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Sumário
Contents

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Constitutional identities and traditions: a conundrum for comparative lawyers

Identidades e tradições constitucionais: um enigma para os comparatistas

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Abstract: This paper elaborates upon a novel understanding of the interaction between constitutional traditions common to the Member States of the European Union and their domestic identity through comparative methodology. It puts forward a bottom-up understanding of identities through comparative case law, while grasping their potential contribution to the content of common traditions. It connects these issues to the ongoing discussion on the values of the EU through a circular model of mutual influence.

Keywords: Constitutional identity. European integration. Constitutional traditions. Fundamental values of the EU. Comparative methodology.

Resumo: Este artigo desenvolve uma nova compreensão da interação entre tradições constitucionais comuns aos Estados-Membros da União Europeia e sua identidade doméstica por meio de metodologia comparativa. Apresenta uma compreensão *bottom-up* das identidades através da jurisprudência comparada, ao mesmo tempo em que capta sua contribuição potencial para o conteúdo das tradições comuns. Liga essas questões à discussão em curso sobre os valores da UE através de um modelo circular de influência mútua.

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Palavras-chave: Identidade constitucional. Integração europeia. Tradições constitucionais. Valores fundamentais da EU. Metodologia comparativa.

1 Identities and Constitutions

Constitutional identity is becoming an increasingly relevant issue in comparative constitutional law. And its relevance more and more significant within multi-layered contexts in which domestic constitutions coexist with international or supranational sources regulating fundamental rights and values. For instance, to what extent identity is shaped by belonging to the Inter-American System for the protection of human rights and not only by domestically determined constitutional norms is still to be determined for Latin American orders. Even more, the issue is discussed with respect to European constitutionalism, as it relies upon different layers, namely domestic constitutions, European Union's treaties and norms (as well as the European Convention on Human Rights).

Scholarly and political debate has been focusing lately on the interaction between domestic systems and the EU system, as it entails the acceptance of common values which represent the foundations of the Union itself. In fact, Article 2 of the Treaty on European Union (TEU) states that '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.'

At the same time, Article 4.2 of the TEU ensures the respect for domestic constitutional identities. In my understanding, two preconditions apply: a) domestic identity shall be consistent with Article 2 TEU; b) it needs to be defined, mainly through the labour of courts as it will be explained later.[1] Of course, there is 'great potential for conflict'.[2] Nevertheless, Article 4.2 TEU does not embed EU institutions nor the Court of Justice of the European Union (CJEU) to establish what domestic identities are. Member States can be assumed to be entitled to elaborate their constitutional identity. Still, when they aim to protect their identity vis-à-vis EU

1 One of the major risks is the lack of determinacy. See FABBRINI, Federico; SAJÓ, András. The Dangers of Constitutional Identity. *European Law Journal*, n. 25, p. 457-473, 2019.

2 CALLIESS, Christian; VAN DER SCHYFF, Gerhard. Constitutional Identity Introduced and Its EU Law Dimension. In: CALLIESS, Christian; VAN DER SCHYFF, Gerhard (coord.). *Constitutional Identity in a Europe of Multilevel Constitutionalism*. Cambridge: Cambridge University Press, 2019, p. 5.

obligations, 'they need to take into account that within a system of autonomous but connected entities, loyalty obligations always have to be mutual'.[3] The case law and scholarship on EU-friendliness responds to this idea.

Against this backdrop, these reflections analyse the role and challenges of the judicial bodies involved: domestic courts shaping constitutional identities (section 2) and the CJEU elaborating common constitutional traditions (CCTs – section 3), trying to reconcile their positions as to potentiate the dialogical dimension of judicial integration (section 4).

The second section applies a bottom-up approach to constitutional identity, which takes into consideration case law and scholarship on the issue. The expression 'constitutional identity' itself is not present in the textual phrasing of EU Member States' constitutions; nevertheless, it is commonly used only in some countries' academic and judicial debates (like *identité constitutionnelle* in France, *Verfassungsidentität* in Germany, or *tożsamość konstytucyjna* in Poland, employed by the corresponding Courts in 2006, 2009 and 2010). In other cases, the last decade has seen the rise of the concept within the intertwined European constitutional framework: for instance, the Czech Constitutional Court referred to this concept in 2012; the Lithuanian one in 2012 and 2014; the Italian Constitutional Court in 2017 and the Hungarian one in 2016.

The second section connects the concept and practice of common constitutional traditions (CCTs) employed by the CJEU and then recognized in EU primary law with constitutional identities, through a threefold approach: a) conceptualization of CCTs and their role, statistical data and individualization of the rights involved in the elaboration of CCTs; b) methodology and comparative assessment of domestic orders when elaborating a CCT; c) substance, with reference to the complex interplay between CCTs and constitutional identities.

I claim that their role needs to be understood today in a novel light, i.e., its interconnection with domestic constitutional identities and within a distinct normative and factual situation of defence of EU values. Such process shall respond to an interpretation of 'common' as a tool to preserve plurality, within a shared framework, 'referring' to the recognition of a shared standard and not 'deferring' to potentially divergent traditions.[4]

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[3] CALLIESS, Christian; SCHNETTEGER, Anita. The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism. In: CALLIESS, Christian; VAN DER SCHYFF, Gerhard. *Constitutional Identity in a Europe of Multilevel Constitutionalism*, cit., p. 362.

[4] On the issue see CASSESE, Sabino. The "Constitutional Traditions Common to the Member States" of the European Union. *Rivista trimestrale di diritto pubblico*, n. 4, p. 944, 2017. On the dialogical value see POLLICINO, Oreste. Corte di giustizia e giudici nazionali: il moto "ascendente", ovverosia l'incidenza delle "tradizioni costituzionali comuni" nella tutela apprestata ai diritti dalla Corte dell'Unione. In: RUGGERI, Antonio and others (coord.). *Crisi dello stato nazionale, dialogo intergiurispudenziale, tutela dei diritti fondamentali*. Torino: Giappichelli, 2015.

CCTs are still essential for the development of EU law.[5] In the recent judgment concerning cases C-156/21[6] (Hungary v Parliament and Council) and C-157/21[7] (Poland v Parliament and Council), the CJEU dismissed the argument brought by Poland and Hungary that the concept of 'rule of law' (used within budgetary conditionality) would be a vague concept violating the principle of legal certainty. In doing so, it referred to its own case law, as well as the common values which are also recognized and applied by the Member States in their own legal systems, claiming that there is a concept shared by the Member States that adhere to it, as a common value within their constitutional traditions. Therefore, according to the Court, it would be possible for the Member States to provide a sufficiently determined content attached to the principle and consequently the corresponding requirements. This statement proves that common constitutional traditions can play a role beyond the protection of fundamental rights as general principles of EU law, in spite of the limitation in scope provided by the TEU.

2 A Novel Bottom-Up Perspective

2.1 Sources

Constitutional identity situates itself at the intersection between EU law and domestic law and represents a tool to 'navigate the multilevel space in Europe from both the perspective of the EU and its Member States',[8] still generating prospective tensions between the two realms.

