Illiberalism and Constitutional Identity. A Critique from a Multilevel Perspective

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As democratic backsliding envelops Hungary and Poland, the legal authority of supranational actors becomes increasingly questioned. Among the legal arguments justifying their insubordination, the two member-states of the European Union (EU) invoke the respect owed to national constitutional identity. The present work aims to prove that the use of constitutional identity as an excuse to overcome the primacy of EU law in the context of the rule of law crisis is unfounded. By approaching EU law from a multilevel perspective, the paper explores the roles, functions, and aims of constitutional identity and advances a theoretical test meant to identify uses of the concept which are compatible with EU law. By applying this test to the constitutional reality of Hungary and Poland, following their democratic backsliding, the paper argues that the language of constitutional identity is misused by the two EU member-states.

Keywords: Illiberalism, European Union, European Constitutional Law, Constitutional Identity, Multilevel Constitutionalism

1. Introduction

With the advent of the post-national constellation,[1] the relations of power between traditional polities often evolve in surprising and divergent manners. As power is transfused from one political entity to another, a multilayered system is starting to take shape, where different powers collide under the question: *Who has the ultimate authority?* Within the process of European integration, this question is tied to the existential doctrine of the primacy of European Union (EU) law which, as developed by the European Court of Justice (ECJ), states that EU law has unconditional precedence and should always be given priority over all conflicting provisions of national law.[2] However, from the perspective of the national polity, absolute primacy is yet to be entirely accepted, as it brings into the spotlight a fragile instrument – sovereignty.

Since the question of the primacy of European law is intimately connected to debates on sovereignty,[3] mapping the concept of ultimate authority implies an exercise of decoding the latter's various

[1] See Jürgen Habermas & Max Pensky, *The Postnational Constellation: Political Essays*, Mass: MIT Press, Cambridge 2001.

[2] Monica Claes, *The Primacy of EU Law in European and National Law*, in Damian Chalmers & Anthony Arnull (Eds.), The Oxford Handbook of European Union Law, Oxford University Press, 2015, p. 178.

[3] M. Elvira. Mendez-Pinedo, *Constitutional Pluralism and Legal Perspectivism in European Union law*, Juridical Tribune, Vol. 10, No. 1, 2020, p. 23.

nuances. However, this exercise may turn rather problematic as European integration runs counter to proven notions of state sovereignty.[4] Via a supranational lens, sovereignty can no longer be regarded as absolute and indivisible,[5] being instead transferred from the nation-state to the Union.[6] Herein lies the crux of the matter. In its constant case law, the ECJ gradually developed the principle of unconditional primacy of EU law within its sphere of conferred powers.[7] Following this approach, traditional literature underlined that primacy precludes conflict since, upon transferring sovereign powers to the Union, the national polity loses its claim to legislate in the respective areas.[8] However, this principle of primacy has never been codified in the founding Treaties of the EU. In the Lisbon rounds, primacy was deleted from the body of the Treaty and transferred to Declaration 17,[9] annexed to its main text. Even though its non-codification should not be seen as a rejection of the principle,[10] the exclusion of a specific provision upholding primacy from the Treaties makes it unlikely for national constitutional courts to accept that EU law prevails over national constitutions.[11] Thus, Member States generally recognize the primacy of EU law, but by virtue of their fundamental laws[12] because, according to national constitutional law, the dominant position is that sovereignty has not been transferred, but is rather being exercised in common within the framework of the EU.[13] Thus, within classical variations of constitutionalism, the final umpire would be either the EU or its Member States.[14]

With the issue of primacy unsettled,[15] the riddle of ultimate authority gradually started to be decoded by a growing scholarship under the umbrella of 'constitutional pluralism', which ultimately views the post-national realm as characterized by an interaction of different suborders within a

[4] Ludger Kühnhardt, *Globalization and the Changing Rationale for European Integration*, in Ludger Kühnhardt (Ed.), European Union - The Second Founding: The Changing Rationale of European Integration, Nomos Verlagsgesellschaft MbH, Baden-Baden 2011, p. 296.

[5] Giacinto della Cananea, *Is European Constitutionalism Really 'Multilevel'?*, Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, Vol. 70, No. 2, p. 296.

[6] Damian Chalmers, Anthony Arnull & Takis Tridimas, *The ECJ and the National Courts*, in Damian Chalmers & Anthony Arnull (Eds.), The Oxford Handbook of European Union Law, Oxford University Press, 2015, p. 418.

[7] The already-settled case law of the ECJ over unconditional primacy dates back to the landmark *Internationale Handelsgesellschaft* Ruling (C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle* für *Getreide und Futtermittel*, [EU:C:1970:114]). See also Cases C 6/64, *Flaminio Costa v E.N.E.L.*, [EU:C:1964:66] and C-106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [EU:C:1978:49].

[8] Mendez-Pinedo 2020, pp. 12-3.

[9] See the 2007 *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 2702 UNTS.

[10] Claes 2015, p. 201.

[11] Paul Craig & Gráinne de Búrca, *EU Law, Text, Cases and Materials, Oxford University Press*, 2015, p. 308.

[12] Per Cramér, *Does the Codification of the Principle of Supremacy Matter?*, The Cambridge Yearbook of European Legal Studies 2004-2005, Hart Publishing, 2006, pp. 60-61.

[13] Bruno de Witte, *The European Union as an International Legal Experiment*, in Gráinne de Búrca & Joseph H. H. Weiler (Eds.), The Worlds of European Constitutionalism (Contemporary European Politics), Cambridge University Press, 2011, p. 42.

[14] Thus, the 'Decisive Question' of final authority boils down to the methodological clothing of the actors seeking to address it. In this regard, the ECJ and national apex courts anchor their reasoning in interpretations of either EU law, or national law. Following the German Constitutional Court's (GCC) reasoning in its *Maastricht* ruling (BVerfG, Order of the Second Senate of 31 March 1998 - 2 BvR 1877/97), its authority flows from the national constitution. Conversely, the ECJ rules from the perspective of an increasingly constitutionalized legal space, floating alongside the national legal orders. In this regard, see Theodor Schilling, Joseph H.H. Weiler & Ulrich R. Haltern, *Who in the Law is the Ultimate Judicial Umpire of European Community Competences?* The Schilling - Weiler/Haltern Debate, No. 10, Jean Monnet Working Papers, Jean Monnet Chair, 1996.

[15] Claes 2015, p. 202.

more open, political form.[16] In general, the pluralist discourse sees both state actors and the EU as autonomously rooted sources of constitutional authority, being heterarchically rather than hierarchically related.[17] Therein, as Maduro hints, the question *supra* would remain open as competing claims would be solved dialogically, through judicial cooperation.[18] Thus, following a pluralist approach, one cannot identify strict hierarchical relations between EU and national legal orders, which appear as parallel and complementary.[19]

The two theoretical approaches converge by accepting that the principle of primacy has to be, in most cases, safeguarded. From this rule, transnational constitutional practice gradually developed an 'identity review' of EU acts, meant to leave provisions of EU law inapplicable in areas located closer to the material core of the constitution. In this approach, the argument of a constitutional kernel, essential to the sovereign existence of the national polity, became increasingly popular to resist the absolute primacy envisaged by the ECJ. Under the clothes of this novel brake to competence transfer, constitutional identity began to earn the potential of tool meant to tame the absolute primacy of EU law. However, as 'identity' itself is an elusive and malleable concept, constitutional identity may be prone to abusive uses. Indeed, as Walter[20] shows, constitutional conceptions of identity can be quickly captured by socio-political considerations and recent political practice mirrors this caveat accordingly. Correspondingly, as certain EU Member States, ruled by increasingly illiberal regimes, attempt to resist the primacy of European norms, national constitutional identity becomes a primordial excuse to bend the application of the principle.

In this paper, I attempt to prove that constitutional identity, as a regulator of primacy,[21] is misused by national actors in illiberal EU Member States. Firstly, the paper maps the European legal order by using the theoretical framework of Multilevel Constitutionalism in order present the underlying rationale of the principle of EU law primacy as a tool of European integration. After this conceptualization, I offer a comprehensive analysis of the role and functions of national constitutional identity from a comparative standpoint, leading to its operationalization as a legal argument meant to counterbalance the principle of primacy. Given the diffuse interaction between constitutional identities and the ECJ-based absolute primacy, I will complement the judicial approach with a consistent scholarship review in order to advance a theoretical model of national constitutional identity meant to successfully derogate from the abovementioned principle. Using this test, I will argue that Poland and Hungary misuse the language of constitutional identity, by manipulating the essential features of the concept.

