constitutional canon, which could form the basis of a future formal constitution. Determining constitutional identity in this way serves a *codification* role, as opposed to simply formalizing the Treaties in their entirety as the Treaty-Constitution attempted unsuccessfully. A future debate about formalizing the EU's substantive constitution could then be driven by its explicit identity.

The more immediate benefits of identity analysis relate though to its role as a *benchmark*. This entails calibrating the interpretation and application of the EU's constitution by reference to its individuality. For instance, article 52(1) CFREU provides that any limitation of the Charter's rights and freedoms must be respectful of their essence, yet determining such essence is not straightforward. In this regard constitutional identity could act as an interpretive benchmark in ensuring that any limitation does not violate fundamental guarantees' essence. This use is important in all the EU's spheres of application, and especially in charting the relationship between the EU and the *international legal order* on the one hand, and the *constitutional identities of its Member States* on the other.

As to the former, the seminal Kadi I judgment showed the need to flesh out the “principles that form part of the very foundations of the community legal order” to decide their relation to *international law*.³⁹ A simple application of EU primary law did not suffice in settling the question to what extent a UN Security Council Resolution had to be respected by EU secondary law in the matter, as a more profound analysis was required. Although the term constitutional identity was not used, it quickly became apparent that some parts of primary law had a special status over other parts.⁴⁰ The question of a constitutional benchmark also arose surrounding the EU's foreseen accession to the ECHR, as required by article 6(2) TEU. In her View on accession, which preceded the full court's Opinion 2/13, Advocate General *Kokott* rejected the argument made before her that judgments of the European Court of Human Rights (ECtHR) could be denied recognition for conflicting with the “constitutional identity of the EU - a kind of *ordre public* in EU law”.⁴¹ This was the first time the term was used by a member of the CJEU and seemed to downplay its

33 Presidency Conclusions of the European Council of 21/22 June 2007, 11177/07.

34 On this distinction, see *Grimm*, (fn. 23), 106; *E. Barendt*, Introduction to Constitutional Law (1998), 26-34 on the related distinction between codified and uncodified constitutions.

35 For the term, see *Pernice*, (fn. 28), 512.

36 *M. Kumm*, Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law, *German Law Journal* (2006), 341, 343-345.

37 See *A.K. Koekoek*, Amerikaanse lessen voor een Europese Grondwet, *CDV* (2003), 133, 136, 138. The Treaty-Constitution comprised 448 articles with 36 Protocols, two Annexes and 50 Declarations attached to it.

38 In addition to 37 Protocols and 65 Declarations applicable to the Treaties, the TEU contains 55 articles and the TFEU 358 articles. To this may be added the CFREU's 54 articles.

39 *Kadi and Al Barakaat International Foundation v. Council and Commission* (C-402/05 P and C-415/05 P) ECLI:EU:C:2008:461, para. 304. See too *Commission and Others v. Kadi* (C-584/10 P, C-593/10 P and C-595/10 P) ECLI:EU:C:2013:518, para. 22, 65-38 (the so-called Kadi II judgment).

40 See *Sarmiento*, (fn. 4), 184; *Martinico*, (fn. 4), 249.

41 *View of Advocate General Kokott regarding Opinion procedure 2/13*, ECLI:EU:C:2014:2475, para. 168-169.

importance. By contrast the Opinion, although not copying the term, showed the importance of benchmarking when it came to positioning the Treaties in relation to the ECHR, as is referred to below in discussing the EU’s diachronic identity. Moreover, the importance of the EU’s constitutional identity in relation to international law was confirmed recently when it was referred to as such only for a second time by a member of the CJEU. In *LG v. Rina SpA, Ente Registro Italiano Navale*, Advocate General *Szpunar* spoke of the importance of maintaining a balance between the need to safeguard such identity and observing international law.⁴² The importance of conceptualizing the EU’s constitutional identity lies moreover in benchmarking its relationship with the *constitutional identities of the Member States*. Whereas *Wojciech Sadurski* could still write in 2006 that the concept of an EU constitutional identity was not particularly useful, the fact that identity as a device became judicially enforceable after the Treaty of Lisbon in 2009 changed the landscape.⁴³ Constitutional identity itself is suggested by the EU’s legal duty in article 4(2) TEU to respect its Member States’ “national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”. The reference to “national identities” in the provision has largely come to be interpreted, based on CJEU and national case law and scholarship, as requiring of the EU to respect the *constitutional identities* of the Member States.⁴⁴ The situation is complicated by the fact that the primacy of EU law over national constitutional identities is not universally recognized across all the Member States.⁴⁵ The possibility of constitutional conflict looms against such a backdrop. In this regard, the *Landtová*, *Ajos*, and *PSPP* cases are examples of where highest national courts ruled EU law, or actions based on it, to be *ultra vires* and thus in principle inapplicable in the national legal order.⁴⁶ In other words, in defiance of the pri-

macy of EU law and the CJEU’s interpretive monopoly over such law, national courts ruled in the final instance that EU institutions overstepped their mandate. Were such instances to increase and escape proper management, European integration could be stalled or compromised. Fortunately, in contrast to these *ultra vires* cases, conflict in the field of *identity* between the EU and its Member States has been avoided to date. It is in this connected multilevel environment that the EU needs to know the various constitutional identities of its members in order to respect them where possible, as required by article 4(2) TEU.⁴⁷ Simultaneously, the focus needs to fall on the constitutional identity of the EU itself as a benchmark in deciding if and to what extent EU law can accommodate a particular national constitutional identity claim. A national claim can only be evaluated properly if the EU level is sure about its own constitutional identity.⁴⁸

