

Cambridge University Press

978-1-108-72739-6 — Constitutional Identity in a Europe of Multilevel Constitutionalism

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Excerpt

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PART I

Constitutional Identity Introduced and Its EU Law Dimension

Constitutional Identity Introduced

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1 Identity as a Multilevel Constitutional Device

The European Union (EU) not only entails social, security, monetary, and market integration, but inevitably also constitutional integration to govern the policy and politics of the other forms of integration. Constitutional integration, however, has not led to the dissolution of Member States' constitutional orders, but instead to their qualification by EU law. The EU and its Member States have developed into a multi-level, and at times also competing, constitutional space as debates about the plurality and hierarchy of the space's laws continue.¹ Constitutional law and theory more than ever before have to address the contours of the relationship between the EU and its Member States. The phenomenon of a multilevel constitutional space is definitely not only a European one, although the EU might be a stellar example of such a shared space. Terms such as the 'constitutionalisation' of public international law or 'global constitutionalism' denote the opening up of the state and its national hierarchy of laws to international and supranational forms of cooperation, questioning traditional hierarchies in light of emerging regional or global constitutional standards.²

Identity has emerged as an important device of constitutional law with which to describe and navigate the multilevel space in Europe

¹ See generally, I. Pernice, 'Multilevel constitutionalism and the crisis of democracy in Europe', *European Constitutional Law Review*, 11 (2015), 541–62.

² See further, E. de Wet, 'The constitutionalization of public international law' in M. Rosenfeld and A. Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), pp. 1209–1230; A. Wiener, A.F. Lang, J. Tully, M.P. Maduro, and M. Kumm, 'Editorial. Global constitutionalism: human rights, democracy and the rule of law', *Global Constitutionalism*, 1 (2012), 1–15.

from both the perspective of the EU and its Member States.³ The importance of such an identity-based discourse is apparent from Article 4(2) TEU, which provides that

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government ...

By requiring such respect, the treaty provision ensures protection for the constitutional identity of each Member State.⁴ The fact that a Member State's constitutional identity is at stake, though, does not in EU law guarantee an automatic finding in favour of that specific identity. In EU case law, constitutional identity does not act as a trump card or as an exception to the primacy of EU law. Instead, Article 4(2) TEU entails an evaluation to determine if and to what extent such identity must be respected by the EU.⁵ The positions of the Member States are quite varied in response to this stance of EU law. At the one end of the spectrum, a Member State might accept the primacy of EU law unreservedly, even where it applies to its constitutional identity, while at the other end a Member State might claim the power to disapply EU law for contradicting its constitutional identity. In formulating their positions, Member States base themselves on national and EU law.

Clearly, the constitutional identity questions can become very complex and important in the context of European integration and the everyday functioning of EU law. As a consequence, identity-related references are becoming more common in the EU, and especially in Member State case law.⁶ The topic is also gaining evermore attention

³ See 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*, 37 (2012), 563–83.

⁴ On this subject, see Chapter 2, by A. Schnettger, and Chapter 15, by G. van der Schyff.

⁵ E.g., while in Case C-208/09, *Sayn-Wittgenstein* ECLI:EU:C:2010:806 the ECJ allowed Austria's constitutional identity to limit the freedom of movement and residence of citizens in Art. 21 TFEU, the ECJ was unwilling in Case C-202/11, *Las* ECLI:EU:C:2013:239, to allow Belgium's constitutional identity to limit the freedom of movement for workers in Art. 45 TFEU.

⁶ See the many examples discussed in the general chapters and country studies in this volume. To mention a few: ECJ, Case C-438/14, *Bogendorff von Wolffersdorff* ECLI:EU:C:2016:401; ECJ, C-391/09, *Runevič-Vardyn and Wardyn* ECLI:EU:C:2011:291; Belgian Constitutional Court, decision no. 62/2016, 28 April 2016; German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 2009; French Constitutional Council, decision no. 2005-540 DC of 27 July 2006.

in scholarship.⁷ What has been under-represented in scholarship, however, are the volumes that study and compare a wide range of Member State constitutional identities and approaches, including their evaluation by the EU in the context of multilevel constitutionalism.⁸ The latter outline is exactly what this volume attempts.