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[16] Nico Krisch, *The Case for Pluralism in Postnational Law*, in Gráinne de Búrca & Joseph H. H. Weiler (Eds.), The Worlds of European Constitutionalism (Contemporary European Politics), Cambridge University Press, 2011, p. 203-204.

[17] Klemen Jaklič, *Constitutional Pluralism in the EU*, Oxford University Press, 2004, p. 21.

[18] Miguel Poilares Maduro, *Three Claims of Constitutional Pluralism*, in Matej Avbelj & Jan Komárek (Eds.), Constitutional Pluralism in the European Union and Beyond, Hart Publishing, 2012, p. 9.

[19] See Merita Huomo-Kettunen, *Heterarchical Constitutional Structures in the European Legal Space*, European Journal of Legal Studies, Vol. 6, No. 1, 2013, p. 51.

[20] Maja Walter, *Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive*, Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, Vol. 72, No. 2, 2012, p. 190.

[21] As the following chapters will hint, EU law primacy is not a traditional rule of validity, being instead, as Claes suggests an implicit conflict rule, which authorizes national judges to set aside a national norm which cannot be interpreted as compatible with EU law. See Claes 2015, p. 182. In this light, constitutional identity acts as an interpretative device meant to limit the incidence of EU law over a specific unfolding of facts.

2. Research Design

In developing this paper, I predominantly use a doctrinal method, commonly employed in legal studies to identify specific principles and their underlying rationale. In the case of this article, understanding the European legal order and its foundational philosophy is paramount in defining the role of constitutional identity. Therefore, an interpretative approach is suitable for describing the mechanism of certain principles (such as the primacy of EU law) by reference to existing literature. In this analysis, I use Multilevel Constitutionalism[22] as a reference theory due to its capacity to explain the legal order of the EU in a unique attempt of reconciling national and supranational claims of legal authority. Then, a conceptual discussion around the place of constitutional identity in the supranational legal order presents the concept in light of comparative scholarship and case law. These various approaches in defining the role of the concept build up the proposal for a tree-step test meant to identify a treaty-compliant model of national constitutional identity. Recently, as authors have already pinned similar models meant to identify abusive uses of constitutional identity,[23] I will anchor my test in a multilevel interpretation of the EU constitutional architecture, in order to further nuance the implications of the concept's misuse.

The aim of the paper is to conduct an evaluation of the abusive use of constitutional identity by illiberal actors, having as reference the proposed theoretical test. Therefore, the selected models of the case study are EU Member States which are commonly referred to as illiberal and subject to democratic backsliding. While constitutional identity is an increasingly popular argument among national constitutional courts meant to leave EU provisions inapplicable, Hungary and Poland are the only Member States that have invoked the concept in an exercise of political insubordination. As the EU gradually started to react against some of the measures enacted by the incumbent regimes,[24] constitutional identity became a popular argument in resisting the undertaken legal actions. As such, the context of the argument's usage significantly differs from the already existing comparative case law in other Member States, which address it in more nuanced terms and usually as part of a broader judicial dialogue with the ECJ. Moreover, the contested policies supposedly protected by the identity argument are the result of a 'democratic backsliding' which weakens the institutional balance of the courts as guarantors of the identity's interpretation.[25] On this background, the use of constitutional identity in the two Member States raised serious concerns in legal literature, which prompted some authors[26] to question the very foundations of the concept. Although not meant to advance a counter-critique starting from their arguments, the paper pleads for the legitimacy of

[22] The concept, initially coined as 'Verfassungsverbund' by Ingolf Pernice in 1999, gained a wide attention in international literature under the name of 'Multilevel Constitutionalism'. Throughout the paper, I use the terms 'multilevel constitutionalism', 'Verfassungsverbund' (or simply 'Verbund') and 'composite European constitution' interchangeably. Although the terms are not formally identical and scholarship criticizes the translation of 'Verfassungsverbund' into 'multilevel constitutionalism' (See della Cananea 2010, p. 301), for the purpose of writing this paper, I will consider the notions synonymous.

[23] See, for instance, Scholte's defense of constitutional identity and his proposed three-tiered analysis of the concept's abuse: Julian Scholtes, *Abusing Constitutional Identity*, German Law Journal, Vol. 22, No.4, 2021.

[24] Specifically, the measures targeted the migration crisis in Hungary and the independence of the judiciary in Poland. A more detailed account is provided in Ch. 6, *infra*.

[25] The constitutional courts of Hungary and Poland have been repeatedly described as "packed" with political allies of the governing parties, raising caveats around the coherence of their rulings. See Tímea Drinóczi & Agnieszka Bień-Kacała, *Illiberal Constitutionalism: The Case of Hungary and Poland*, German Law Journal, Vol. 20, No. 8, 2019.

[26] See, for instance, Federico Fabbrini, Federico & András Sajó, *The Dangers of Constitutional Identity*, European Law Journal, Vol. 25, No.4, 2019 and R. Daniel Kelemen & Laurent Pech, *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, Cambridge Yearbook of European Legal Studies, Vol. 21, December 2019.

constitutional identity as an academic and legal argument for taming the absolute primacy of EU law, by arguing that illiberal uses of national constitutional identity are incompatible with the concept's roles and underlying philosophy.

3. Illiberalism. A Terminological Clarification

Prior to developing the paper, certain coordinates regarding the term 'illiberal', which characterises the subjects of my analysis, have to be established. In this regard, a wide stream of transdisciplinary literature has constantly sought to define the conceptual framework of illiberalism as a political device. However, since the aim of my work is mostly grounded in a legal discussion, I will limit myself to setting a general layout of the concept and its relation to modern constitutionalism. In an early view, *illiberal democracy* was considered to glue formal democratic practices with a disregard for constitutional limits to power and a deficient protection of individual rights.[27] Naturally, as liberalism would imply an effective protection of individual liberty, underpinned by a constitutionalist foundation, illiberalism would appear as an antithetic manifestation of power regulation within the polity, which distorts fundamental checks and balances. Starting from this assumption, the very term *illiberal democracy* seems to be an oxymoron. In fact, Zakaria's original concept of *illiberal democracy* was largely criticized, precisely given that a genuine democracy implies more than just mechanical elections and cannot be decoupled from liberalism, as it recognises the legitimacy of pluralism[28]. More recent definitions would locate illiberalism in the coordinates of populism, (organizational) antipluralism and monism,[29] while giving due attention to the geographical and political space it manifests in.[30] In a broader *ex-negativo* definition, illiberalism is a backlash against today's liberalism's scripts, hinging on a majoritarian, nation-centric and culturally homogenous foundation.[31] As such, pre-modern emotional elements, supposedly suppressed by liberal constitutionalism and the rule of law, are revived within an illiberal regime, which reverses constitutional trends in regulating public authority.[32] Similarly, if the main characteristic of constitutionalism is the legally limited power of the government, neither authoritarian nor illiberal polities can fulfil the requirements of constitutionalism.[33] As such, I will generally refer to illiberalism as a broader notion manipulating pre-modern imaginative elements of social relations, fostered by a loosely regulated power structure, and place the concept in opposition to modern liberal constitutionalism.

[27] Fareed Zakaria, *The Rise of Illiberal Democracy*, Foreign Affairs, Vol. 76, No. 6, 1997, pp. 22-43.

[28] See, for example, Jan-Werner Müller, *The Problem With 'Illiberal Democracy'*, Social Europe, https://www.socialeurope.eu/the-problem-with-illiberal-democracy (29 April 2022) and Gábor Halmai, *Populism, Authoritarianism and Constitutionalism*, German Law Journal, Vol. 20, No. 3, 2019.

[29] Jan Kubik, *Illiberal challenge to liberal democracy. The case of Poland*, Taiwan Journal of Democracy, Vol. 8, No. 2, 2012, pp. 1-11.

[30] See Weronika Grzebalska & Andrea Pető, *The gendered modus operandi of the illiberal transformation in Hungary and Poland'*, Women's Studies International Forum, Vol. 68, 2019, pp. 164-172.