Unfortunately, the EU level’s constitutional identity has been largely implicit in the literature and case law and underplayed to date. Apart from Advocates-General *Kokott* and *Szpunar* mentioning the term in the context of the EU, references to constitutional identity or article 4(2) TEU are only found in relation to the Member States, and then more often in the opinions of Advocates-General than in the judgments of the CJEU.⁴⁹ Yet, the language and concept of constitutional identity can become an important bridging device with which to better enable, structure and refine the discourse between the constitutions of the EU and its Member States, and between the EU and its international environment.⁵⁰

IV. CONTOURS OF THE EU LEGAL ORDER’S CONSTITUTIONAL IDENTITY

The main roles and need to conceptualize the constitutional identity of the EU legal order having been established, the attention can turn to sketching some contours of its identity. In other words, how can the constitutional individuality of this

42 Opinion of Advocate General *Szpunar* in *LG v. Rina SpA, Ente Registro Italiano Navale* (C-641/18) ECLI:EU:C:2020:3, para. 141, 144.

43 *Sadurski*, (fn. 4), 22, speaks of its “rather limited use”.

44 In *Sayn-Wittgenstein v. Landeshauptmann von Wien* (C-208/09) ECLI:EU:C:2010:806, para. 74, 92 a claim based on Austria’s constitutional identity was accepted in the context of art. 4(2) TEU. See also *L.F.M. Besselink*, National and Constitutional Identity Before and After Lisbon, *Utrecht Law Review* (2010), 36, 44; *Von Bogdandy/Schill*, (fn. 2), 1419–29; *G. van der Schyff*, Member States of the European Union, Constitutions, and Identity: A Comparative Perspective, in: *Callies/Van der Schyff* (eds.), (fn. 2), 305, 328–330; *Belov*, (fn. 18), 90, 93. But see *E. Cloots*, National Identity (2015), 165–167, who focuses on the protection of national identities.

45 See the list of countries mentioned in *BVerfG*, Judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813, para. 142.

46 *Czech Constitutional Court*, Judgment of 31 January 2012, Pl. ÚS 5/12 *Holubec*; *Landtová v. Česká správa sociálního zabezpečení* (C-399/09) ECLI:EU:C:2011:415; Danish Supreme Court, Judgment of 6 December 2016, Case 15/2014; *Dansk Industri v. Estate of Karsten Eigil Rasmussen* (C-441/14) ECLI:EU:C:2016:278; *BVerfG*, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/1, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915; *Weiss* (C-493/17) ECLI:EU:C:2018:1000.

47 Compare also *Belov’s*, (fn. 18), 81–86 socio-legal analysis of constitutional identity functions, noting that it “safeguards” the national inviolable constitutional core. The delimitation of which determines “universally valid elements of constitutional design” allowing the EU’s legal order to constitutionalize (89), possibly resulting in supranational constitutional identity (87). Some impediment to this could seemingly seat in constituent power questions (81).

48 *Sarmiento*, (fn. 4), 178 speaks of the EU’s constitutional features as a counterbalance to the constitutional cores of its Member States.

49 *E.g.* Opinion of Advocate General *Campos Sánchez-Bordona* in *Wightman v. Secretary of State for Exiting the European Union* (C-621/18) ECLI:EU:C:2018:978, para. 130–132.

50 See *Belov*, (fn. 18), 87, 93 on constitutional identity as a bridge between “domestic constitutionalism” and “EU constitutionalism”, so linking and differentiating the orders.

order be conceived? The intention here is not to offer a definitive account of such identity, but to indicate how the logic of identity as a paradigm can be applied in perceiving and analyzing the EU's constitutional order.

In approaching such issues, *Federico Fabbrini* and *Andr s Saj * question whether constitutional identity can be identified at all.⁵¹ These authors consider the concept to be indeterminate and arbitrary. They explain that the legally identifiable source of constitutional identity is unclear.⁵² And, they continue, if one points to a constitution as the source, it is unclear again which of its provisions are to be used in particular, if not all of the provisions. In the end, the result will be a “random and haphazard” one characterized by opportunism and “political compromise”.⁵³ In this regard, they refer to provisions such as preambles, which are considered to be “vague ideological statements”, and which allow “historical identity references” to “mushroom”.⁵⁴ Their skepticism also extends to eternity clauses, provisions in some constitutions that protect certain provisions from legislative amendment, as possible sources of identity. The authors fear that the meaning of such unamendable provisions, which often guarantee principles over rules, will remain obscure, and by implication constitutional identity to the extent that it relies on such provisions.⁵⁵

Doubts about the indeterminacy of constitutional identity as to render the concept useless cannot be shared however. Much of *Fabbrini* and *Saj *'s criticism could be read as applying to the act of constitutional interpretation as such, and not to constitutional identity in particular. By its very nature constitutional interpretation can lead to different results in some instances, as is the case with discovering identity too. Standard interpretation doctrines such as “reading down”, which favors interpretations that lead to constitutional outcomes over interpretations that do not, attest to this.⁵⁶ Immunizing a constitution against the type of uncertainty the two authors fear would require the formulation of a set of clear-cut rules which either find application or not, as opposed to principles which express a certain value and whose application can be optimized or balanced in the face of competing principles.⁵⁷ Achieving a wide rule-

based level of legal certainty is unrealistic and might even be counter-productive. Constitutional provisions are often formulated in an open-ended manner in order to account for a variety of foreseen and unforeseen circumstances and to allow for such provisions to operate in the context of other provisions.