It is domestic courts and scholarship that most frequently shape its content. Even the Opinion by Advocate General Maduro in the matter of *Marrosu and Sardino* expressed that: 'Doubtless the national authorities, in particular the constitutional courts, should be given the responsibility to define the nature of the specific national features […]. Those authorities are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect.'[9] This section builds upon previous analyses of domestic doctrines to provide a critical comparative assessment of constitutional identities as they emerge from case law and academic assessment.

5 LENAERTS, Koen. La vie après l'avis: Exploring the Principle of Mutual (yet not blind) trust. *Common Market Law Review*, vol. 54, n. 3, p. 805, 2017.

6 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, 16th of February 2022.

7 Case C-157/21 *Poland v European Parliament and Council of the European Union*, 16th of February 2022.

8 CALLIESS, Christian; VAN DER SCHYFF, Gerhard. Constitutional Identity Introduced and Its EU Law Dimension, cit., p. 4.

9 Paragraph 40 of the Opinion of 20 September 2005, ECLI:EU:C:2005:569, in the matter of CJEU, C-53/04, Marrosu and Sardino ECLI:EU:C:2006:517.

In general, the content of constitutional identity is the result of the interplay of textual analysis and contextual appreciation.[10] Therefore, texts still matter,[11] as the eternity clauses enshrined in the German, French, Italian, Czech Constitutions prove: their formalization shows the relevance of certain principles within the context of national constitutional identity.[12] Within constitutional texts, preambles can give hints as well, as it is the case for the French or the Polish cases,[13] but not only.[14] But even more, the interpretation of constitutional clauses provided by constitutional courts does, particularly as these courts often try to maintain the final say on the matter[15] and do not define the fundamental or core principles of the Constitution 'a priori', while applying a case-by-case method, depending also on the threat and the value at stake.[16]

Therefore, constitutional identity only partially relies upon the constitutional text itself,[17] being this complemented by pieces of legislation[18] (rarely) and judgments (frequently). The case of the UK before its exit from the European Union would have been significant with respect to the role played by ordinary legislation, as there are necessarily 'constitutional statutes' and conventions linked to its identity which cannot be amended nor implicitly repealed.[19] In this respect, also the cases of Austria and Belgium are relevant.

[10] VAN DER SCHYFF, Gerhard. Member States of the European Union, Constitutions and Identity. In: CALLIESS, Christian; VAN DER SCHYFF, Gerhard (coord.). *Constitutional Identity in a Europe of Multilevel Constitutionalism*, cit., p. 322.

[11] They are a 'start', as it is stated by JACOBSOHN, Gary Jeffrey. *Constitutional Identity*. Oxford: Oxford University Press, 2010, p. 348.

[12] VON BOGDANDY, Armin; SCHILL, Stephan. Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty. *Common Market Law Review*, n. 48, p. 1432, 2011.

[13] ŚLEDZIŃSKA-SIMON, Anna; ZIÓŁKOWSKI, Michal. Constitutional Identity in Poland: Is the Emperor Putting On the Old Clothes of Sovereignty?. In: CALLIESS, Christian; VAN DER SCHYFF, Gerhard (coord.). *Constitutional Identity in a Europe of Multilevel Constitutionalism*, cit., p. 243-67.

[14] With respect to the Visegrad group, see POPLAWSKI, Karol. Introductory parts to the constitutions of Visegrad Group countries: Their relevance, constitutional identity and relation towards European Constitutional Identity. *Central European Papers*, p. 25, 2019.

[15] See KUMM, Mattias. Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice. *Common Market Law Review,* n. 36, p. 351ff., 1999; HALBERSTAM, Daniel.Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States. In: DUNOFF, Jeffrey L.; TRACHTMAN, Joel P. (coord.). *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press, 2009, p. 326ff.

[16] Nevertheless, not all Courts have entered into defining the domestic constitutional identity (see the UK and Sweden).

[17] LIENBACHER, Georg; LUKAN, Matthias. Constitutional Identity in Austria. Basic Principles and Identity beyond the Abolition of the Nobility. In: CALLIESS, Christian, VAN DER SCHYFF, Gerhard (coord.). *Constitutional Identity in a Europe of Multilevel Constitutionalism*, cit., p. 41-58.

[18] These could be 'semi-constitutional norms', as explained by CLOOTS, Elke. Constitutional Identity in Belgium: A Thing of Mystery. In: CALLIESS, Christian, VAN DER SCHYFF, Gerhard (coord.). *Constitutional Identity in a Europe of Multilevel Constitutionalism*, cit., p. 59-84.

[19] CRAIG, Paul. Constitutional Identity in the UK: An Evolving Concept. In: CALLIESS, Christian, VAN DER SCHYFF, Gerhard (coord.). *Constitutional Identity in a Europe of Multilevel Constitutionalism*, cit., p. 284ff.

2.2 Case Law

Concerning case law, the majority of constitutional courts separate national identity under Article 4.2 TEU and their constitutional identity *stricto sensu*.[20] Often, they just state that EU norms and acts cannot infringe upon the basic principles of the corresponding state's constitutional order. But still, when entering into this dialogue, Courts have gained authority[21] at both the domestic and the European level.

German case law intertwines identity from a domestic perspective and vis-à-vis the EU.

The Second Senate of the German Constitutional Court (particularly in its *Lisbon* judgment) stated that Germany's national identity is determined by the limits on the amending power according to the 'eternity clause' set in Article 79.3.[22] This case law is the most elaborated and the one with a widest scope. The issue is to ensure 'sufficient space […] for the political formation of the economic, cultural and social living conditions'.[23] This covers all 'areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as […] political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics.'[24] The Second Senate inferred several specific limitations related to constitutional principles.[25]

With respect to German constitutional case law, a case is recalled as well by Susanne Baer in an upcoming chapter,[26] namely the 2019 judgment on the right to be forgotten.[27] The Court decided to apply domestic constitutional standards in the cases affected, but not completely dependent on EU law, while it applies the standards

[20] See SÁIZ ARNAIZ, Alejandro; ALCOBERRO LLIVINA, Carina (coord.). *National constitutional identity and European integration*. Cambridge: Intersentia, 2013.

[21] CLAES, Monica. Negotiating constitutional identity or whose identity is it anyway?. In: DE VISSER, Maartje; POPELIER, Patricia; VAN DE HEYNING, Catherine (coord.). *Constitutional Conversations in Europe: Actors, Topics and Procedures*. Cambridge: Intersentia, 2012, p. 229.

[22] BVerfGE 123, 267 – *Lisbon* (2009), para 239-240.

[23] BVerfGE 123, 267 – *Lisbon* (2009), para 249.

[24] BVerfGE 123, 267 – *Lisbon* (2009), para 249.

[25] See, e.g., HALBERSTAM, Daniel; MÖLLERS, Christoph. The German Constitutional Court Says 'Ja zu Deutschland!'. *German Law Journal,* n. 10, p. 1249, 2009; KOTTMANN, Matthias; WOHLFAHRT, Christian. Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, n. 69, p. 460ff., 2009; SCHÖNBERGER, Christoph. Lisbon in Karlsruhe: Maastricht's Epigones At Sea. *German Law Journal*, n. 10, p. 1209, 2009, p. 1209 ff. See also GÄRDITZ, Klaus Ferdinand; HILLGRUBER, Christian. Volkssouveränität und Demokratie ernst genommen: Zum Lissabon-Urteil des BVerfG. *JuristenZeitung,* n. 64 p. 872-881, 2009.