[31] Marlene Laruelle, *Illiberalism: a Conceptual Introduction*, East European Politics, 2022, p. 7.

[32] See András Sajó & Juha Tuovinen, *The Rule of Law and Legitimacy in Emerging Illiberal Democracies*, OER Osteuropa Recht, Vol. 64, No.4, 2018, p. 528.

[33] Halmai 2019, p. 312.

4. Conceptualizing Verbund and Identity

4.1. Beyond Constitutionalism and Pluralism. Verfassungsverbund in the German Constitutional Thought

In the introduction, we have seen how theories such as classical Constitutionalism and Pluralism, drawing on the *Janus*-faced hierarchy and heterarchy of the EU and national legal orders, attempt to tackle the question of ultimate authority. The constitutionalist discourse, revolving around absolute primacy (of EU and national constitutional law, respectively), envisages the European (or national) legal order as a Kelsenian pyramid, with the founding treaties (or national constitutions) as *Grundnormen*, while the pluralist discourse, in its many shades, theorizes the European legal sphere as a heterarchical arrangement, which interlocks the supranational and national legal orders in procedurally equivalent elements that give substance to each other. However, while the former fails to find a consensual balance, the latter lets the conflicting claims of ultimate authority unresolved. Beyond what the two discourses have argued so far, the national and supranational elements can be arranged in yet a different constellation.

In this context, Ingolf Pernice introduces his concept of 'Verfassungsverbund'. Following a post-national understanding of constitutionalism, Pernice[34] argues that the constitution itself may be redesigned as an instrument that can be used to create new institutions on the foundation of existing legal structures. Thus, Pernice fosters the idea that a European Constitution already exists as a composition of the Member States' national constitutions at the foundation, and the EU primary law as a complementary layer.[35] The national constitutions and the European treaties are, therefore, closely interwoven and interconnected in both their institutions and their substantive law.[36] Taking the theory further, Martinico explains the interactions between the supranational and national levels as part of a constitutional *synallagma*, a process of *inter curiae* exchange of rules and practices, fostering integration as constitutional coordination.[37] In this interpretation, the European Constitution is seen as a process rather than as a document.[38] Since the relationship between the two levels is pluralistic and cooperative,[39] this composite European constitution shares the same premise with constitutional pluralism. The difference between the concepts lies in the answer of how to achieve legal unity in this pluralistic legal space[40] or, in other words, how to reconcile the national and supranational levels by answering the question of ultimate authority. Herein lies the ingenious apparatus of the *Verfassungsverbund*. According to the traditional approach to legal hierarchies, as developed by Kelsen,[41] primacy grants validity and application in a vertical order. The superior law validates the subsequent law, thus allowing its application. In the *Verfassungsverbund* however, heterarchy between legal orders on the level of their validity does not necessarily result in

[34] Ingolf Pernice, *Multilevel constitutionalism in the European Union*, European Law Review, Vol. 27, No. 1, 2002, p. 515.

[35] Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, Columbia Journal of European Law, Vol. 15, No. 3, 2009, p. 353.

[36] Pernice 2009, p. 379.

[37] Giuseppe Martinico, *Complexity and Cultural Sources of Law in the EU Context: From the Multilevel Constitutionalism to the Constitutional Synallagma*, German Law Journal, Vol. 8, No. 3, 2007, p. 212.

[38] Martinico 2007, p. 213.

[39] Pernice 2009, pp. 383-4.

[40] Christina Calliess & Anita Schnettger, *The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism*, in Christina Calliess & Gerhard van der Schyff (Eds.), Constitutional Identity in a Europe of Multilevel Constitutionalism, 1st ed, Cambridge University Press, 2019, p. 357.

[41] Hans Kelsen, *Pure theory of law*, University of California Press, Berkeley 1967.

a heterarchy of application, as neither hierarchy of application may imply a hierarchy of validity.[42] According to Pernice, unlike the traditional polity, governed by kelsenian hierarchies of validity, the EU is grounded in a supranational understanding of democracy going beyond the traditional subordination of legal levels.[43] The kernel of the multilevel approach starts from considering legal levels equivalent and ordered not by a static rule of validity, but by a dynamic instrument meant to facilitate the needs of the citizens, which the national polity is increasingly unable to fulfil.[44] Thus, the whole interpretative edifice of the multilevel constitutional system starts from the understanding of the EU from the citizens' perspective. As more recently suggested by Pernice, when viewed as such, the constitutional architecture of the EU ceases to represent a union of abstract states.[45] Instead, because the citizens of the Union are, in the same fashion, citizens of the nation-state, the source of constitutional legitimacy is no longer the monopoly of the latter.[46] Thus, the European citizens are the ultimate masters of the Treaties, and their choice to establish the primacy of EU Law as a tool of supranational governance enables the principle's application ('functional primacy' – limited to the scope of the Treaties).[47] Thus, hierarchy is restricted to the level of application (and not validity), under the form of the primacy of EU law,[48] which, according to this view, does not fit the classical state-revolving theories of legal hierarchy. Instead, EU law is given primacy by a treaty-enshrined right-of-way,[49] connected to the national constitutions of the Member States, which authorize the priority in the application of international instruments.

Accordingly, the Member States and their constitutional courts have acknowledged the primacy of European law even over their national constitutions, but this is not an unconditional primacy.[50] As della Cananea hints, he [Pernice] makes it quite clear that, though a unified Europe now exists, it must not cancel the constitutional identity of the Member States.[51] Therefore, national constitutional structures are integrated into the European composite constitution and, thus, the refusal to apply a provision of European law that is incompatible with their national constitutional identity would not be a violation of the treaty, but an expression of the loyalty between the elements of the *Verbund*.[52] But to prevent conflict in this order, national constitutional claims have to be recognized by both levels in the constitutional composition and must be determined consensually.[53] Thus, the question of where the ultimate jurisdictional claims are located arises again. Following Pernice's multilevel approach,[54] the answer points to Art. 267 TFEU[55] on procedural grounds and through a

[42] Dana Burchardt, *Die Rangfrage im Europäischen Normenverbund. Theoretische Grundlagen und Dogmatische Grundzüge des Verhältnisses von Unionsrecht und Nationalem Recht*, Mohr Siebeck, 2006, p. 381.

[43] Pernice 2015, pp. 547-9.

[44] Pernice 2002, pp. 2-3.

[45] Pernice 2015, p. 543.

[46] Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, Common Market Law Review, Vol. 36, 1999, p. 720.

[47] Pernice 1999, p. 719.

[48] Burchardt 2015, p. 264.

[49] Franz C. Mayer, *Multilevel Constitutional Jurisdiction*, in Armin von Bogdandy & J.ürgen Bast (Eds.), Principles of European Constitutional Law, Hart Publishing, 2010, p. 430.

[50] Pernice 2009, p. 383.

[51] della Cananea 2010, p. 299.

[52] Pernice 2009, p. 64.

[53] Mayer 2010, p. 431.

[54] Ibid.

[55] Art. 267 TFEU provides the legal basis for preliminary ruling requests from the ECJ. From a pluralist perspective, the article provides a legal basis for judicial cooperation in the EU. According to Jóźwicki, this 'sequential model' of adjudication would enable national constitutional courts to issue a referral for a preliminary judgment to the CJEU by interpreting the content of national constitutional identity and describing why it is incompatible with the EU norm

substantive lens, to Art. 4 (2) TEU. In this reading, the ultimate authority would be exercised jointly by the Union, through the ECJ and the Member States, a view which now glides over a consistent practice of constitutional courts addressing preliminary ruling requests to the ECJ.[56]

4.2. A Much Debated and Contested Concept: Constitutional Identity and its Discontents

We cannot get away from identity or identity politics.[57] And, in a similar vein, from identity on matters constitutional. *In nuce* encasing the core principles of a polity's constitution, there is no clear consensus concerning an accurate, all-encompassing definition of the subtitles' subject matter. Throughout American scholarship, constitutional identity is an essentially contested concept as there is no agreement over what it means or refers to.[58] And no trenchant lines can be drawn in Europe either. As some of its critics show, the sources of constitutional identity are difficult to trace, since the concept itself is clouded in uncertainty and arbitrariness,[59] and tied to constitutional subjectivity.[60] With a growing myriad of clashing interpretations, the following paragraphs aim to shed light on the multi-faceted figure of constitutional identity.