The reality is that absolute certainty in constitutions cannot be reached, with the same applying to their identities.⁵⁸ In determining viable constitutional meaning it must be realized that this is a multidimensional process. In this regard it is common practice to investigate constitutional identity by starting with the relevant constitutional text, which for the EU legal order would be the TEU and TFEU, cognizant of the CFREU given its equal status.⁵⁹ However, texts are but the starting point of the exercise. As *Julien Sterck* advances, constitutional texts “do not themselves vest certain of their provisions with identity properties”.⁶⁰ Instead, identity can be understood as the result of a particular discourse.⁶¹ The constitutional text then serves as the primary source for investigating not only the meaning of its provisions, its *internal* dynamic, but also the provisions' relationship with their wider environment as the constitution's *external* dynamic.⁶² These dynamics need to be captured in an authoritative way in order to determine constitutional identity as a legal device. With regard to the Member States, Advocate General *Maduro* opined already in 2005 that:

“Doubtless the national authorities, in particular the constitutional courts, should be given the responsibility to define the nature of the specific features [...]. Those authorities are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect.”⁶³

A survey of the Member States' practice confirms *Maduro*'s remarks. Not only do national authorities steer the process, but highest national courts, be they supreme courts or constitutional courts, often take the lead in determining the constitutional

51 *Fabbrini/Saj *, (fn. 18), 467-469.

52 *Ibid.*, 467.

53 *Ibid.*, 468.

54 *Ibid.*

55 *Ibid.* They note that such provisions vary widely, from art. 112 of the Norwegian constitution vaguely protecting its “spirit”, to the Portuguese constitution's lengthy art. 288(a)-(o) which lists a long range of elements and values to be respected.

56 See *R.A. Edwards*, Reading Down Legislation Under the Human Rights Act, *Legal Studies* (2000), 353; *T. Koopmans*, Courts and Political Institutions: A Comparative View (2003), 117-119.

57 On rules and principles, see *R. Alexy*, Rights and Liberties as Concepts, in: *Rosenfeld/Saj * (eds.), (fn. 3), 283, 291.

58 *As F.-X. Millet*, Constitutional Identity in France: Vices and – Above All – Virtues, in: *Calliess/Van der Schyff* (eds.), (fn. 2), 134, 147 explains, the concept is essentially “fuzzy”. See also *Scholtes*, (fn. 18), 17.

59 See *Jacobsohn*, (fn. 19), 348; *Van der Schyff*, (fn. 44), 312.

60 *Julien Sterck*, Sameness and Selfhood: The Efficiency of Constitutional Identities in EU Law, *European Law Journal* (2018), 1, 2. Compare *Jacobsohn*, (fn. 1), 129 who explains that a constitution's identity arises through experience. See also *Van der Schyff*, (fn. 44), 321.

61 *Sterck*, *ibid.*

62 See *Jacobsohn*, (fn. 19), 353. And (fn. 1), 130 on internal and external “dis-harmonies”.

63 Opinion in *Marrosu and Sardino v. Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate* (C-53/04) ECLI:EU:C:2005:569, para. 40. Compare Advocate General *Cruz Villal n*'s Opinion in *Gauweiler v. Deutscher Bundestag* (C-62/14) ECLI:EU:C:2015:7, para. 60. See the critical remarks by *Belov*, (fn. 18), 92-93.

identities of their respective jurisdictions.⁶⁴ *François-Xavier Millet* even goes so far as to describe the case law of the Constitutional Council as the “only reliable methodology” in finding France’s constitutional identity.⁶⁵ This reliance on constitutional and other highest courts can be explained as they are often the “guarantors of the supremacy of national constitutions”.⁶⁶ Courts are also prominent in this field, given their potential to act as moral leaders which imbue society with a positive value orientation as far as the law is concerned.⁶⁷

On this account, the focus should fall on the CJEU as the natural institution to determine the constitutional identity of the EU legal order.⁶⁸ While not the sole actor in isolating and developing such identity, as other EU institutions enjoy executive and legislative competence in respect of the Treaties, the CJEU is arguably the ultimate authority given its judicial duty in article 19(1) TEU to interpret and apply the Treaties. In fulfilling its mandate the CJEU has essentially emerged as a constitutional court by overseeing and shaping the EU’s substantive constitution, much as its national counterparts would do in respect of their constitutions.⁶⁹ The constitutional role is one which the Court has embraced, as evidenced by the initiative it took in *Les Verts v. Parliament* by characterizing the then European Economic Community’s treaty base as a constitutional charter.⁷⁰ Also, the CJEU’s constitutional role has increasingly been confirmed by the Member States’ constitutional courts, who recognize it as their interlocutor in conducting a dialogue with the EU.⁷¹ Whereas the German Federal Constitutional Court, the final instance institution on German constitutional identity, initially refrained from requesting preliminary rulings from the CJEU, it now recognizes that this procedure must be followed first before a national judgment on identity can be made definitively.⁷²