[26] See BAER, Susanne. The Evolution and Gestalt of the German Constitution. In: VON BOGDANDY, Armin HUBER, Peter, RAGONE, Sabrina (coord.). *Ius Publicum Europaeum. Constitutional Foundations*, Oxford University Press, 2022, forthcoming.

[27] BVerfG, Order of the First Senate, 6 November 2019 - 1 BvR 16/13 - *Recht auf Vergessen (Right to be Forgotten I)*.

set by the Charter of Fundamental Rights of the EU in those fully determined by EU law. This mechanism stands as long as the outcome is consistent with national constitutional requirements and in some cases, it may become necessary to refer preliminary questions to the CJEU.[28] The Court intersected in this jurisprudence the existence of a common ground of European constitutionalism (the ECHR) and the preservation of pluralism (Article 6 TEU), recalling Germany's commitment to EU integration.

Other Courts have also elaborated upon the principles protected by the corresponding eternity clauses. The Czech Court interpreted the rule of law principle as including several more specific components such as the prohibition of arbitrary overruling of previous case law,[29] the prohibition of retroactivity,[30] and the principle of the generality of law.[31] The (frequently preserved by comparative eternity clauses) democratic principle is intended as embedding popular sovereignty and representative democracy[32] alongside electoral guarantees.[33] Concerning fundamental rights, the Czech Court stated that, 'limiting an already achieved procedural level of protection of fundamental rights and freedoms' would infringe upon the eternity clause.[34]

The Italian Constitutional Court defended the existence of supreme principles in the constitutional order that cannot be changed in their 'essential content' and include both the republican form, which is the only unamendable aspect according to Article 139 of the Constitution, and those principles that belong to the essence of the supreme values on which the Italian Constitution is based. The core identity of the Constitution, according to judgment n. 1146/1988, prevails on constitutional laws and amendments, and not only on the other para/infra-constitutional sources, like the Lateran Pacts or the norms of the EU (which cannot violate the supreme principles, according to the so-called doctrine of *controlimiti*). It did not list those values nor provide details, but it used the intertwined concept of 'controlimiti' (comparable to 'constitutional identity' in its confrontative dimension vis-à-vis EU norms) to define which parts are those fundamental aspects that cannot be affected by European sources, that otherwise prevail over domestic norms. Similarly, the Spanish Constitutional Court in declaration 1/2004 (related to the failed 'Treaty establishing a Constitution for Europe') held, with respect to the principle of primacy of EU law, that a balance was required to combine the possibility to enter into organizations whose norms are binding under Article 93 and constitutional supremacy

[28] BVerfG, Order of the First Senate, 6 November 2019 - 1 BvR 276/17 - *Recht auf Vergessen (Right to be Forgotten II)*.
[29] Judgment of the CCC of 11 June 2003, Pl. ÚS 11/02.
[30] Judgment of the CCC of 10 September 2009, Pl. ÚS 27/09.
[31] Judgment of the CCC of 10 September 2009, Pl. ÚS 27/09.
[32] Judgment of the CCC of 21 December 1993, Pl. ÚS 19/93.
[33] Judgment of the CCC of 6 February 2001, Pl. ÚS 42/2000.
[34] Judgment of the CCC of 25 June 2002, Pl. ÚS 36/01.

had to be found. It stated that, as long as the EU respects the same basic principles embodied by the Spanish Constitution (sovereignty of the State, basic constitutional structures, and substantive values, including fundamental rights), and as long as the level of protection afforded those principles by the European institutions is similar, Spain can accept the primacy of EU law. In the Spanish case, no eternity clause is embedded in the Constitution and the interpretation given by the Constitutional Court and scholars is therefore paramount.[35]

Austrian Constitutional jurisprudence refers to democracy (Article 1), federalism (Article 2) and the rule of law (VfSlg. 2455/1952). Scholarship elaborated upon them, distinguishing the democratic principle from the republican one, as well as dividing the rule of law principle into three sub-categories, namely, principle of legality, separation of powers and fundamental rights.[36] Additionally, the case law by the Constitutional Council is the unavoidable reference to understand constitutional identity in France.[37]

Excluding some Courts that have not dealt with the issue at stake (like the Netherlands due to their system's openness towards international legal developments, particularly on human rights)[38] and Courts like the German, the Italian and the Spanish ones which had already issued jurisprudence on the relationship with EU law, other Courts have engaged with this question after the entry into force of the Lisbon Treaty. It is not by chance that the expression 'constitutional identity' has become much more popular in the academic/judicial/political debate after 2009.

2012 was a topical year. The Czech Constitutional Court (judgment of 31st of January 2012, Pl. ÚS 5/12 *Holubec*), responded to a petition submitted to obtain the annulment of a judgment by the Supreme Administrative Court from 2011 and a judgment of the Regional Court in Hradec Králové from 2009, setting the old age pension. The plaintiff claimed that such decisions infringed upon his fundamental right to adequate material security in old age, according to Article 30 of the Charter of Fundamental Rights and Freedoms, his fundamental rights arising from the principles of equality and the prohibition of discrimination under Article 1 and Article

[35] See MARTÍN Y PÉREZ DE NANCLARES, José. Constitutional Identity in Spain: Commitment to European Integration without Giving Up the Essence of the Constitution. In: CALLIESS, Christian, VAN DER SCHYFF, Gerhard (coord.). *Constitutional Identity in a Europe of Multilevel Constitutionalism*, cit., p. 268ff.

[36] See WALTER, Robert. *Österreichisches Bundesverfassungsrecht: System.* Wien: Manz, 1972, p. 103; ÖHLINGER, Theo; EBERHARD, Harald. *Verfassungsrecht*. Wien: Facultas, 2019, p. 63; MAYER, Heinz; KUCSKO-STADLMAYER, Gabriele; STÖGER, Karl. *Grundriss des österreichischen Bundesverfassungsrechts.* Wien: Manz, 2015, p. 146.

[37] See MILLET, Francois-Xavier. Constitutional Identity in France: Vices and – Above All – Virtues. In: CALLIESS, Christian; VAN DER SCHYFF, Gerhard (coord.). *Constitutional Identity in a Europe of Multilevel Constitutionalism*, cit., p. 134-152.

[38] See, as well, VAN DER SCHYFF, Gerhard. EU Member State Constitutional Identity: A Comparison of Germany and the Netherlands as Polar Opposites. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 76, n. 1, p. 167ff., 2016.

3.1 of the Charter and his fundamental right to judicial and other legal protection under Article 36 of the Charter.