In North American literature, constitutional identity is intrinsically tied to historical constitutional evolution, therefore emerging dialogically, as it dissolves commitments that are expressive to a nation's past and determination towards transcending it.[61] In this light, constitutional identity appears as a continuous renegotiation of the interpretation of a polity's constitutional core. Starting from the sociological assumption that identity depends on the dialogical relation with others,[62] Jacobsohn[63] links constitutional identity to the aspirations of the polity, the constant process of their formation, and concessions between these universal commitments and the peculiar nuances of the local socio-political reality. Clothed in a meta-constitutional language, the identity of the Constitution is, thus, subject to social, political, cultural, and religious influence, elements intertwined as part of a 'living tradition'.[64] Since Jacobsohn understands constitutions as embodiments of unique histories and circumstances,[65] his view anchors constitutional identity in the specific legal culture, inside which a given constitution operates.[66] Thus, the concept may be found dwelling in the various legal

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it seeks to leave inapplicable. See Władysław Jóźwicki, *Ultra Vires and Constitutional Identity Control: Apples and Oranges or Two Drops of Water?*, Verfassungsblog, https://verfassungsblog.de/ultra-vires-and-constitutional-identity-control-apples-and-oranges-or-two-drops-of-water/ (1 May 2022), p. 2.

[56] The German Constitutional Court's practice spearheads the developments in the area of judicial dialogue. For a contextual account, see Tímea Drinóczi & Ágoston Mohay, *The Preliminary Ruling Procedure and the identity Review*, in Dunja Duić & Tunjica Petrašević (Eds.) Procedural Aspects of EU Law, Jean Monnet International Scientific Conference, 2017, p. 199.

[57] Franics Fukuyama, *Identity: the demand for dignity and the politics of resentment*, Pearson, London 2018, p. 163.

[58] Michel Rosenfeld, *Constitutional Identity*, in Michel Rosenfeld & András Sajó (Eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, 2012, p. 756.

[59] Fabbrini & Sajó 2019, p. 469.

[60] Francesca Strumia & Asha Kaushal, *Opening the Ranks of Constitutional Subjects: Immigration, Identity, and Innovation in Italy and Canada*, German Law Journal, Vol. 18, No. 7, 2017, p. 3.

[61] Gary Jeffrey Jacobsohn, *Constitutional Identity*, Harvard University Press, 2010, p. 7.

[62] Charles Taylor, *The Ethics of Authenticity*, MA: Harvard University Press, 1991, p. 48.

[63] Jacobsohn 2010, pp. 103-117.

[64] One may already notice the transdisciplinary migration of ideas outside European legal literature. See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, Third Ed., University of Notre Dame Press 2007, p. 206.

[65] Gary Jeffrey Jacobsohn, *Constitutional Identity*, The Review of Politics, Vol. 68, No. 3, 2006, p. 372.

[66] Elena-Simina Tănăsescu, *Despre identitatea constituțională* și *rolul integrator al Constituției*, Curierul Judiciar, Vol. 5, 2017, p. 244.

cultures of the world,[67] ingrained with the dialogical interaction between other global and local constitutional identities.[68]

Likewise, for Rosenfeld, the making of every constitution is a unique historical event.[69] *A fortiori*, the construction of the constitutional identity implies an organic process of negation and integration of extra-constitutional traditions or, as Tushnet[70] remarks, an application of psychoanalytic theory, whose goal is to explain how a person's past both structures and provides opportunities for present and future experiences. From this perspective, French constitutional identity stems from appropriating an existing language and imposing it throughout the territory of the nation-state to make political deliberation accessible, while, in contrast, German constitutional identity is, *ab origine*, linked to an ethnic understanding of nationhood.[71] Consequently, this view of constitutional identity, originating from the interpretation of an old constitution, historically difficult to amend, naturally focuses on the interpretation of constitutional change, by employing a transdisciplinary methodology. In a world of younger constitutions, gradually integrated into a multilevel constitutional system, the case for constitutional identity lies on different premises.

European legal literature links constitutional identity to the gradual transplant of national sovereign elements in the supranational structure of the EU. Thus, the regional discourse on the identity of the constitution is largely framed in positivist and procedural terms, distancing itself from the emotional constitutionalism of North American literature. Instead of discussing constitutional identity as an emulator of constitutional culture, European legal literature frames it as an *ultima ratio* safeguard of constitutional supremacy. The substantive core of constitutional identity in this discourse is not anchored in meta-legal processes, but in whimsical constitutional provisions, eternity clauses,[72] the preamble of the constitution, or even sub-constitutional texts, whereas the identity-holder does not have a written constitution.[73] Additionally, Drinóczi deduces constitutional identity from the identity of the constitutional subject, as materialized in the name of the constitution, the state, and its inherent symbolism, as well as from the peculiarities of the amendment system and its safeguards.[74] In a similar vein, Varga refers to the *national identity clause* (distinct from Art. 4 (2) TEU) as an implicit all-encompassing constitutional provision meant to emulate peculiar institutions, constitutional traditions, values, and principles.[75] It is perhaps this legal realist approach that would

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[67] Ibid.

[68] Bui Ngoc Son, *Globalization of Constitutional Identity*, Washington Law Review, Vol. 26, No. 3, 2017, p. 467.

[69] Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*, Routledge, 2009, p. 149.

[70] Mark Tushnet, *How Do Constitutions Constitute Constitutional Identity?*, International Journal of Constitutional Law, Vol. 8, No. 3, 2010, p. 673.

[71] Michel Rosenfeld, *The Problem of 'Identity' in Constitution-Making and Constitutional Reform*, Cardozo Legal Studies Research Paper No. 143, 2005, pp. 7-8.

[72] In European constitutional practice, eternity clauses are the most common markers of constitutional identity. For example, in its *Lisbon* ruling, the German Constitutional Court referred to the eternity clauses of the German Constitution to determine the content of its identity. See BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08, paras. 216-8. Eternity clauses grant absolute entrenchment status to certain constitutional values and rights to ensure that they remain eternal, and are not amended (See Rivka Weill, *Secession and the prevalence of both militant democracy and eternity clauses worldwide*, Cardozo Law Review, Vol. 40, No. 2, 2018). As these provisions seek to prevent eventual authoritarian revolutions, they protect the constitutional core of a polity from subsequent amendments. In this regard, constitutional identity could prove itself an implicit redline for the law-making process.

[73] Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, German Law Journal, Vol. 18, No. 7, 2017, pp. 1605-10.

[74] Tímea Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach*, German Law Journal, Vol. 21, No. 2, 2020, p. 119.

[75] Attial Varga, *Identitatea Constituțională Națională – Sursă de conflicte sau de soluții? Unele aspecte doctrinare și*

define constitutional identity as a special, constructed identity related to the constitution itself and deduced from constitutional processes.[76]

While the legal-realist approach is dominant in defining the concept, European legal literature doesn't neglect the underlying culture constitutional identity is rooted in. For instance, Belov suggests that constitutional engineering can be complemented by a common socio-cultural experience, thus viewing constitutional identity as based on a mixture of rational and emotional constitutionalism.[77] And certainly, the constitutionalization of national peculiarities implies a deeper understanding of the socio-political realities that gave birth to them. In an incremental democratic process, principles of national identity are constitutionalized through political deliberation, which mirrors their legitimacy. In this respect, constitutional identity would signal "the zenith of national political choice in constitutional design".[78]

Employed by the EU's Member States to justify the retention of certain sovereign attributes, constitutional identity becomes a tool of interpretative arguments,[79] sketching a conceptual instrument of defence.[80] To act as a shield in the face of the supranational law-maker when acting *intra-vires*, constitutional identity has to carefully convey core legal institutions, whose essence is invaluable for the national polity's constitutional architecture. In this sense, constitutional identity conveys a strong message to the EU lawmaker, which has to take into account the core constitutional features of the Member States when designing new legislation.[81] Likewise, the national legal orders may use the argument to counterbalance the incidence of already enacted EU law in areas 'protected' by the constitution's identity. This latter approach generated a significant stream of constitutional case law, which seeks to set limits to the ECJ's absolute primacy doctrine. Based on this practice, Konstadinides observes that states use identity either as a 'shield' (as a legitimate derogation from EU law) or as a 'sword' (as a break to competence transfer using judicial review of EU acts).[82] As further interpreted by Faraguna, states like Germany in its *Solange I* ruling raised soft shields meant to provide an additional layer of protection to human rights provided by the national constitution, while hard shields were used as domestic limits to integration set by constitutional identities.[83] In this denomination, constitutional identities as hard shields and swords are usually unilaterally proclaimed by national actors as limits of integration, while soft shields are used as tools of inter-institutional dialogue. Substantively, national constitutional practice of the EU Member States

jurisprudențiale, in Elena-Simina Tănăsescu & Ștefan Deaconu (Eds.), In Honorem Ioan Muraru - Despre Constituție în Mileniul III, Hamangiu, 2019, p. 457.