1. Diachronic identity: Autonomy of EU law

In constructing the EU legal order’s constitutional identity, a distinction first needs to be made between various types of identity. When classifying the constitutional identity of national constitutions, a distinction is drawn between such identity in a *diachronic*, and a *synchronic* sense.⁷³ Constitutional identity in a diachronic sense entails that the focus falls on identity as “continuity” or “permanence through time”. Diachronic identity in this sense can be linked to the notion of “selfhood” as the primary ability to define oneself.⁷⁴ In the case of Ireland for example, this is achieved through referendums as an expression of popular sovereignty in ratifying constitutional change in domestic and matters of EU integration.⁷⁵ In this way Irish constitutional identity centers on the people and their ability to define themselves through time.

The EU level’s constitutional identity can be said to possess a diachronic aspect linked to the notion of selfhood, too. Contrary to the Irish case, this identity is not intended to express the immediate, unfettered and popular will of the EU’s citizens.⁷⁶ Although ultimately dependent on its constituent source, the diachronic identity of the EU is expressed by the *autonomy of its legal order*, which includes the ability of EU institutions to define this order commensurate with their powers. Autonomy allows the Treaties to cohere, operate and develop as a legal order through time. That EU law can operate as a benchmark at all is due to this element of its identity. The fact that autonomy exemplifies the individuality of the EU’s constitution is not readily discernible when reading the Treaties. The concept’s significance only becomes apparent when these sources are considered in the light of the CJEU’s jurisprudence.⁷⁷ Although only first mentioned in 1991 by the CJEU in Opinion 1/91, the lineage of autonomy stretches back to some of the Court’s very first judgments.⁷⁸ As the systematic analysis by *Tamás Molnár* shows, the CJEU emancipated the body of law under its control from international law, thereby affirming the Community’s

64 *Van der Schyff*, (fn. 44), 313-317. Possible exceptions are Ireland (where the expression of constitutional power is particularly closely linked to popular sovereignty) and the Netherlands (where the judicial constitutional review of statutes is prohibited).

65 *Millet*, (fn. 58), 147-148.

66 *A. Śledzińska-Simon/M. Ziolkowski*, Constitutional Identity in Poland: Is the Emperor Putting on the Old Clothes of Sovereignty?, in: Calliess/*Van der Schyff* (eds.), (fn. 2), 243, 254.

67 See *D. Roberts*, The Judge as Political Theorist (2010), 38. See also *Van der Schyff*, (fn. 44), 315.

68 *Van der Schyff*, (fn. 5), 236. Consider also *Martinico*, (fn. 4), 262.

69 On the CJEU’s various functions, see *M. Claes/M. de Visser*, The Court of Justice as a Federal Constitutional Court: A Comparative Perspective, in: Cloots/*De Baere/Sottiaux* (eds.), Federalism in the European Union (2012), 83, 98-105, 107-108.

70 *Les Verts v. Parliament* (C-294/83) ECLI:EU:C:1986:166, para. 23. See too *Kadi and Al Barakaat International Foundation v. Council and Commission* (C-402/05 P and C-415/05 P) ECLI:EU:C:2008:461, para. 81, 281.

71 *Claes/De Visser*, (fn. 69), 108.

72 On this interaction, see *U. Di Fabio*, Karlsruhe Makes a Referral, *German Law Journal* (2014), 107, 109.

73 *J.-H. Reestman*, The Franco-German Constitutional Divide Reflections on National and Constitutional Identity, *European Constitutional Law Review* (2009), 374, 377. See too *Martinico*, (fn. 4), 238 (“definition” and “identification”). For a division along substantive and procedural lines, see *Van der Schyff*, (fn. 44), 331-334.

74 On “selfhood” as it relates to constitutional identity, see *Sterck*, (fn. 60), 282. *Sterck* draws on *P. Ricoeur*, *Oneself as Another* (1992).

75 See *E. Daly*, Constitutional Identity in Ireland: National and Popular Sovereignty as Checks on European Integration, in: Calliess/*Van der Schyff* (eds.), (fn. 2), 182, 183-186; *Van der Schyff*, (fn. 44), 333-334.

76 On immediate and mediate types of identity expression, see *Van der Schyff*, (fn. 10), 573.

77 The term itself features in few provisions and in different contexts. Art. 152 TFEU (autonomy of social partners); art. 335 TFEU (administrative autonomy of EU institutions); art. 28 Protocol (No. 5) on the Statute of the European Investment Bank (financial autonomy of legal subsidiaries).

78 Opinion 1/91 of the Court, ECLI:EU:C:1991:490, para. 30 (“autonomy of the Community legal order”).

external autonomy regarding such law.⁷⁹ This opened the door to asserting its *internal* autonomy in relation to the Member States, who now had to rely on the monist rules as developed by the CJEU for receiving this new body of law, instead of each state relying on its own approach to the reception of international law.⁸⁰ When viewed through this prism, various fundamental features of EU law can be traced to the need for vindicating such autonomy. Autonomy explains the direct effect of EU law in national orders and its primacy over countervailing laws, as stated in Declaration No. 17 to the Treaties. To this list may be added the preliminary ruling procedure in article 267 TFEU as the “keystone” of the EU’s judicial system.⁸¹ These devices are not stand-alone or incidental features of the EU legal order, but concrete expressions of the abstract principle of autonomy.