The Court affirmed that the seventy years of the Czechoslovak statehood and the posterior peaceful dissolution of Czechoslovakia had influenced the contemporary Czech constitutional identity, alongside the constitutional eternity clause and the core values, including an historical dimension to the approach to constitutional identity. In spite of not explicitly using the term, the Court has elaborated upon the concept over time, starting from the textual references to the basic principles defining the nature of Czech statehood (Article 1, according to which 'the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law (closer to the German concept of *Rechtsstaat*), founded on respect for the rights and freedoms of men and of citizens', as well as to the eternity clauses embedded in Article 9.2 (providing that, 'any changes in the essential requirements of a *democratic* state governed by the *rule of law* are impermissible').[39]

With respect to the rule of law, in 2017 the Italian Constitutional Court referring a preliminary question within the context of the 'Taricco saga' (a series of preliminary references submitted to the CJEU) defined the scope of the supreme principle of the 'legality' as comprehending within the legal definition of offences and penalties the statute of limitation as well (order 24/2017). While preserving the Italian identity, the Italian Court referred to other Member States' legal orders shaping a sort of common identity, and the CJEU adopted a similarly cooperative aptitude by embracing such understanding of the principle. The principle of legality is treated as a general principle of EU law rather than a constitutional basic element, therefore preserving EU law primacy.

The Lithuanian Constitutional Court as well entered into the debate in 2012:[40] in the decision of 19 December 2012 and the ruling of 24 January 2014, it managed EU membership itself as a fundamental constitutional value, reaffirming a constitutional obligation to take part to European integration as a source of peace, stability, tolerance, and prosperity. Contextually, it secured that independence of the state, democracy and republic, respect for fundamental rights and freedoms are the core constitutional principles that cannot be 'negated'.[41] In other words,

[39] Again, the eternity clause's scope can be infused through further content, being considered 'narrower' than the substantive core. See MOLEK, Pavel. *Materiální ohnisko jako věčný limit evropské integrace*. Brno: MUNI Press, 2014, p. 91.

[40] See as well JARUKAITIS, Irmantas. Respect for the National Identities of the Member States as a General Principle of European Union Law. In: BERNATONIS, Juozas and others (coord.). *Lithuanian Legal System under the Influence of European Union Law*. Vilnius: Vilnius University, 2014, p. 575ff.

[41] 'Article 1 of the Constitution consolidates the fundamental constitutional values: the independence of the state, democracy and the republic; they are inseparably interrelated and form the foundation of the State of Lithuania, as the common good of the entire society consolidated in the Constitution, therefore, they must not be negated under any circumstances […] the principle of recognition of the innate nature of human

it also distinguished between 'ordinary' constitutional rules and the constitutional core ('nucleus'), which would not cede vis-à-vis EU law. The Court did not mention the principles referred to by other constitutional courts, such as the rule of law, protection of fundamental rights, welfare state or the principle of subsidiarity. Still, the Court seems potentially prone to accept minor changes to the nucleus, as the verb used is 'negated', which indicates that the Court is ready to some extent to accept minor limitations even to the basic aspects.

In 2013, the Polish Constitutional Court stated that 'the guarantee of preserving the constitutional identity of the Republic is Article 90 of the Constitution and boundaries of conferral of competences set therein.'[42] This judgment was consistent with the previous decision on the Lisbon Treaty,[43] representing the primary judgment concerning constitutional identity, which was defined as 'a concept which determines the scope of excluding –from the competence to confer competences– the matters which constitute [...] the heart of the matter, i.e., are fundamental to the basis of the political system of a given state.' It relied upon Article 90 of the Constitution, that allows the delegation of powers to international organizations on certain matters.

Those aspects which compose the constitutional identity and therefore cannot be subject to delegation based on Article 90 are: 'decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences.' If a EU norm were to be inconsistent with such identity, its primacy in the domestic legal system would be overcome. As it is widely known, the Polish Court in 2021 adopted two judgments openly contrasting the CJEU's jurisprudence, denying any binding value of the interim measures of the CJEU with regard to the Polish judiciary[44] and later declaring Article 1, 2, 4 and 19 TEU incompatible with the 1997 Constitution.[45] Overruling its previous case law, it defended the 'constitutional identity' and sovereignty of the country against the spread understanding of rule of law and solidarity.

rights and freedoms should also be regarded as a fundamental constitutional value that is inseparably related to the constitutional values: the independence, democracy and the republic'.

42 Judgment of 26 June 2013, Ref. No. K 33/12 [Procedure for the Ratification of the European Council Decision 2011/199/EU amending Article 136 of the TFEU].

43 Judgment of 24 November 2010, Ref. No. K 32/09.

44 Judgment of 14 July 2021, Ref. No. P 7/20.

45 Judgment of 7 October 2021, Ref. No. K 3/21.

The Constitutional Court of Belgium, when deciding on the 2012 Fiscal Stability Treaty, stated that the constitution resists violations of 'the national identity, inherent in the fundamental structures, political and constitutional, or the fundamental values of the protection conferred by the Constitution upon the legal subjects'.[46] Clearly, even some constitutional courts normally prone to accept and defend EU law have had their say on identity vis-à-vis the European legal system. This is much truer for countries challenging European integration as it is for Poland, as already examined, and Hungary.

The Hungarian Constitutional Court is no exception to the rule in terms of timing, although it remains a peculiar case due to the political context of reference and the use/abuse of the concept of constitutional identity.[47]

The first judgment featuring identity claims is n. 22/2016, which was issued in the context of Orban's policies on migration. The national Commissioner for Fundamental Rights, in 2015, had asked the Court to deliver an abstract interpretation of the constitution in connection with the EU Council's decision 2015/1601 that fixed provisional measures to help Italy and Greece manage the extraordinary arrival of asylum-seekers, consistently with the principles of solidarity and fair sharing of responsibility. Among the questions submitted by the Commissioner, the one that triggered the use of the concept was that concerning the application of *ultra vires* doctrine and the identification of the national institution entitled to decide whether an act passed by the EU is actually outside its scope of attributions.

Interestingly, the Court stated that the constitutional (self)identity is simply recognized and acknowledged by the constitution, and not established by it: as a consequence, no international treaty could serve the purpose of waiving it (paragraph 67).

On the issue at stake, the Court claimed that 'the joint exercise (with the EU) of a competence shall not violate Hungary's sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control)' (paragraph 54). It attributed to itself the protection of constitutional identity within a framework of sovereignty, as these are intertwined concepts the control of which 'should be performed with due regard to each other in specific cases' (paragraph 67).

Additionally, it elaborated upon the protection of constitutional identity, connecting it with Article 4.2 TEU and on 'an informal cooperation with the CJEU based on the principles of equality and collegiality, with mutual respect to each

[46] Judgment of 28 April 2016, Ref. No. 62/2016.

[47] HALMAI, Gábor. Abuse of Constitutional Identity: The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law. *Review of Central and East European Law*, vol. 43, n. 1, p. 23-42, 2018.

other'. The Court 'interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical Constitution— as required by article R) para 3 of the Fundamental Law' (paragraph 63).

As far as the content is concerned, the Court held that Hungarian constitutional identity shall not be considered as being composed of a static list of values. Nevertheless, 'many of its important components— identical with the constitutional values generally accepted today— can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomy under public law, freedom of religion, the exercise of lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us' (paragraph 65).

As Gábor Halmai explains, such conception of constitutional identity overlaps with national identity, as nationalism became a part of the fundamental law after 2011, alongside historical roots and references to Christian culture. As a matter of fact, the national avowal can be found in the preamble of the current constitution and contains the main principles which arguably are all part of the constitutional identity.