[76] Polzin 2017, p. 1603.

[77] Martin 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, No. 2, 2017, p. 91.

[78] Ibid. p. 89.

[79] Petr Kucherenko & Elena Klochko, *The Concept of Constitutional Identity as a Legal Argument in Constitutional Judicial Practice*, Russian Law Journal, Vol. 7, No. 4, 2019.

[80] Arnold Rainer, *Constitutional Identity in European Constitutionalism*, 2019, http:// www.constcourt.md/public/files/file/conferinta_20ani/programul_conferintei/Rainer_Arnold.pdf (28 April 2022).

[81] According to Halberstam, constitutional practice outlines certain areas where lawmaking belongs to the final authority of the state and, as such, cannot be infringed by subsequent EU legislation. See Daniel Halberstam & Christoph Möllers, *The German Constitutional Court says "Ja zu Deutschland!"*, *German Law Journal,* Vol. 10, No. 8, 2009, p. 1251.

[82] Theodore Konstadinides, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, Cambridge Yearbook of European Legal Studies, Vol. 13, No. 1, 2011, p. 195.

[83] Pietro Faraguna, *Constitutional Identity in the EU–A Shield or a Sword?*, German Law Journal, Vol. 18, No. 7, 2017, p. 1629.

used constitutional identity to outline a constitutional kernel immune to the transfer of powers to the EU. For instance, the Czech Constitutional Court argued that the EU could not violate the basic principles of the Czech Constitution.[84] However, few courts expressly defined, or at least indicated the content of constitutional identity. Following judicial and extra-judicial practice on sovereign matters, scholarship referred to constitutional identities as vessels of national sensitive areas, which are left uncovered by the EU law.[85] For instance, Millet[86] sketches French constitutional identity starting from the overarching principle of the egalitarian republic (including, *inter alia*, the distinctive laïcité). Additionally, the double jurisdictional order (judicial and administrative) of the French Republic as a distinctive element of statehood with a strong legal tradition can be considered as an element of constitutional identity.[87] This interpretation leads to the 'distinctiveness' criteria of national constitutional identity. Accordingly, as Van der Schyff infers, constitutional identity ultimately conveys fundamental elements or values of a particular Member State's constitutional order as an expression of its individuality.[88] The next subsection bridges the concept of constitutional identity with the EU legal framework, seen through the lens of multilevel constitutionalism.

4.3. Bridging the Concepts. Constitutional Identity from a Multilevel Perspective

Connecting constitutional identity with EU law is most commonly operationalized through Art. 4 (2) TEU. Drawing its basis from the vague Art. 6 (3) of the Maastricht Treaty, the new Lisbon provision states that "Apart from respecting the Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government, the Union shall also respect their essential State functions". A teleological interpretation of the identity clause, starting from its *travaux préparatoires* as designed for the Constitutional Treaty[89] reveals that its drafters wished to broaden the scope of the derogation by wording it in general terms, instead of creating a charter of restrictive competencies held by the Member States.[90] Thus, the Member States have been granted a strong tool at the EU level to protect aspects central to their identity.[91] But Art. 4 TEU only mentions national identity. Even though the discourse of constitutional identity was already highly popular by the time of the drafting, the concept is missing from the Treaty. Drawing on existing legal literature, Advocate General Bot argued in his Conclusionsin *Tarrico II*[92] that the national identity of the Member States certainly includes constitutional iden-

[84] Jiří Přibáň, *Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism*, Journal of Law and Society, Vol. 45, 2018, p. 198.

[85] Thomas Wischmeyer, *Nationale Identität und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven*, Archiv des öffentlichen Rechts, Vol. 140, No. 3, 2015, p. 429.

[86] François-Xavier Millet, *Constitutional Identity in France. Vices and - Above All – Virtues*, in Christian Calliess & Gerhard van der Schyff (Eds.), Constitutional Identity in a Europe of Multilevel Constitutionalism, 1st ed, Cambridge University Press, 2019, p. 147

[87] Millet 2019, p. 149.

[88] Gerhard van der Schyff, *Exploring Member State and European Union constitutional identity*, European Public Law, Vol. 22, No. 2, 2016, p. 226.

[89] Although the Constitutional Treaty was not adopted, the national identity clause as defined by its drafting committee was transferred to the subsequent Lisbon Treaty, cited *supra*.

[90] See the reports of the Fifth Working Group, specifically CONV 400/02, 13 November 2002, http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00400.en02.pdf (22 April 2022) and CONV 251/02, 9 September 2002, http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00251.en02.pdf. (22 April 2022).

[91] Mary Dobbs, Sovereignty, *Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?*, Yearbook of European Law, Vol. 33, No. 1, 2014, p. 334.

[92] Case C-42/17, *Criminal Proceedings against M.A.S., M.B (Tarrico II)*, Opinion of Advocate General M.P. Maduro, [EU:C:2017:564], para. 172.

tity. Similarly, as Faraguna shows,[93] the connection between national and constitutional identity has gradually been taken as a self-evident truth. However, this 'intentionalist' approach has been criticized[94] as Art. 4 (2) TEU precludes the use of constitutional identity since national constitutional courts found their claims on immutable state sovereignty, a theory the ECJ does not endorse, adding that it should be protected instead on different normative grounds.

As seen *supra*, when constructed in an EU legal discourse, the notion of constitutional identity cannot depart from the existential doctrine of the primacy of EU law.[95] In Konstadinides' reading,[96] Article 4 (2) TEU implies that national identity counterbalances the principle of EU law primacy. Therefore, the ECJ pays due respect to the legal traditions and identities common to the Member States as long as constitutional identity retention does not (…) undermine the underlying goals of the EU legal order.[97] In a similar vein, Advocate General Maduro noted in *Michaniki*[98] that "as [Union] law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the [Union] legal order". Consequently, constitutional identity as defined by the Member States deserves protection under EU law only after it is mediated by the EU framework.[99] This reading qualifies Art. 4 (2) as a *Verbundnorm*, a provision meant to allow national orders to permeate EU law in a point of shared normativity.[100] Elevating national constitutional values as general principles of EU Law suggests a reconciliatory Union, which builds its own identity upon these national institutions.[101] Consequently, constitutional diversity is a fundamental value of the Union,[102] for the integrity of which, no constitutional identity can be proclaimed in radical, nationalistic terms.[103]

On the judicial stage, soon after the Lisbon Treaty came into force, the ECJ accepted Austria's arguments that the republican order, fundamental for its constitutional identity, allows the prohibition of nobility titles as a justified measure in restricting the freedoms conferred by Art. 21 TFEU.[104]

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[93] Pietro Faraguna, *Taking Constitutional Identities Away from the Courts*, Brooklyn Journal of International Law, Vol. 41, No. 2, 2016, p. 496.

[94] See Elke Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, Netherlands Journal of Legal Philosophy, Vol. 45, No. 2, 2017, pp. 95-6.

[95] Barbara Guastaferro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, Yearbook of European Law, Vol. 31, No. 1, 2012, p. 263.

[96] Konstadinides 2011, p. 198.

[97] Ibid. p. 211.

[98] Case C-213/07, *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, Opinion of Advocate General M.P. Maduro, [EU:C:2008:544], para. 33.

[99] Anita Schnettger, *Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System*, in Christina Calliess & Gerhard van der Schyff (Eds.), Constitutional Identity in a Europe of Multilevel Constitutionalism, 1st ed, Cambridge University Press, 2012, p. 26. This mediation is not necessarily restricted to Art. 4 (2) TEU. As Faraguna observes, constitutional identities can be brought to a rich extra-judicial dialogue, for example through treaty reservations. Moreover, the discourse may also be found in proceedings based on Art. 7 TEU, under which EU Member States' may have their political power limited if found to be breaching their obligations pursuant to the Founding Treaties. See Faraguna 2016, p. 534.