This volume and its type of research are necessary for three reasons. The first reason is that, by its nature, constitutional identity is a form of self-expression, which means that no two Member State constitutional identities or approaches will be exactly the same. Constitutional identities may overlap or they may be exclusive, but they are always an expression of a Member State's individuality. The resultant diversity needs to be outlined and understood if the phenomenon of constitutional identity is to be more than an abstract notion. The second reason relates to Article 4(2) TEU and ties in with the first reason. The EU can only respect the constitutional identity of its Member States if those identities are known and clear. As the EU cannot determine the content of Member State constitutional identity, which is a matter of national self-expression, it becomes necessary to have reliable constitutional resources for the EU to use in applying Article 4(2) TEU. The third reason is that a great potential for conflict inheres in the Member State expression of constitutional identity, especially insofar as it claims to qualify or reject the primacy of EU law. The potential for conflict becomes strikingly clear when one considers that the viability of the euro as a currency depended on the German Federal Constitutional Court ruling that the European Central Bank's OMT programme did not violate the country's constitutional identity.⁹ Such situations of Member States expressing and wanting to protect their constitutional identities call for closer study in order to understand their possible effects on the primacy of EU law and the future of Europe's multilevel constitutionalism.

⁷ For a variety of identity-related discussions, see E. Cloots, *National Identity in EU Law* (Oxford University Press, 2015); C. Calliess (ed.), *Europäische Solidarität und nationale Identität Überlegungen im Kontext der Krise im Euroraum* (Tübingen: Mohr Siebeck, 2013); G.J. Jacobsohn, *Constitutional Identity* (Harvard University Press, 2010); D. Lustig and J.H.H. Weiler, 'Judicial review in the contemporary world: retrospective and prospective', *International Journal of Constitutional Law*, 16 (2018), 315–72, at 340–1, 345–6, 354–72. See Chapter 15.

⁸ Some of the few examples include A. Saiz Arnaiz and C. Alcobarro Llivina (eds.), *National Constitutional Identity and European Integration* (Antwerp: Intersentia, 2013), and M. Claes, M. de Visser, P. Popelier, and C. Van de Heyning (eds.), *Constitutional Conversations in Europe* (Antwerp: Intersentia, 2012).

⁹ German Federal Constitutional Court, BVerfGE 142, 123 (OMT-Programme) 2016, reacting to ECJ, Case C-62/14, *Gauweiler* ECLI:EU:C:2015:400.

2 Division and Approach of the Volume

The volume is divided into three parts, respectively, entitled ‘Constitutional Identity Introduced and Its EU Law Dimension’, ‘Constitutional Identity and Its Member State Law Dimension’, and ‘Comparative Constitutional Identity and Multilevel Constitutionalism’.

The first part of the volume fulfils a dual purpose, the first of which is to introduce the concept of constitutional identity as it applies to the volume – the object of the current chapter written by the co-editors. The second purpose of the first part is to analyse the protection of constitutional identity in terms of Article 4(2) TEU. This analysis can essentially be termed a ‘top-down’ view of constitutional identity, as the perspective is a decidedly EU one. The purpose is to establish the EU framework according to which Member State constitutional identity claims are to be evaluated by those organs responsible for making, applying, and interpreting EU law. This entails addressing questions related to the nature and scope of the duty resting on the EU to respect the constitutional identity of each of its Member States. In her chapter, Anita Schnettger shows that Article 4(2) TEU does not compromise the primacy of EU law in enjoining the EU to respect Member State constitutional identity.

The second part of the volume forms its core. This part consists of twelve EU Member State country studies. The studies address two main issues – namely, (i) the national constitutional relationship between Member State constitutional identity and the primacy of EU law and (ii) the (possible) content of such identity of each Member State. These questions are important, as an increasing number of Member States use identity-based arguments, but also because Article 4(2) TEU enjoins the EU to respect the constitutional identity of each Member State.

The selection of the country studies reflects variety in terms of their geographical distribution, legal systems, and especially their national approaches to constitutional identity issues in relation to European integration. Leading and well-placed authors were invited to write the country studies, covering Austria (Georg Lienbacher and Matthias Lukan), Belgium (Elke Cloots), the Czech Republic (David Kosař and Ladislav Vyhnánek), Denmark (Helle Krunke), France (François-Xavier Millet), Germany (Christian Calliess), Ireland (Eoin Daly), Italy (Federico Fabbrini and Oreste Pollicino), the Netherlands (Ernst Hirsch Ballin), Poland (Anna Śledzińska-Simon and Michał Ziółkowski), Spain (José Martín y Pérez de Nanclares), and the United Kingdom (Paul Craig). The United Kingdom was included for

comparative reasons irrespective of Brexit, but also because of Brexit as the consequence of fundamental opposition in a Member State to multilevel constitutionalism in the EU.