3 The Other Way Around: Identities in Common Constitutional Traditions

3.1 Conceptual Issues

Constitutional traditions common to the Member States (CCTs) can be studied and understood through two different methodologies,[48] namely a synchronic method (basically a 'snapshot' of the current role within the case law of the CJEU) and a diachronic perspective/method, taking into account the evolutionary (and regressionist) trends of the case law. The second one has been chosen by scholars as it proves to be better suited for identifying lines of continuity binding the different stages of European integration.[49]

The diachronic perspective is as well more appropriate to respond to the inquiry proposed by this chapter, concerning the significance of CCTs today. They were formulated at first by the CJEU and then found their way into the TEU (Article 6.3, according to which 'Fundamental rights, as guaranteed by the European Convention

[48] PIZZORUSSO, Alessandro. Common constitutional traditions as Constitutional Law of Europe? Sant'Anna Legal Studies-STALS Research Paper, n. 1, 2008. Available at: https://www.stals.santannapisa.it/sites/default/files/stals_Pizzorusso_0.pdf).

[49] POLLICINO, Oreste. "Transfiguration" and Actual Relevance of the Common Constitutional Traditions: Past, Present and Future. *Global Jurist*, vol. 18, n. 1, p. 1, 2017.

for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'). The Charter of Fundamental Rights of the European Union as well embeds the concept, as 'in so far as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions' (Article 52.4). This concept not only contains an obligation to respect national constitutional traditions, but it transforms them into a source of law. After the entry into force of the Charter, 'Common constitutional traditions now appear to have found a new creative lease of life in the case law of the Court thanks to the minor interpretative gaps between the scope of a right as provided for under the Charter and when by contrast construed as a general principle, the source of which may be found precisely in the common constitutional traditions of the Member States'.[50] In other words, where some of the rights do not overlap the general principles, these gaps offered ground for creative interpretations by the CJEU trying to expand the boundaries connected to the scope of application of EU law.[51] Additionally, when the meaning diverges, the relation between fundamental rights under the Charter and the general principles of EU law becomes paramount, in order to expand the scope of the affected right. In this respect, the example of the 'right to good administration' is significant to grasp the issue, as its scope under Article 41 of the Charter is narrower than the general principle of good administration elaborated upon by domestic courts.[52] The dynamic complexity of European rights can benefit from these overlaps and inconsistencies, provided that the CJEU enters into a dialogical relationship with the case law of Member States' courts.

Until recent years, CCTs (and general principles of EU law as a whole) within the European case law were substantively relevant, although not statistically numerous.[53] The reliance on CCTs seemed to be recessive also due to the initial

[50] POLLICINO, Oreste. Common Constitutional Traditions in the Age of the European Bill(s) of Rights: Chronicle of a (Somewhat Prematurely) Death Foretold. In: VIOLINI, Lorenza; BARAGGIA, Antonia (coord.), *The Fragmented Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non-Judicial Actors*. Cheltenham: Edward Elgar Publishing, 2018, p. 51. On the comparative dimension of general principles, see MARTINICO, Giuseppe. Exploring the Platonic Heaven of Law: General Principles of EU Law from a Comparative Perspective. *Nordic Journal of European Law*, vol. 3, n. 1, p. 1-18, 2022.

[51] POLLICINO, Oreste, "Transfiguration" and Actual Relevance of the Common Constitutional Traditions: Past, Present and Future', cit., p. 8.

[52] See HOFMANN, Herwig C.H.; MIHAESCU, Bucura C. The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case. *European Constitutional Law Review*, vol. 9, n. 1, p. 73-101, 2013.

[53] Of course, European integration as such implies a connection between domestic legal orders and the supranational frameworks, as it is proven by continuous interactions and borrowings –the 'preliminary reference' (drawn after the Italian constitutional mechanism) or the action for annulment (drawn from the French tradition). Several principles were extracted from national legal experiences, such as German proportionality.

rationale behind them, namely the need to recognize an implicit Bill of Rights (see *Internationale Handelsgesellschaft* 1970) and to a certain extent europeanise domestic interpretations of the content of fundamental rights.[54] The legal value attached to the Charter of Fundamental Rights would have diminished the need for their use. Nevertheless, even after the Treaty of Lisbon, European case law has referred to CCTs[55] and scholarship has underlined its persisting importance also in light of the crises that EU integration is undergoing.[56]

Over time, in fact, common constitutional traditions have played a role in the realm of guaranteeing the protection of fundamental rights, which were virtually absent at the origin of the European order focused on common market and economic integration. The transformation of the Communities into a Union led to the 'constitutional' mutation into an entity with general purposes. The CJEU was essential in the whole process (see judgments *Stork* 1959, case 1/58; or *Stauder*, case 29/69, in which the Court stated that 'the fundamental rights of the human being […] are a part of the general principles of Community Law that are enforced by the Court.' In the abovementioned case *Internationale Handelsgesellschaft*, the Court held that the protection of fundamental rights represents a component of the general legal principles enforced by the Court itself; those rights were to be informed by the constitutional traditions common to the Member States, but they must be ensured within the structure and purposes of the Community.

Overall, the cases are not few,[57] although CCTs were particularly present in the case law over the first decade of the 2000, decreasing in number afterwards. They affect different rights or principles, namely the right to respect of private life; right to property; freedom of expression; right to workers' freedom of movement; right to freedom of conscience and religion; prohibition of discrimination on grounds of age; right to an effective remedy or to effective judicial protection; right to a fair

[54] The approach of the CJEU was defined in this respect as a 'strategic miscalculation' by DAVIES, Bill. *Internationale Handelsgesellschaft* and the miscalculation at the inception of the CJEU's human rights jurisprudence. In: DAVIES, Bill; NICOLA, Fernanda (coord.). *EU Stories, Contextual and Critical Histories of European Jurisprudence*. Cambridge: Cambridge University Press, 2017, p. 155; as the Court proved the disconnect between its ambitions and how Member States received them.

[55] See Judgment of 14 September 2010, C550/07 P Akzo Nobel Chemicals, in Reports of Cases 2010 I-08301 ('that area of European Union law must take into account the principles and concepts common to the laws of the Member States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client').

[56] See MANGIAMELI, Stelio. The Constitutional Traditions Common to the Member States in European Law, as a Tool for Comparison among Member States' Legal Orders in the Construction of European Fundamental Rights. *Caderno de Relações Internacionais*, vol. 7, n. 13, p. 13-44, 2016.