[100] Schnettger 2019, p. 13.

[101] Sacha Garben, *Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers*, JCMS: Journal of Common Market Studies, Vol. 58, No. 1, 2020, p. 45.

[102] Pernice 2011, p. 221.

[103] Massimo Fichera & Oreste Pollicino, *The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?*, German Law Journal, Vol. 20, No. 8, 2019, p. 1101.

[104] See C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, [EU:C:2010:806].

Although not expressly referring to constitutional identity as stated by the Austrian Government,[105] the Court held that the status of the State as a republic formed part of its national identity, thus intensifying the nexus between national identity and fundamental constitutional principles.[106] However, it is still debatable whether the Luxembourg Court simply followed a previous trend of allowing Member States to derogate from the Treaties by invoking elements of public interest.[107] Afterall, *Sayn-Wittgenstein* was a Market case concerning the fundamental freedoms, where the broader public policy justification played the card of derogation. Nevertheless, an expansive reading of the identity clause suggests constitutional identity would serve as a broader rationale of these justifications.[108] Viewed from an overarching constitutional perspective, the post-Lisbon judgment mirrors the innovation brought by the new identity clause which, as noted by, renders a constitutionalization of national identity,[109] by weakening its historical and cultural references. In the light of the *Verfassungsverbund*, Art. 4(2) TEU provides a legal basis that links national constitutional law to EU law and forms a building block of the composite constitutional structure of the Union.[110] Thus, Wischmeyer shows that, through constitutionalization, principles that have been recognized by the citizens as part of their order are worthy of protection in the *Verbund*.[111] Upon being accepted by the supranational polity, constitutional identity becomes a platform meant to negotiate normative principles, and not a *norme de résistance* meant to abusively leave EU norms inapplicable.[112] Therefore, as both the EU and its Member States should partner in applying constitutional identity as a limitation to primacy, the next section sketches a test meant to identify patterns of identity compatible with the scope of Art. 4 (2) TEU as a valve of power regulation in the composite European constitution.

5. Drawing the Baselines of a Treaty-compliant Model of National Constitutional Identity

Any discussion over constitutional identity in a Union of multilevel constitutionalism ultimately leads to the challenge of successfully employing it as an exception to the principle of the primacy of EU law. As detailed in the last section, the TEU would allow, in theory, derogations based on constitutional identity supposedly certain formal and substantive requirements are met. Following the multilevel constitutional approach, I consider these requirements to be distinctive constitution-

[105] Throughout its case law, the ECJ refrains from directly addressing the matter of constitutional identity. Given the connotation of the concept in several national courts' case law, it was suggested that answering constitutional identity questions could be seen as a gateway to undermining the primacy of EU law. See Robbert Bruggeman & Joris Larik, *The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity*, Utrecht Journal of International and European Law, Vol. 35, No. 1, 2020.

[106] Armin Von Bogdandy & Stephan W. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, Common Market Law Review, Vol. 48, 2011, pp. 1424-1425.

[107] See Cases C-379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, [EU:C:1989:599] and C-36/02, *Omega Spielhallen und Automatenaufstellungs-GmnH v. Oberbürgermeisterin der Bundesstadt Bonn*, [U:C:2004:614].

[108] Ágoston Mohay & Norbert Tóth, *What's in a Name? Equal Treatment, Union Citizens and National Rules on Names and Titles, Vienna Journal on International Constitutional Law*, Vol. 11, No. 4, 2017, p. 600.

[109] Faraguna 2017, p. 1620.

[110] Certainly, as Von Bogdandy and Schill argue, not every provision of domestic constitutional law forms part of a Member State's constitutional identity as art. 4(2) TEU only covers basic domestic constitutional features, provisions which otherwise coincide with the constitutional limits to the primacy of EU law domestic constitutional courts developed. See Von Bogdandy & Schill 2011, p. 1431.

[111] Wischmeyer 2015, pp. 431-432.

[112] Ibid. p. 460.

alization, democratic legitimation and supranational validation.

Firstly, for national constitutional identity to be integrated as a joint element in the composite European constitutional order, the former has to *a priori* imply a constitutionalization[113] of essential national institutions which mirror the selfhood of a legal culture.[114] In my reading, this criterion requires a Member State's constitutional identity to be located in normative procedural and substantive coordinates. For detailing the former, one may refer to the *triad of constitutionalization* advanced by Moser and Rittberger,[115] namely the markers of democratic scrutiny by parliaments, judicial review by courts, and classical governance standards, such as transparent decision-making[116] in designing legal institutions. Conversely, de-constitutionalization implies a weakening of the elements of the triad,[117] thus signalling an inconsistent normative sedimentation of the values encompassed by a given constitutional identity. From a substantive point of view, constitutional identity has to protect an element of national constitutionalism.[118] But since not every legal institution is encompassed by constitutional identity, I complement this requirement by the 'distinctiveness' criteria, which identifies certain elements as indispensable to the polity's constitutional culture.[119] In this reading, constitutional identity is a normative tool meant to protect selective legal institutions which are the result of a gradual constitutionalization of national socio-cultural elements. Because the *Verbundnorm* ensures a degree of constitutional diversity, only institutional aspects which are unique and distinctive for the Member States may complement the constitutional structure of the Union.

Secondly, as the citizens' opinion-making lies at the conceptual foundation of the *Verbund*, these national institutions have to reflect a collective agreement. Thus, from the view of a citizens'-perspective constitutionalism, incremental legitimation of legal traditions is paramount in justifying their protection when colliding with supranational constitutional engineering. In my reading, this condition mirrors a supranational transfer of legitimacy, as paramount elements of the polity's constitutional imaginary are the result of a timely validated tradition. In a Habermasian sense, the citizens of the Union are justified in having an interest in their respective nation-states continuing to perform their proven role as guarantors of law and freedom also in their role as EU Member States.[120] *A fortiori*, it becomes evident that constitutional identity itself has to be legitimated by the members of the national polity. As Drinóczi shows,[121] constitutionalizing collective identity is the result of exercising popular power by the national citizens, who recognize a freedom-guaranteeing constitutional instrument as their own.[122] Similarly, as Belov remarks,[123] constitutional identity is a

[113] See, for instance, Wischmeyer 2015, pp. 431-432, Faraguna 2017, p. 1620, and Drinóczi 2020, p. 117.

[114] van der Schyff, 2016, p. 226.

[115] See Carolyn Moser & Berthold Rittberger, *The CJEU and EU (De)Constitutionalization - Unpacking Jurisprudential Strategies*, SSRN Electronic Journal, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3805923 (13 June 2022) p. 4.

[116] In the authors' reading, this process overlaps with existing definitions of the rule of law. See Moser & Rittberger, 2021, pp. 4-5.

[117] Ibid. p. 5.

[118] Scholtes also suggests that constitutional identity has to be located in a broader normative picture. As such, the concept cannot be detached from a shared European constitutional understanding. See Scholtes 2021, pp. 551-552.

[119] The emphasis on the *material core* of the constitution is highlighted in national case law as well. See the *Decision of the Czech Constitutional Court of Nov. 26, 2008*, Pl. ÚS 19/08: Treaty of Lisbon I, para. 85.

[120] Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, European Journal of International Law, Vol. 23, No. 2, 2012, p. 345.

[121] Drinóczi 2017, p. 117.

[122] Wischmeyer 2015, p. 432.

[123] Belov 2017, p. 79.

bearer of democratic legitimacy, as it expresses a transgenerational consensus of the political community. The relevance of constitutional identity as an emulator of collective social identity may be further explained by reference to the French Constitutional Council's 2006 Decision.[124] The ruling suggests that a directive cannot run counter to French constitutional identity *unless authorized by the constituent power,*[125] thus signalling the ultimate importance of the polity's citizens in regulating the flow of constitutional authority. As such, constitutional identity as an expression of the citizens' will to institutionalize cardinal elements of municipal culture can be waived solely by the same holder of constitutional authority.