A proper appreciation of autonomy as diachronic identity would need to factor in how it operates. The closest an explicit reference comes to this is Advocate General Szpunar’s remark in the LG case that the EU’s constitutional identity should result in EU law forming an active part of the international community, instead of being “hostile” to it.⁸² A similar approach can be discerned in the context of the EU’s internal autonomy. While article 10 of the Treaty establishing the European Community (EC) only still required sincere cooperation from the Member States and not the EU, the reciprocal nature of this duty had already been recognized by the CJEU before its codification in article 4(3) TEU.⁸³ Also, article 4(2) TEU, on the EU’s duty to respect national constitutional identity, can be viewed in the spirit of earlier CJEU case law which protected national constitutional fundamentals at the price of EU’s law primacy.⁸⁴ The autonomy of the EU level is arguably one that can only be understood, developed and asserted against the background of sincere and cooperation and dialogue with the Member State level. This goes to the heart of the EU’s identity, as its interconnection with the Member State constitutional orders is neither based on a universally accepted hierarchy of norms, nor does one seem to be imminent. Although the current division of competences between the EU

and the Member States resembles that of a federation and while EU competences have steadily increased in range and depth, the EU is unlikely to develop into a federal state in the traditional sense.⁸⁵ In other words, the EU’s regional constitution will probably never supplant the Member State constitutions, at least not entirely. A new federal state might even be undesirable, as it makes little sense to question state sovereignty by creating a regional constitutional entity, only for it to be turned into a state itself.⁸⁶ Instead, the context is likely to remain pluralist according to which the autonomous EU level “co-exists with an equally autonomous Member State level”.⁸⁷ As a consequence various Member State courts will continue to qualify the primacy of EU law over national constitutional identity, which in turn emphasizes the need for the CJEU to exercise sensitivity and circumspection in such situations to ensure the continued autonomy of the EU legal order in practice.

Although there is something to be said for *Molnár’s* view that the “domestic legal sphere” is the “real playing field” when it comes to testing the EU’s autonomy, such as when Member States assert their constitutional identities, the division between external and internal autonomy should not be overstated as he also admits.⁸⁸ The Kadi I judgment and Opinion 2/13 are cases in point. According to Kadi I, EU primary law can prevail over international law as implemented by EU secondary law.⁸⁹ Although the Court was careful not to call into question the primacy of the contested rule at the international level as such, the effect of the judgment was to disapply the rule in the EU legal order because of a deficiency.⁹⁰ As *Juliane Kokott* and *Christoph Sobotta* explain, this decision was necessary to ensure the primacy of EU law over Member States’ laws, too.⁹¹ Otherwise a Member State might have decided to disapply the rule of EU secondary law of its own accord for implementing the offending rule of international law. Consider also Opinion 2/13, where the CJEU’s concerns over maintaining the primacy of its law upon the EU’s accession to the ECHR effectively stalled the accession process.⁹²

79 *T. Molnár*, The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of the Member States, in Szabo/Láncos/Varga (eds.), *Hungarian Yearbook of International Law* 2015 (2016), 433, 436-437. Consider also *Martinico*, (fn. 4), 239-242.

80 *Ibid.* See Opinion 2/13 of the Court (Full Court) ECLI:EU:C:2014:2454, para. 170.

81 Opinion 2/13 of the Court (Full Court) ECLI:EU:C:2014:2454, para. 176, 198.

82 Opinion of Advocate General Szpunar in *LG v. Rina SpA, Ente Registro Italiano Navale* (C-641/18) ECLI:EU:C:2020:3, para. 141.

83 *Luxembourg v Parliament* (Case 230/81) ECLI:EU:C:1983:32, para. 37. See also *H.-J. Blanke*, Article 4 [The Relations Between the EU and the Member States], in: *Blanke/Mangiameli* (eds.), (fn. 31), 185, 234.

84 *E.g. Omega* (C-36/02), ECLI:EU:C:2004:614. See also *Blanke*, (fn. 83), 212.

85 See too *Calliess/Schnettger*, (fn. 30), 351. Compare *Belov*, (fn. 18), 93 who notes that a clear solution lacks in distributing sovereignty in the EU space, and that the concept of sovereignty itself has changed.

86 *Van der Schuyff*, (fn. 17), 190. See also *H.-J. Blanke*, Article 1 [Establishment and Functioning of the Union], in: *Blanke/Mangiameli* (eds.), (fn. 31), 45, 63-64; *J.H.H. Weiler*, To be a European Citizen – Eros and Civilization, Working Paper Series in European Studies, Special Edition (1998), 1, 35.

87 *Rummens/Sottiaux*, (fn. 27), 574-575.

88 *Molnár*, (fn. 79), 444, 451-452, 459.

89 *Kadi and Al Barakaat International Foundation v. Council and Commission* (C-402/05 P and C-415/05 P) ECLI:EU:C:2008:461, para. 307-308. See also *Martinico*, (fn. 4), 242-252.

90 *Ibid.*, para. 288.

91 *J. Kokott/C. Sobotta*, The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?, *European Journal of International Law* (2012), 1015, 1019.