[57] Michele Graziadei and Riccardo de Caria listed 100 (92 judgments and 8 orders) cases until 2017, see GRAZIADEI, Michele: DE CARIA, Riccardo. The Constitutional Traditions Common to the Member States in the Case-Law of the European Court of Justice: Judicial Dialogue at its finest. *Rivista trimestrale di diritto pubblico*, n. 4, p. 958, 2017.

trial; principle of retroactivity of more lenient criminal law; principle of the legality of criminal offenses and of punishments.[58]

3.2 Methodological Issues

The Court of Justice and later the TEU and the Charter have embraced a doctrinal approach, using a terminology employed by comparative lawyers to refer to the term 'tradition', including within the EU legal system concepts deriving from established and socially embedded, dynamic and pluralistic legal orders.[59] The comparative nature of traditions is inherent to the term. The choice to apply a doctrinal approach to traditions implies the need for references to their history and actual implementation, alongside and/or beyond the textual phrasing of domestic constitutions. Additionally, it entails the consideration for the past interpretations of the concepts within the Member States' legal systems, including a 'time dimension'.[60]

From a methodological perspective, the application of the term 'common' requires an analysis of how many countries are supposed to be sharing the same tradition to see that transposed into a general principle. Numerical analysis does not suffice in this respect. The CJEU responds to a different logic in comparison to the majority principle applied by the European Court of Human Rights in the well-known 'consensus' doctrine. In fact, as stated by Advocate General Kokott, 'it is by no means inconceivable that even a legal principle which is recognized or even firmly established in only a minority of national legal systems will be identified by the Courts of the European Union as forming part of EU law. This is the case in particular where, in view of the special characteristics of EU law, the aims and tasks of the Union and the activities of its institutions, such a legal principle is of particular significance, or where it constitutes a growing trend.'[61]

Therefore, the CJEU does not engage in empirical/statistical comparison, but rather in evaluative or critical comparison (*wertende Rechtsvergleichung*):[62] it is not necessary that a principle is present in each and every Member State's constitutional

[58] CASSESE, Sabino. The "Constitutional Traditions Common to the Member States" of the European Union, cit., p. 947; GRAZIADEI, Michele, DE CARIA, Riccardo. The Constitutional Traditions Common to the Member States in the Case-Law of the European Court of Justice: Judicial Dialogue at its finest, cit., p. 961.

[59] CASSESE, Sabino. The "Constitutional Traditions Common to the Member States" of the European Union, cit., p. 942.

[60] A third idea is connected to traditions as families, as it is underlined by CASSESE, Sabino. The "Constitutional Traditions Common to the Member States" of the European Union, cit., p. 943.

[61] Advocate General Juliane Kokott's opinion in Case C-550/07, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, para 95.

[62] As AG Roemer defined it in the abovementioned opinion in the case *Werhahn Hansamühle*, ECR 1259, in order to in order 'to ascertain which legal system emerges as the most carefully considered' (1260).

order, nor in the majority, in order to qualify as an EU principle.[63] The quest is for the best solution to suit the targets of the EU, not for the lowest nor greater common denominator of the Member States' constitutions.[64]

In *Omega*,[65] the CJEU stated that certain fundamental values deriving from domestic constitutions can amount to limitations to freedoms under the Treaties even when their actual scope is not identical in different constitutions.[66] This case, combined with the reforms of the Lisbon Treaty, introduced 'a certain degree of pluralism in the jurisprudence of the Court, and in its dialogue with the national Courts. This pluralism is now guaranteed by the notion of constitutional identity.'[67]

The *Mangold* judgment[68] proves it as in that case the prohibition of discrimination on grounds of age was labelled as deriving from the common constitutional traditions of the Member States while at the time of the judgment such prohibition was mentioned in the constitutions of only two Member States (Finland and Portugal).[69] In this respect, teleological interpretation is an additional way of understanding the CJEU's attitude, particularly with respect to how the corresponding Advocate General has used comparative references to build general principles: concerning *Akzo* case,[70] 'for the Advocate General, even if a principle is only recognized in a minority of Member States, *it may still constitute a general principle of EU law in so far as it reflects a mission with which the authors of the Treaties have entrusted the EU, or mirrors a trend in the constitutional law of the Member States*. However, AG Kokott found that those two elements were missing in Akzo'.[71]

Taken this into consideration, it becomes clear that the relevance of a comparative analysis pursued by the CJEU does not depend on quantitative

63 MAYER, Franz C. Constitutional comparativism in action: the example of general principles of EU law and how they are made – a German perspective. *International Journal of Constitutional* Law, n. 11, p. 1007, 2013.

64 KAKOURIS, Constantinos N. L'utilisation de la Méthode comparative par la Cour de Justice des Communeautés Européennes. In: DROBNIG, Ulrich; VAN ERP, Sjef (coord.). *The Use of Comparative Law by Courts.* Alphen aan den Rijn: Kluwer Law International, 2018, p. 100. See also LENAERTS, Koen; GUTIÉRREZ-FONS, José A. The Role of General Principles of EU Law. In: ARNULL, Anthony and others (coord.). *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*. Oxford: Hart Publishing, 2011, p. 183.

65 Case C-36/02 *Omega Spielhallen v Bonn*, 14th of October 2004.

66 See *Omega Spielhallen v Bonn*, 37: "It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected."

67 GRAZIADEI, Michele; DE CARIA, Riccardo. The Constitutional Traditions Common to the Member States in the Case-Law of the European Court of Justice: Judicial Dialogue at its finest, cit., p. 954.

68 Case C-144/04 *Mangold v Helm* [2005] ECR I-9981 (ECLI:EU:C:2005:420).

69 CASSESE, Sabino. The "Constitutional Traditions Common to the Member States" of the European Union, cit., p. 945.

70 Case C-550/07 *Akzo Chemical Ltd. and Akcros Chemicals Ltd v Commission* [2010] ECR I-08301 (ECLI:EU:C:2010:512).

71 LENAERTS, Koen; A. GUTIÉRREZ-FONS, José. To say what the law of the EU is: methods of interpretation and the European Court of Justice. *Columbia Journal of European Law*, vol. 20, n. 2, p. 3, 2014.

standards— the number of cases, but on qualitative standards— the differentiation of the legal solutions examined.[72] and the consistency with the objectives of the EU norm at stake.[73]

After the *Algera* judgment, the Court was conscious that, 'a detailed comparative law analysis of the constitutional experiences of the Member States would from that moment onwards risk working against the new argumentative priorities of the Court as it was likely to make it clear that there was no such common experience (on the domestic constitutional level), whereas the Luxembourg court desperately needed to make it apparent.'[74] Therefore, with the exception of very rare occasions, the Court has not relied upon numerical standards, one of the scarce examples being *Hauer* judgment (as the CJEU analyzed the wording of three constitutions, the Italian, the German and the Irish ones, which represented one third of the Member States at the time), in which nevertheless CCTs played a very marginal role in the reasoning. In even fewer occasions, the Court has relied upon a comparative overlook to state that a specific feature was not a CCT.[75]

Now, to achieve good qualitative comparison from this perspective, potentially, an initial assessment of all legal solutions adopted in the EU, followed by a classificatory work into models, for simplification and explanation. The CJEU so far has stated the existence of a CCT without delving into its origin, while it would count on a considerable number of lawyers working on comparative law, who have collectively the necessary expertise and linguistic skills to go over the Member States' orders.

The current approach of the CJEU, which treats CCT as a 'source of inspiration' briefly referring to them with a passing mention, has led scholars to claim that it 'never engages in an in-depth investigation of the actual existence of a CCT',[76] could be transformed therefore exploiting the potential of the interaction with domestic courts and orders.