The second part essentially reflects a 'bottom-up' view of constitutional identity, as the perspective is a decidedly national one. Authors were asked to consider constitutional identity questions, also where their respective orders did not use the term 'constitutional identity' as such. A formal or literal definition of the term would have excluded too much useful information in studying the impact of national constitutional identity issues in the EU. In order for the country studies to give a reliable and comparable picture of what resides, or could reside, under the constitutional identity of each Member State, a common definition of the term was agreed upon. A broad and inclusive definition of constitutional identity was devised. Constitutional identity is consequently defined as the core or fundamental elements or values of a particular state's constitutional order as the expression of its individuality. Individuality does not have to imply the exclusivity of a whole identity or some of its elements, but it does imply an identity which is rooted in national self-reflection. The definition of constitutional identity is descriptive and does not require any particular normative relationship between its (possible) contents and the EU legal order. This is an open matter up for decision in each country study. The terms 'constitution' and 'constitutional order' are to be broadly understood as including codified Constitutions and other constitutive norms such as laws, policies, and conventions that have the capacity to express identity.

The authors were presented a number angles and questions to consider in completing their allotted country studies:

1. What do national constitutional sources and literature determine about the relationship between the Member State's constitutional identity and EU law, including the doctrine of primacy?
2. What is the effect, according to national constitutional law, of expressing constitutional identity in relation to EU law, and how does this relate to constitutional interaction and dialogue with the EU? For instance, is constitutional identity absolute in that EU law may never limit it, or may it be limited, and how?
3. Which national institutions, such as courts and political institutions, are involved in the formulation, expression, and interpretation of constitutional identity, especially in relation to EU law?
4. What qualifies, or could conceivably qualify, as a Member State's constitutional identity according to its own sources? Further to this point, is the term 'constitutional identity' or an equivalent used, does it have a vague or defined content in relation to institutions or intrinsic values, and does such identity regulate the transfer of sovereign powers to the EU?

5. Does the notion of constitutional identity aid or hinder constitutional interaction between the Member State concerned and the EU? In this regard, does the device contribute anything meaningful to such interaction, from the perspective of multilevel constitutionalism? Is identity to be perceived as a device of resistance or cooperation between the national and EU legal orders?

The third part of the volume reflects on its first and second parts. In his chapter, Gerhard van der Schyff classifies and compares the information generated by the twelve country studies on the topic of constitutional identity. In conducting the comparison, the sources of such identity, the actors involved, and its content and interpretation are studied. The chapter also considers the various ways in which a Member State's constitutional identity can be 'disturbed' by different processes, including the constitutional parameters involved in determining a Member State's reaction to such a disturbance of its identity. In the final chapter to the volume, Christian Calliess and Anita Schnettger study how the concept of multilevel constitutionalism can provide a bridge between the Member State expression of constitutional identity and the duty resting on the EU to respect such expression in accordance with Article 4(2) TEU. In addressing this matter, they develop the concept of multilevel constitutionalism and apply it to the relationship between the EU and its Member States. The third part of the volume moves between what may be termed a 'horizontal' approach in comparing the country studies and an 'integrative' approach in using the notion of multilevel constitutionalism to avoid constitutional conflict in the space shared by the EU and its Member States.

Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System

ANITA SCHNETTGER*

1 Introduction

The protection of constitutional identity is a rising star in the current discussion about Europe's future. Every new step of the integration process will be confronted with the question of whether the direction European integration is taking infringes the fundamental elements or values of a particular Member State's constitutional order as an expression of its individuality – in short, its constitutional identity. Especially the ongoing discussion about the design of a European Security and Defence Union will be challenged with this question. Furthermore, we will have to consider the effects of the refugee crisis, because it raises questions concerning the social dimension of European integration, including social integration and the regulation of social benefits. Up to what point is a common European action within these fields not infringing on a Member State's constitutional identity? From a European perspective, one of the main normative bases for these questions is the second half of the first sentence of Article 4(2) of the Treaty on European Union (TEU), which provides that the European Union (EU) respect Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. What is the extent of the here-stated duty resting on the EU?

The aim of this chapter is to examine both the content and the normative functions of the identity clause. At present, there are several judgments of

* This chapter is a revised extract of the author's doctoral thesis entitled 'Das Achtungsgebot nationaler Identität im Verbund – Schutzgehalt, Funktionen und gerichtliche Durchsetzung des Art. 4 Abs. 2 S. 1 Var. 2 EUV', which was submitted at the Free University of Berlin in 2018. Consequently, the analyses, findings, ideas, and conclusions of this contribution can be found in the thesis.

the European Court of Justice (ECJ) on Article 4(2) TEU. However, they do not put forward a clear directive regarding the provision's interpretation and application. Nonetheless – mostly influenced by the national debates about the limits of integration – there already is a considerable amount of literature on some of the main questions. For instance, should Article 4(2) TEU be interpreted as protecting the constitutional identity of the Member States? Is the provision an exception to the primacy of EU law? Does Article 4(2) TEU give Member States the right to unilaterally deviate from EU law, especially from secondary law? Can the provision be understood as legitimising the conduct of national constitutional identity reviews – as prominently claimed by various Member States' constitutional courts?¹

These questions will also be addressed in the course of this chapter. Yet the focus of this contribution will be on discussing the theoretical and dogmatic gaps underlying the understanding of identity protection in Article 4(2) TEU. In achieving this aim, the main question will centre on how the identity clause could be interpreted and then integrated into the existing system of the treaties in a dogmatically coherent way. Consequently, the focus of this chapter is to show how the application of the identity clause can strike a convincing balance between the need for uniformity and the protection of diversity, particularly *national* constitutional identity, in a pluralistic European legal system.