92 Opinion 2/13 of the Court (Full Court) ECLI:EU:C:2014:2454, para. 184-190. See also *Martinico*, (fn. 4), 252-262.

The CJEU feared that article 53 ECHR, which allows Member States to apply a higher standard of protection than that under the Convention, would be used by states to deny the primacy of EU law on account of their national laws providing a higher standard than that afforded by EU rules.⁹³

Apart from illustrating the interconnectedness of external and internal autonomy, these examples also show the central importance of autonomy to the EU's diachronic identity.⁹⁴ When faced by a “disharmony”, the term coined by *Gary Jacobsohn* in determining identity, between EU law and that of a national or the international legal order, the CJEU consistently chooses to safeguard the EU's autonomy commensurate with the situation.⁹⁵ Autonomy is clearly fundamental to the EU's constitution in the sense of *Glenn's* third layer. Ultimately, much as some of its Member States' constitutional identities set out to guarantee their orders in a diachronic fashion by ensuring their existence through time, so too does that of the EU legal order.⁹⁶

2. Synchronic identity: EU citizenship

Synchronic identity covers the individuality of a constitution at a particular point in time, as opposed to across time.⁹⁷ The emphasis falls on the characteristics of the identity being expressed at that moment. Identity in this sense amounts to protecting “sameness”, in addition to the selfhood described above, by affirming the content of identity in the face of challenge.⁹⁸ The diachronic and synchronic elements of constitutional identity are essentially two aspects of the same body. Whereas the diachronic identity of the EU's constitution allows its legal order to persist, its synchronic identity gives specific effect to its content.

Depending on the constitutional order though, both types of identity can be emphasized, or only one. In the case of Irish identity mentioned above, the near singular focus on the continuity of the people as its defining constitutional principle, its diachronic

element, makes it difficult to settle on a specific constitutional content of comparable value, its synchronic identity.⁹⁹ This is because the actual content of its constitution is always contingent on the immediate will of the people as the superior value. By comparison, the EU legal order's constitutional identity relies on both its diachronic and synchronic elements. Each of these aspects is important if the EU's identity is to serve as a benchmark in relation to international and Member State laws.¹⁰⁰ For instance, in Opinion 1/91 the CJEU made a distinction between the autonomy of the legal order on the one hand, and the objectives pursued by it on the other.¹⁰¹

Although Advocates General *Kokott* and *Szpunar* mentioned the EU's constitutional identity as such in the Opinion 2/13 procedure and the LG case respectively, there was little reflection on its synchronic content.¹⁰² In attempting to explicitly configure the EU constitutional order in this way, the concept of *EU citizenship* in article 9 TEU and article 20(1) TFEU becomes particularly useful.¹⁰³ Citizenship in a material or substantive sense is important, as the EU is ultimately derived from its citizens, as explained above in establishing the legal order's constitutional credentials. Moreover, EU citizenship is destined to become the primary status of the Member States' nationals according to the CJEU in the *Grzelczyk* case.¹⁰⁴ This citizenship, as Advocate General *Maduro* elaborated in *Rottmann v. Freistaat Bayern*:

“forms the basis of a new political arena from which rights and duties emerge, which are laid down by Community law and do not depend on the State. This, in turn, legitimises the autonomy and authority of the Community legal order.”¹⁰⁵

In this regard *Christian Calliess* explains that the concept of an EU citizenship transformed the Euro-

93 Essentially the question in *Melloni v. Ministerio Fiscal* (C-399/11) EU:C:2013:107.

94 EU law's autonomy is amplified in that EU institutions follow CJEU rulings when confronted by contradictory national rulings. *E.g.*, in the Public Sector Purchase Programme matter, the European Central Bank took note of the German Federal Constitutional Court's decision (BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/1, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915) that it had exceeded its mandate, adding that it would exercise its mandate as determined by the CJEU (Weiss (C-493/17) ECLI:EU:C:2018:1000). For the Bank's statement, see <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505-00a09107a9.en.html> (last accessed 4 March 2021).

95 On disharmony, see *Jacobsohn*, (fn. 1), 130. Compare the remarks on “conflict” by *Martinico*, (fn. 4), 262-263.

96 *E.g.* the constitutional identities of Denmark, Germany and Spain each entail the protection of their statehood. See *Van der Schyff*, (fn. 44), 332 and the sources cited there.

97 *Reestman*, (fn. 73), 377.

98 On “sameness” as it relates to constitutional identity, see *Sterck*, (fn. 60), 282.

99 Consider *Daly*, (fn. 75), 199-200.

100 This does not mean that the balance between the two elements may not differ between cases, or exhibit some tension over time. Compare *Martinico*, (fn. 4), 248-249.

101 Opinion 1/91 of the Court, ECLI:EU:C:1991:490, para. 30. See also Opinion 2/13 of the Court (Full Court) ECLI:EU:C:2014:2454, para. 169-170 on autonomy as the method to protect fundamental rights.

102 View of Advocate General *Kokott* regarding Opinion procedure 2/13, ECLI:EU:C:2014:2475, para. 168-169; Opinion of Advocate General *Szpunar* in *LG v. Rina SpA, Ente Registro Italiano Navale* (C-641/18) ECLI:EU:C:2020:3, para. 141, 144.