Nevertheless, not even the CJEU can be required to devote equal attention to all Member States. And that is not necessary when several countries show commonalities in their regulation: similar norms, not the same norms, are enough to ascribe two legal systems to the same model and therefore a joint analysis is

[72] On this point, see in general terms MARTÍNEZ SORIA, José. Die Bedeutung der (Verfassungs-) Rechtvergleichung für den europäischen Staaten- und Verfassungsverbund. Die Methode der Rechtsvergleichung im öffentlichen Recht. In: CALLIESS, Christian (coord.). *Verfassungswandel im europäischen Staaten- und Verfassungsbund*. Tübingen: Mohr Siebeck, 2007, p. 165.

[73] RAGONE, Sabrina. European Comparative Law: Reasons for "Enhanced Comparison" and Role of the CJEU. *Revista de Derecho Político,* n. 212, p. 297ff., 2021.

[74] POLLICINO, Oreste. Common Constitutional Traditions in the Age of the European Bill(s) of Rights: Chronicle of (Somewhat Prematurely) Death Foretold, cit., 2018, p. 52.

[75] Joined Cases C-174/98 and C 189/98 *Netherlands and Gerard van Der Wal v Comission* [2000] ECR I-00001 (ECLI:EU:C:2000:1).

[76] GRAZIADEI, Michele; DE CARIA. The Constitutional Traditions Common to the Member States in the Case-Law of the European Court of Justice: Judicial Dialogue at its finest, cit., p. 968.

sufficient. The first model to be considered will necessarily be the one into which the case under scrutiny falls. Then the examination will open to the rest of systems. The first set of questions to be asked would be whether that specific legal solution has been adopted by the majority of the Member States; what features characterize the Member States which have chosen the same solution, if there is a common pattern or condition; to what extent that solution is peculiar to the specific Member State. After the reconstruction of the different models, the second set of questions would be dedicated to the legal solutions belonging to the most different possible model. This would respond to the critique against the CJEU insofar it has not addressed the issue of diverging traditions and of diverging principles enshrined in various national traditions and in the Charter.[77] In the third step, all solutions, including the intermediate models, will need to be contrasted with both the values of the EU as defined by the Treaties and the target that the EU is pursuing through the corresponding rule subject to the CJEU's decision.

Through this threefold approach, a new flexible method to select the case studies for the CJEU could be implemented. It would be useful as well to diminish the doubts concerning the level of detail into which the Court delves.[78]

In the final judgment, there would be no need to mention all the case studies analyzed, but just the 'models' of reference, with particular attention to the most different one from the solution under scrutiny and the aims pursued by the EU norm, alongside the value at stake. Such a method would allow the CJEU to better justify the choice of the Member States, while engaging into a dialogue with the others applying different models, providing further arguments to support the decision. In particular, as the interpretation reached by the Court will involve future cases concerning other Member States, the effort of being aware of national sensibilities and essential moral and political values to strive for a common synthesis would be facilitated by the comparative approach, reducing future conflicts with the constitutional rules of particular States.[79] This method could also be applied to both cases in which the CJEU employs comparative law: lacunas and interpretation of EU norms.[80]

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77 CASSESE, Sabino. The "Constitutional Traditions Common to the Member States" of the European Union, cit., p. 946.

78 Sabino Cassese notes that the more the Court pays attention to details and in depth analysis, the harder it becomes to elaborate a common tradition, see CASSESE, Sabino. The "Constitutional Traditions Common to the Member States" of the European Union, cit., p. 946.

79 On this last point, TORRES PÉREZ, Aida. *Conflicts of Rights in the European Union.* Oxford*:* Oxford University Press, 2009, p.154.

80 A comprehensive reconstruction of the cases in which the CJEU used to apply the comparative method can be found in LENAERTS, Koen. Interlocking Legal Orders in the EU and Comparative Law. *The International and Comparative Law Quarterly*, vol. 52, n. 4, p. 883ff., 2003, who divided the cases into two main possibilities: filling a lacuna (p. 883) and interpreting a European norm (p. 894). For each case, the author imagined situations where there are different degrees of convergence among the Member States.

4 Intersecting Method and Substance: A Synthesis

The language of CCTs represents a significant complementary narrative vis-à-vis the language of constitutional identity, having the potential to become a profitable terrain for judicial dialogue between the CJEU and the Constitutional Courts of Member States.[81]

Actually, the reach of Article 4.2 TEU has been interpreted by some scholars and politicians equating 'national identity' to 'constitutional identity' in terms of sovereign authority, while I consider that national identity cannot be perceived as a counterweight to CCTs.[82] Of course, the scope of constitutional identity is not self-evident and requires an elaboration by domestic courts as well, in good faith and with a collaborative attitude towards the CJEU.

By contrast, CCTs and national identity under Article 4.2 TEU are not necessarily opposite concepts.[83] They have to enter into a dialectical relationship as far as the primacy of EU law relies upon several factors.[84] This logical transition requires understanding the double logic behind the search for CCTs by the CJEU: on the one hand, to reinforce its dialogical construction vis-à-vis domestic law(s), including their constitutional orders.; on the other, to state the autonomy of EU law.[85] If considered under the lenses of a socio-legal approach, constitutional identity could become a key normative ideology, a legitimation strategy and an ordering tool for a non-hierarchical EU constitutionalism.[86]

In *Gauweiler*,[87] the role of that clause was to bring about 'basic convergence of the common constitutional identity of the Union and that of each of the Member States.' The recognition of national identities was not denied, rather the Court stated that within the realm of the protection of fundamental rights, convergence exists.[88] This judgment was the 'apex of polemic constitutional patriotism' as language of

[81] POLLICINO, Oreste. "Transfiguration" and Actual Relevance of the Common Constitutional Traditions: Past, Present and Future, cit., p. 11.

[82] Similarly, COMBA, Mario. Common Constitutional Traditions and National Identity. *Rivista trimestrale di diritto pubblico*, n. 67, p. 974, 2017.

[83] CASSESE, Sabino. The "Constitutional Traditions Common to the Member States" of the European Union, cit., p. 943.

[84] CONSTANTINESCO, Vlad. La Conciliation entre la primauté du Droit de l'Union Européenne et l'Identité Nationale des Etats Membres : Mission impossible ou Espoir Raisonné?. In: BLNKE, Hermann-Josef and others (coord.). *Common European Legal Thinking*. Heidelberg: Springer, 2015, p. 104.

[85] GRAZIADEI, Michele; DE CARIA, Riccardo. The Constitutional Traditions Common to the Member States in the Case-Law of the European Court of Justice: Judicial Dialogue at its finest, cit., p. 951.

[86] BELOV, Martin. 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*, vol. 9, n. 2, 2017.

[87] Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, 16th of June 2015.