Finally, national constitutional identity should not depart from a shared meaning of constitutionalism which glues the multilevel structure together. In order to properly connect constitutional identity to the *Verbund*, its definition in national law has to be validated by the EU, through judicial (Art. 4(2) as *Verbundnorm*) and extra-judicial (treaty opt-outs and Art. 7 procedures) channels of dialogue. Following the multilevel approach, (judicial) dialogue is indispensable in defining and validating constitutional identities as safeguards of national constitutional primacy. As such, the proposed test is essentially filtering illiberal uses, as it requires an incremental process of legitimation of certain institutions which are central for the polity's constitutional imaginary. The next subtitle argues that the use of constitutional identity amidst the rule of law crisis in Hungary and Poland does not mirror any of the test's criteria.

6. Discussing the Limits of Constitutional Identity

Employing abusive constitutional practices,[126] populist parties from Central Europe managed to gain majoritarian positions in their countries' parliaments and soon started to enact policies standing at odds with classical virtues of constitutionalism.[127] Building on identity politics, the narratives promoted by Hungarian and Polish political majorities hinge on the *othering* of Western liberal Europe.[128] In turn, institutional *othering* results in an apparent *constitutionalization* of populist nationalism,[129] a rhetoric which can now formally legitimate legislative action. This value fragmentation also allows the two Member States to grant national constitutional identity an illiberal clothing. Following new, more daring claims of the concept, several voices[130] started to question and even

[124] French Constitutional Council, *Decision no. 2006-540 DC of 27 July 2006*.

[125] Ibid. para. 19.

[126] See David Landau, *Abusive Constitutionalism*, University of California, Davis, Vol. 47, 2013, p. 195.

[127] The subject of capturing state institutions by populist parties has been widely covered in legal literature. For a comprehensive analysis in the case of Hungary, see Gábor Halmai, *The Evolution and Gestalt of the Hungarian Constitution*, 2019, https://me.eui.eu/gabor-halmai/work-in-progress/ (24 April 2022) and Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School Research Paper No. 18/01, SSRN Electronic Journal, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491 (24 April 2022) for Poland.

[128] Chrisopher Bridge, *Chapter 1. Orbán's Hungary: The Othering of Liberal Western Europe*, in Jan Chovanec & Katarzyna Molek-Kozakowska (Eds.), Discourse Approaches to Politics, Society and Culture, John Benjamins Publishing Company, 2017, p. 39.

[129] See Drinóczi & Bień-Kacała 2019, p. 1156. However, as outlined *supra*, illiberalism and constitutionalism are divergent concepts, thus constitutionalizing pre-modern elements appears as an oxymoron. Nevertheless, given the incorporation of certain pre-political elements in the Constitution's preamble, one may ascertain a formal constitutionalization of illiberal discourse.

[130] See Gábor Halmai, *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, No. 1, 2018, as well as Fabbrini & Sajó, 2019 and Kelemen & Pech cited *supra*.

call for abandoning the identity discourse. In the recent years, Hungary used constitutional identity amidst its concerns over migration, while Poland pioneered a shy identity review meant to protect the organization of the judiciary against the ECJ's 'negative integration' over the rule of law. My analysis, thus follows the metamorphosis of the concept in the two Member States' constitutional practice, following their democratic backsliding. After a brief legislative context, I test Decision 22/2016 of the Constitutional Court of Hungary[131] (CCH) and its subsequent case law, as well as two novel rulings of the Polish Constitutional Tribunal[132] (TK), together with the Polish Government's ambiguous references to the concept amidst the Art. 7 TEU procedures in 2018 against the benchmarks of the test.

6.1. Hungary

The constitutional landscape of Hungary witnessed a profound shift in 2011, with the occasion of a new Fundamental Law (FL), enacted in a suspiciously short period which prompted international observers, such as the Venice Commission, to question its drafting legitimacy.[133] The FL seemingly reorients the Hungarian constitutional imaginary towards a pre-political understanding of nationhood,[134] while abolishing some constitutional traditions such as the *action popularis* and creating an 'inferior' standard for the protection of fundamental rights.[135] However, the FL does not radically depart from the aspirations of modern constitutionalism, as it establishes principles such as the separation of powers, the rule of law and popular sovereignty, as well as imports the former 1989 Constitution's commitment to European integration,[136] fortified by a uniform constitutional practice, which does not reflect the metamorphosis of the FL.[137] By striking a balance between national and European commitments,[138] the FL appears as an admixture of "traditional nationalism and contemporary constitutionalism".[139]

For Hungary, 2015 saw the highest number of migrants ever reaching the country, with asylum requests multiplying manifold[140]. Even though many of these claims were abandoned, as most of the applicants left the country a few days later, the Hungarian state used 'mass migration' as a justifi-

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[131] See *Decision 22/2016 of the Constitutional Court of Hungary*, 5 December 2016.

[132] See *Decision K-3/21, Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*, 7 October 2021 and *Decision P-7/20*, 14 July 2021.

[133] Venice Commission, *Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session*, Venice 17–18 June 2011, http://www.venice.coe.int/webforms/documents/?pdf=CDL%282011%29058-e (30 April 2022) p. 23.

[134] Zsolt Körtvélyesi & Balázs Majtényi, *Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary*, German Law Journal, Vol. 18, No. 7, 2017, p. 1734.

[135] Nóra Chronowski, Márton Varju, Petra Bárd & Gábor Sulyok, *Hungary: Constitutional (R)Evolution or Regression?*, in Anneli Albi & Samo Bardutzky (Eds.), National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law, T.M.C. Asser Press, 2019, p. 1441.

[136] Nóra Chronowski and Erzsébet Csatlós, *Judicial Dialogue or National Monologue? The International Law and Hungarian Courts*, ELTE Law Journal, Vol. 1, 2013, pp. 8-9.

[137] Chronowski et al 2019, p. 1440. See, also, Decision 2/2019 of the CCH, which accommodates the application of EU law as a sui generis legal order, distinct from international law, in the 'retained sovereignty' doctrine.

[138] Ferenc Hörcher, *The National Avowal*, Politeja, Vol. 17, 2011, p. 35.

[139] Timothy William Waters, *The Undignified Part of Constitutional Analysis - Gábor Attila Tóth (ed.): Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law (Budapest, CEU Press2012) ISBN 978-615-5225-18-5.*, European Constitutional Law Review, Vol. 10, No. 2, 2014, p. 373.

[140] Boldizsár Nagy, *Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation*, German Law Journal, Vol. 17, No. 6, 2016, p. 1035.

cation for introducing emergency measures to protect the sovereignty and cultural identity of Hungary.[141] Following a Ceasarean logic aimed to curb pluralism,[142] Orbán's *Fidesz* gradually started to institutionalize a new political *Weltanschaaung*, revolving around an ethno-centric understanding of nationhood. As part of this process, culminating in a failed attempt of the ruling party to amend the constitution which would embed pre-political values in Hungary's constitutional identity, the CCH reconsidered an "abandoned petition" of the Ombudsman that challenged implementation a Council Decision meant to relocate refugees to Hungary.[143] In theory, the Ombudsman argued Hungarian law provided superior protection to the rights of the asylum-seekers in comparison to EU law, but in fact, the validity of the Council Decision was questioned by reference to the constitutional identity of Hungary. In Decision 22, the CCH asserted that, while it cannot review EU law, exercising joint competences meets two limits: sovereignty and constitutional identity[144]. Thus, in a tone reminiscent of *Solange I*, the CCH positioned itself as the holder of ultimate authority, by arguing that the FL ensures superior protection of human dignity, a fact which *prima facie* might signal a legitimate use of constitutional identity. However, even though mentioning cooperation and dialogue in its decision, the CCH did not even consider requesting a preliminary ruling from the ECJ,[145] a silence which suggests the absence of an invitation to dialogue and, thus, the absence of a subsequent validation from the supranational polity. Instead, the Hungarian Court unilaterally invoked Art. 4 (2) TEU as a ground for derogation based on constitutional identity described as a dynamic list of achievements of Hungary's historic constitution.[146]

The 'historic constitution', a concept introduced by the FL is interpreted to sum various laws and customs that ensured freedoms and provided guarantees for the institutional functioning of the Kingdom of Hungary.[147] To explain the term, one should refer to a *huge corpus* of secondary literature in Hungarian legal history, over which there is no consensual opinion concerning what it exactly conveys.[148] These documents are intrinsically tied to the 'Holy Crown' doctrine, which has been described as encasing a mystic membership, opposed to constitutional patriotism.[149] However, albeit its pre-modern connotations, the concept could be permeated by liberal conceptions, which allowed reconfigurations of the political system.[150] Therefore, the preamble meant to decode the Hungarian constitutional identity conveys a chain of ambiguous references to history. However, as della Cananea points out, giving due respect to constitutional identities does not necessarily implthat pre-existing identities and ties of both a national and a local nature are immutable.[151] Instead, as seen *supra*, to deserve protection as elements of the composite European constitutional structure, identities have to convey legal principles, detached from their national (*i.e.* cultural) connotations, through a process of constitutionalization, compliant with democratic safeguards, specifically to

[141] Kriszta Kovács, *The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts*, German Law Journal, Vol. 18, No. 7, 2017, p. 1712.