This contribution proposes an understanding of the identity clause as a *Verbundnorm* (translated from German as 'composite norm'), meaning a provision building a connection between the EU and national legal orders and thus establishing and ensuring the functioning of the legal system as a whole. A detailed development of this understanding of the identity clause leads to the realisation that some accepted truths about the identity clause's content' and functions may need to be re-examined.

2 The Identity Clause as a *Verbundnorm*

In academic literature it is generally accepted that the EU is not entitled to define Members States' national identity, inherent in their fundamental structures, political and constitutional, inclusive of regional and local

¹ E.g., German Constitutional Court, BVerfGE 134, 366 (OMT order), 14 January 2014, para. 27; 140, 317 (Identity Control/European Arrest Warrant), 15 December 2015, paras. 42, 44; 142, 123 (OMT judgment), 21 June 2016, paras. 136 and 140; Polish Constitutional Tribunal, judgment of 24 November 2010, Ref. No. K 32/09, 2.1; Conseil Constitutionnel, decision no. 2005-540 DC of 27 July 2006, para. 19.

self-government.² It is the prerogative of the Member States to determine their identity, especially if this identity is connected to the interpretation of their constitutions. The EU has to respect this prerogative. However, it is not quite clear yet what this respect for Member States' prerogative legally entails. What are the theoretical and dogmatic legal grounds for that respect, and what are the extents and limits of its recognition by the EU when applying Article 4(2) TEU?

This question gains importance when one considers that most scholars interpret the wording of the identity clause as protecting constitutional identity.³ Constitutional identity is a term that in various Member States is closely linked or even equated with the limits of conferral of national competence on the EU.⁴ The usage of the same term to capture the content of the identity clause as a matter of EU law as well as the constitutional limits of EU integration can become problematic under certain circumstances. In particular, if the prerogative to define constitutional identity is given to the Member States *without first* outlining the structure of this prerogative and the limits of its recognition by the EU, then the respect for constitutional identity entailed in Article 4(2) TEU becomes an undetermined placeholder for whatever content the Member States deem necessary to protect themselves from European influence.

It is possible to develop a comprehensive, dogmatic structure of the identity clause against the concept of multilevel constitutionalism – or *Verbund*,⁵ the much broader German term I prefer. As already mentioned,

² See, e.g., G. van der Schyff, 'The constitutional relationship between the European Union and its Member States: the role of the national identity in Article 4(2) TEU', *European Law Review*, 37 (2012), 563–83, 572; J. Villotti, 'National constitutional identities and the legitimacy of the European Union – two sides of the European coin', *Zeitschrift für europarechtliche Studien* 18 (2015), 475–505, 496; but see A. Haratsch, 'Nationale Identität aus europarechtlicher Sicht', *Europarecht* (2016), 131–45, 138f.

³ See, e.g., van der Schyff (note 2), 567; C. Calliess, 'Art. 1 EUV', in C. Calliess and M. Ruffert (eds.), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 5th ed. (München: C.H. Beck, 2016), para. 49; L.F.M. Besselink, 'National and constitutional identity before and after Lisbon', *Utrecht Law Review*, 6 (2010), 36–49, 44; D. Simon, 'L'identité constitutionnelle dans la Jurisprudence de l'Union Européenne', in L. Burgorgue-Larsen (ed.), *L'Identité Constitutionnelle saisie par les Juges en Europe* (Paris: 2011), pp. 27–43, at pp. 28f.; F.-X. Millet, 'The respect for national constitutional identity in the European legal space: an approach to federalism as constitutionalism', in L. Azoulai (ed.), *The Question of Competence in the European Union* (Oxford University Press, 2014), pp. 253–75, at p. 260.

⁴ See, e.g., Chapter 13, Section 2; Chapter 8, Sections 2.2 and 4.3; and Chapter 3, Section 1.

⁵ There is no English translation of this term reflecting its meaning completely. Mostly, the term 'multilevel constitutionalism' is used, which was introduced into the English discussion by I. Pernice. Some authors speak about a 'composite constitution', see van der Schyff (note 2), 568; see in detail Chapter 16, Section 2.2.