[88] CASSESE, Sabino. The "Constitutional Traditions Common to the Member States" of the European Union, cit., p. 944.

constitutional identity played a major role in it as a mainly confrontative tool.[89] The German Constitutional Court stated that it retained the competence to determine the inviolable core content of the constitutional identity and to check the compatibility of EU norms with it.[90]

The insertion of constitutional identity in case law as a confrontative argument, namely by the German Constitutional Court, has (involuntary) supported the rise of judicial populism in the EU, as it is proven by the use of this discourse by the Hungarian Constitutional Court. This was even underlined in scholarly reactions to the 2020 judgment of the German Constitutional Court on the European Central Bank's Public Sector Purchase Program (PSPP): the signing scholars challenged 'those versions of scholarship on constitutional pluralism and constitutional identity that would defend the authority of the BVerfG or any national court to make such a ruling and that helped (even if unintentionally) encourage it to do so.' More influential courts enjoying a 'dominant position in the market of constitutional ideas' shall be aware of their responsibility and the potential manipulation of their arguments.[91]

In response to this untimely or unfriendly use/abuse of constitutional identities, which may not reflect the principles of subsidiarity and loyal cooperation,[92] I consider that the language of CCTs can and should be part of EU judicial conversations as a tool for integration and management of tensions, of cooperation instead of conflict. National identities, additionally, do not necessarily represent unique features of one system, being sometimes shared by other constitutions and contributing to the construction of a CCT, as it happened with the arguments used by the Italian constitutional court in the *Taricco* case.[93] The Italian Court used an alternative language in comparison to the 'identity-based' discourse adopted by the German Constitutional Court in *Gauweiler*, elaborating upon constitutional traditions as concepts shared by other legal systems and contributing to cooperative constitutionalism.[94] It is worth noting true that in all these cases the CJEU avoided referring to Article 4.2. Still,

[89] POLLICINO, Oreste. "Transfiguration" and Actual Relevance of the Common Constitutional Traditions: Past, Present and Future, cit., p. 11.

[90] URÍA GAVILÁN, Elisa. '*Solange III*? The German Federal Constitutional Court Strikes Again. *European Papers,* vol. 1, n. 1, European Forum, 2016, p. 367.

[91] NINATTI, Stefania; POLLICINO, Oreste. Identità costituzionale e (speciale) responsabilità delle Corti. *Quaderni costituzionali,* n. 1, p. 191, 2020.

[92] DI FEDERICO, Giacomo. Il ruolo dell'art. 4, par. 2, TUE nella soluzione dei conflitti interordinamentali. *Quaderni costituzionali*, n. 2, p. 333ff., 2019.

[93] This case was defined as a □paradigm shift□ by MARTINICO, Giuseppe; POLLICINO, Oreste. Use and Abuse of a Promising Concept: What Has Happened to National Constitutional Identity?. *Yearbook of European Law*, n. 39, p. 228ff., 2020. The relevance of CCts in the judgment is underlined as well by GARCÍA VITORIA, Ignacio. La participación de los Tribunales constitucionales en el Sistema europeo de Derechos Fundamentales (a propósito del diálogo entre la Corte Constitucional italiana y el Tribunal de Justicia en el Asunto Taricco). *Revista Española de Derecho Europeo*, n. 67, p. 139ff., 2018.

[94] POLLICINO, Oreste. "Transfiguration" and Actual Relevance of the Common Constitutional Traditions: Past, Present and Future, cit., p. 12.

I argue that plural identities can represent the bricks to construe CCTs, and the challenge relies in the degree of commonality required.[95]

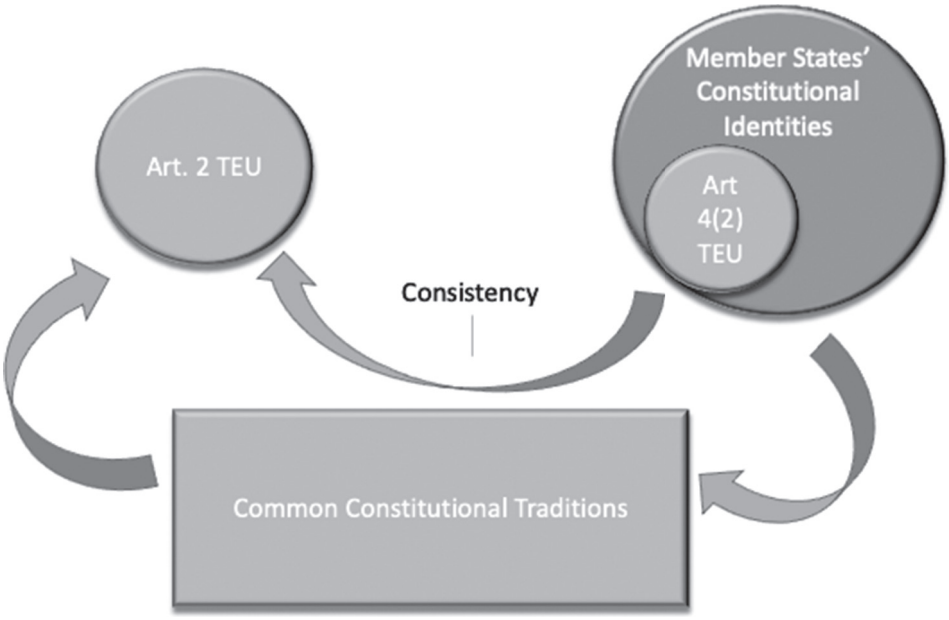
The CJEU shall rely upon CCTs only in landmark cases, as it has been so far (Bosman, Omega, Mangold, Kadi, Achbita…). Interpreted through a comprehensive assessment, CCTs construed through constitutional identities would be beneficial to shape the identity of the EU itself as mirroring domestic constitutional constructions, as it was presented by Advocate General Pedro Cruz Villalón's Opinion in *Gauweiler* (61): 'I think it useful to recall that the Court of Justice has long worked with the category of 'constitutional traditions common' to the Member States when seeking guidelines on which to construct the system of values on which the Union is based. Specifically, the Court of Justice has given preference to those constitutional traditions when establishing a particular culture of rights, namely that of the Union. The Union has thus acquired the character, not just of a community governed by the rule of law, but also of a 'community imbued with a constitutional culture'. That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States.

Again, identities can become source of tension between national orders, depending on what is (or is not) common between these constitutions, and between these and European law, which could transcend them. Identities are national but they are not necessarily exclusive, as they can reflect multiple legal orders. The extent to which they overlap among each other, tend to shared targets and eventually contribute to define EU identity becomes essential in the current framework, in which new challenges have arisen, the major example being to achieve a common understanding of the rule of law as part of EU identity through the domestic comparative prism. A circular understanding of the relationship between these components (EU values, domestic identities and CCTs) shall provide a fruitful environment. In such circularity, Member States' identities are assumed (and have) to be consistent with Article 2 TEU, domestic courts manage constitutional identities as conceptualizations capable of contributing to the elaboration of CCTs by the CJEU,[96] the content of

[95] COMBA, Mario. Common Constiutional Traditions and National Identity, cit., p. 976.

[96] On the contrast between the domestic and the CJEU's understanding of identities, see CRUZ VILLALÓN, Pedro. La identidad constitucional de los estados miembros: dos relatos europeos. *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, n. 17, p. 501-514, 2013.

which can infuse substance into Article 2 in a virtuous circle. Graphically, it could be represented as follows.



In conclusion, CCTs are a powerful tool to bridge the gap between domestic constitutional identities and the identity of the EU, to emphasize axiological similarities and convergence, especially in times in which the Union is struggling to reinstate its values.

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