103 See too *Sarmiento*, (fn. 4), 183-186 on “the autonomous content” of citizenship as the EU's legal “core”. Although to function meaningfully, citizenship would have to be construed autonomously, care should be taken not to conflate the two concepts. Autonomy as identity serves a broader function than securing the persistence of EU citizenship, as it also underpins the everyday application of EU law in general.

104 *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (C-184/99) ECLI:EU:C:2001:458, para. 31.

105 *Rottmann v. Freistaat Bayern* (C-135/08) ECLI:EU:C:2009:588, para. 23.

pean from a *bourgeois* into a *citoyen*.¹⁰⁶ In other words, in addition to membership of the internal market as a *homo economicus*, a *homo civitatis* was created with membership in a constitutional order, or “political arena” to use *Maduro’s* words.¹⁰⁷ Abolishing the concept of citizenship, which was formally established by article 8(1) of the Maastricht Treaty in 1992, would fundamentally reshape the EU’s constitutional individuality by removing a central building block in the sense of *Glenn’s* third identity layer.¹⁰⁸ Its removal would in effect undo the Maastricht Treaty’s constitutional moment in grounding the EU.¹⁰⁹ Consequently, it is around and in response to its citizenship that the EU’s synchronic identity is to be concretized by signaling the core elements or values which it is meant to express.¹¹⁰ To this end, a few lines can be sketched which can be pursued based on the internal and external dynamics of the Treaties.

As to the *internal*, or textual, dynamics of the Treaties, caution is advised in not over-emphasizing the presence or absence of eternity clauses as is sometimes done with Member State constitutions. Merging constitutional identity with the existence of an eternity clause might erroneously limit identity to such clauses. The reality is that a particular identity may be broader or narrower than such clauses, or it may potentially not even overlap with such clauses at all.¹¹¹ The fact that the TEU and TFEU do not possess eternity clauses does not mean to say that these Treaties do not possess a discernible identity, or that such an absence translates into an obstacle in determining identity.¹¹² Amendable or ordinary treaty provisions can also provide ample material in deducing substantive identity. In this regard, preambles can be insightful.¹¹³ These provisions are not to be viewed with skepticism, as *Fabbrini* and *Sajó’s* criticism entails, but as sources that “express the underlying values and principles”

of constitutions.¹¹⁴ In addition to their expressive function, an “identifying function” is generally distinguished, by which is meant that preambles point to constitutions’ “political, religious or ideological identity”.¹¹⁵ Viewed from this angle, preambles can serve to reinforce a constitution’s provisions, thereby guiding their interpretation. In the case of the TEU, for instance, the importance of article 2 becomes especially evident. This provision, inserted by the Lisbon Treaty, codifies many of the values and aspirations recited in the TEU’s preamble and declares them to be foundational:

“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.”¹¹⁶

Signifying its importance, the “values” in this provision include and expand on the list of “principles” in article 6 TEU (now article 6 TEU) which the CJEU protected from derogations by article 297 EC (now article 347 TFEU) and article 307 EC (now article 351 TFEU).¹¹⁷ Article 2 TEU can clearly be associated with the EU’s constitutional “core”.¹¹⁸ In this regard, the provision could serve as a framework with which to ground and refine the linking of fundamental rights protection with the EU’s identity by Advocate General *Szpunar* in the LG case.¹¹⁹ The provision could also be put to use in evaluating questions regarding a possible hierarchy among the range of fundamental rights protected by EU law.¹²⁰

106 *C. Calliess*, The Dynamics of European Citizenship: From Bourgeois to Citoyen, in: Rosas/Levits/Bot (eds.), The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law -La Cour de Justice et la Construction de l’Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence (2013), 425, 427-430.

107 Advocate General *Colomer*, Petersen v. Arbeitsmarktservice Niederösterreich (C-228/07) ECLI:EU:C:2008:281, para. 15.

108 See *Calliess*, (fn. 106), 430 who views the introduction of an EU citizenship as a “paradigm shift”.

109 *J.H.H. Weiler*, The Constitution of Europe. “Do the New Clothes have an Emperor?” and Other Essays on European Integration (1999), 4 locates the constitutional moment in the public debate surrounding the Treaty’s adoption.

110 Compare *Weiler*, (fn. 86), 36 on EU citizenship as symbolising supranational “civilization”, which tames national “eros”.

111 See also *M. Polzin*, Constitutional Identity as a Constructed Reality and a Restless Soul, German Law Journal (2017), 1595, 1607-1610.

112 The absence of such clauses can be deduced from *Pringle v. Government of Ireland* (C-370/12) ECLI:EU:C:2012:756, para. 33-36 where it was held that “the examination of the validity of primary law does not fall within the Court’s jurisdiction”. This does not preclude the CJEU from reviewing adherence to the simplified treaty revision procedure in art. 48(6) TEU. This entails reviewing a European Council decision, which as an act of an EU institution falls within the CJEU’s art. 19(3)(b) TEU remit.

113 See *Polzin*, (fn. 111), 1605.

114 *W. Voermans/M. Stremmler/P. Cliteur*, Constitutional Preambles: A Comparative Analysis (2017), 92; *Van der Schyff*, (fn. 44), 310.

115 *Ibid.* See too *S.C. van Bijsterveld*, Grondwet en constitutionele identiteit: Het constitutioneel verdrag voor de EU als spiegel voor de Nederlandse Grondwet, in: Zootjens/Peters (eds.), Getuigend Staatsrecht: Liber Amicorum A.K. Koekkoek (2005), 189, 194.

116 Consider references in the TEU’s preamble to “the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”, the “attachment to fundamental social rights” and the desire “to deepen the solidarity between [the states] peoples”. The importance of art. 2 TEU is affirmed by the mechanism in art. 7 TEU allowing the suspension of Member States’ treaty rights for serious persistent breaches of its values. See also *Van der Schyff*, (fn. 5), 235.

117 The principles were “liberty, democracy and respect for human rights and fundamental freedoms”. Kadi and Al Barakat International Foundation v. Council and Commission (C-402/05 P and C-415/05 P) ECLI:EU:C:2008:461, para. 301-304.

118 See *Sarmiento*, (fn. 4), 187. *Martinico*, (fn. 4), 239, 262 explains that the list of values is not exhaustive.

119 Opinion of Advocate General *Szpunar* in *LG v. Rina SpA, Ente Registro Italiano Navale* (C-641/18) ECLI:EU:C:2020:3, para. 140, 141, 144.

120 *D. Sarmiento*, What Schrems, Delvigne and Celaj tell Us About the State of Fundamental Rights in the EU, VerfassungsBlog, 2015/10/16, <https://verfassungsblog.de/what-schrems-delvigne-and-celaj-tell-us-about-the-state-of-fundamental-rights-in-the-eu/> (last accessed 4 March 2021) speaks of privacy as a “super-fundamental right” outranking all other rights.

In addition, article 2 TEU alludes to the *external*, or contextual, dynamic of the Treaties, by relaying the EU's constitutional values to its Member States. This is also confirmed in article 6(3) TEU which recognizes the fundamental rights of the ECHR and those sprouting from the constitutional traditions common to the Member States as general principles of EU law.¹²¹ In debating and developing the constitutional identity of the EU, notice must be taken not only of its textual setting, but also of the interplay with its national and international context. EU constitutional identity is therefore not only to be found *within* its constitution, but also *among* other constitutions.¹²² To this can be added that the EU's constitutional identity might also be found in *contrast* to other constitutional orders. The identity of the Austrian constitution, for example, is as much a positive expression of its elements and values, as it is a negation of the constitutional paradigm presented by National Socialism which it prohibits from re-emerging.¹²³ In order to prevent a return to tyranny and totalitarianism in Europe, it has been postulated that an EU constitutional identity could be premised on a repudiation of not only Nazism but also of Soviet Communism.¹²⁴ Contrast as a method can be applied in relation to other constitutional democracies too, and not only between democratic constitutions and the dispensations that reject them. In this regard, comparisons have been suggested and made between the core tenets of constitutionalism in the EU and the United States of America for example.¹²⁵ This exercise can also be undertaken in respect of constitutional elements of the international legal order, as exemplified by the Kadi I judgment when in the interests of EU fundamental rights the CJEU annulled a Council Regulation that gave effect to a UN Security Council Resolution.¹²⁶

Once the three constitutional parameters of “within” the EU level’s constitution, “among” and in “contrast” to other constitutions are appreciated, the attention can turn to fleshing out the core elements and values which underpin the EU’s citizenship, with a particular focus on the CJEU’s interpretive role given its central position in this regard.

V. CONCLUDING THOUGHTS

In bringing the strands of the discussion together, it becomes clear that a constitutional identity can indeed be attributed to the EU’s legal order. Moreover, this is an exercise which must be attempted more explicitly in configuring the EU’s constitutional content, especially by the CJEU as its legal guardian. This is because there is a need to rationalize the individuality of the EU’s substantive constitution, thereby refining its application and developing a canon better suited on which to model a formal constitution than simply codifying the Treaties in their entirety, as the failed Treaty-Constitution attempted. Moreover, distilling its constitutional identity will enhance the benchmark role of EU law in relation to international law and national constitutional law. A mechanical insistence on the autonomy of EU law is insufficient in realizing such benchmarking, as this identity pillar needs to be conditioned by EU citizenship in a substantive sense. In this regard the device of identity does not by itself imply a particular outcome to a potential conflict between EU law on the one hand, and international or national law on the other. Instead, it serves as a tool with which to map and navigate the constitutional interfaces encountered by EU law. As to the multilevel relationship between the EU legal order and the Member State legal orders, the need for identity analysis will remain crucial. This is because the current multilevel situation might persist indefinitely, given that the EU is unlikely to become a state, while its existence means a reduction of Member State sovereignty. Whether constitutional conflict is avoided in this context will depend on the spirit of cooperation exhibited between the EU level and the Member State level when interacting. In which case it would be helpful to remember that both the regional constitution and the national constitutions ultimately derive from and serve the interests of the same citizens.

121 See the repetition in the CFREU’s preamble.

122 *Rosenfeld*, (fn. 3), 760.

123 See *Lienbacher/Lukan*, (fn. 13), 52-53.

124 *Rosenfeld*, (fn. 3), 774-775.

125 *Ibid.*; *Sadurski*, (fn. 4), 8, 13-21.

126 *Kadi and Al Barakaat International Foundation v. Council and Commission* (C-402/05 P and C-415/05 P) ECLI:EU:C:2008:461, para. 17-18, 303-304, 307-308, 372.