[142] Rorbert Sata & Ireneusz Pawel Karolewski, *Caesarean Politics in Hungary and Poland, East European Politics*, Vol. 36, No. 2, 2020, p. 11.

[143] Halmai 2018, p. 30. The term "abandoned petition" is borrowed from Halmai.

[144] Decision 22/2016, para. 54.

[145] Ágoston Mohay & Norbert Tóth, *Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law*, American Journal of International Law, Vol. 111, No. 2, 2017, p. 473.

[146] Ibid. para. 56.

[147] Ivett Császár & Balázs Majtényi, *Hungary: The Historic Constitution as the Place of Memory*, in Markku Suksi, Kalliope Agapiou-Josephides, Jean-Paul Lehners & Manfred Nowak (Eds.), First Fundamental Rights Documents in Europe, 1st ed, Intersentia, 2015, p. 62.

[148] Hörcher 2011, p. 28.

[149] Kovács 2017, p. 1715.

[150] Császár & Majtényi 2015, p. 62.

[151] della Cananea 2015, p. 299.

the rule of law. The constitutional identity referenced by Decision 22/2016 fails to express such a process, being instead pictured in an illiberal view.

Yet, regardless of its cosmetic historicism, the application of the FL by reference to the case-law of the CCH shows the rather weak practical significance of the preamble. For example, in 2018, an applicant before the CCH specifically referred to Christianity and family values as mentioned by the National Avowal in determining the status of Sunday as a rest day. Even though the petition was dismissed on formal grounds, a dissenting opinion shows that, even though the Christian element allowed the recognition of Sunday as a day of rest, this factor plays no definitive role today as the state secularized its meaning.[152] Furthermore, even though the value of human dignity is given a communitarian interpretation by the National Avowal,[153] the CCH gave a positivist reading of the principle, arguing that establishing that legal gender recognition and related name change is a fundamental right of transgender persons is part of the principle of human dignity, as understood by the Hungarian state, giving no clue toward a Christian understanding which, according to some authors would signal an 'exclusive' constitutional identity.[154] Moreover, in Decision 477/2021, the Court subtly suggested a liberal interpretation of the National Avowal. The case concerned the aftermath of C-808/18[155] in the context of the national law not allowing third country nationals to wait inside Hungary while their asylum applications were processed. The CCH interpreted the right to human dignity as an overarching principle of the FL and encased in Hungary's constitutional identity. Then, the Court assessed the principle by reference to the achievements of the 'historic constitution', this time referencing a poignant piece of history, namely St. Stephen's admonition to his son Imre, read in a rather 'liberal' key.[156] Consequently, the CCH postulated the state's obligation to ensure the human dignity of all the persons staying on Hungary's territory, regardless of their legal title, or the lawfulness of their stay.[157]

It, therefore, seems that Decision 22/2016 is an isolated example of constitutional interpretation, with no effects concerning an eventual derogation from EU law, being rather a simulation of legal insubordination. The reasoning standard stands in stark contrast with the GCC's identity and ultra vires review. Firstly, the variable list of the 'historical constitution's' achievements is open to the CCH's interpretative liberty, while the GCC's identity review is limited to the German Constitution's eternity clauses, thus putting the coherence of the identity argument at the whim of the Court's discretion. Moreover, although mentioning a GCC-inspired *Europafreundlichkeit*, the CCH is more willing to maintain a lively dialogue with the governing parliamentary majority than with ECJ.[158] To sum up, in Bakó's words,[159] the CCH "just tries to follow the 'bold rebel' GCC, without

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[152] Miklós Könczöl & István Kevevári, *History and Interpretation in the Fundamental Law of Hungary*, European Papers – A Journal on Law and Integration, Vol. 5, No. 1, 2020, p. 172.

[153] Katalin Egresi, Katalin, *Role of the Holy Crown Doctrine and 'Historical Constitution' in the Hungarian Constitutionalism*, Studia Juridica et Politica Jaurinensia, Vol. 1, 2014, p. 17.

[154] Kovács 2017, p. 1719.

[155] See C-808/18, *Commission v Hungary*, [EU:C:2020:1029].

[156] See Decision X-477/2021, p. 17 and Scheppele's account of the reasoning. Kim Lane Scheppele*, Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament, VerfBlog,* 2021/12/21, https://verfassungsblog.de/escaping-orbans-constitutional-prison/ (2 May 2022). Although not directly cited by the Decision, the Admonition illustrates the Court's intentions tellingly: "*For a country of one single language and one set of customs is weak and vulnerable. Therefore, I enjoin on you, my son, to protect newcomers benevolently and to hold them in high esteem so that they should stay with your rather than dwell elsewhere."*

[157] X-477/2021, p. 19.

[158] Beáta Bakó, *The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires and Fundamental Rights Review in Hungary*, Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, Vol. 78, 2018, p. 898.

[159] Bakó 2018, p. 901.

having the same weapons, and without realising the difference between the situations".

6.2. Poland

In Poland, the identity argument's career was born out of the governing party's entanglement with the independence of the national court system. The reforms of the judiciary established, along with the lustration of the Supreme Court justices, a political subordination of the National Judiciary Council[160] (NCJ; a technocratic organ that usually has its leading members elected from the ranks of the judiciary and has the role to oversee the proper functioning of the court system) and the establishment of a special disciplinary chamber within the Supreme Court[161] (meant to facilitate executive pressure over the judiciary). As the organization of the judiciary is an exclusive competence of the Member States, the EU cannot, at least following classical harmonization measures, interfere with its national variations. However, following the increasingly criticized reforms of the governing Law and Justice party (PiS), ordinary judges started to challenge the allegedly abusive measures vis-à-vis the general principles of EU law. With the ECJ opening the gates of what may be described as a 'negative integration' based on the rule of law in *ASJP*[162], the Polish ordinary courts began to pierce the smokescreen of the exclusive competence discourse, by supplying the ECJ with arguments to extend the newly created rule of law standard of art. 19 TEU to the constitutional crisis in Poland. Unsurprisingly, the ECJ answered the call in a stream of case law which uses a constellation of primary law provisions as standards of negative integration.[163]

However, prior to the Court's intervention, the Commission's own commitment to the rule of law resulted in an activation of the Art. 7 TEU procedure. On this background, the Polish Government started to sketch the first usage of constitutional identity. Essentially, the state's agents don't picture a detailed account of the identity argument in the context of the constitutional crisis. As the procedure unfolded before the ECJ's avant-garde *ASJP* ruling, the Government centred its defence around the "exclusive competence" discourse, with constitutional identity being a rather futile addition, backed by limited arguments. Similar to the CCH, the Polish Government referenced[164] existing *Lisbon*-like constitutional case law on the matter of identity, as well as pre- and post-*Lisbon* rulings on Art. 4 (2) by the ECJ. However, the specific application of the Polish constitutional identity is only mentioned in para. 207 of the white paper[165] presented with the occasion of the Art. 7 proceedings. In the memorandum's wording, the concept allows the reforms of the judiciary to "be assessed solely at the national level by competent authorities", thus suggesting an overarching con-

[160] Sadurski 2018, p. 38.

[161] For an overview of the Chamber's history, see Katarzyna Gajda-Roszczynialska & Krystian Markiewicz, *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland*, Hague Journal on the Rule Law, Vol. 12, 2020, p. 463.

[162] The *ASJP* ruling (C-64/16, *Associação Sindical Dos Juízes Portugueses*, [EU:C:2018:117]) is reminiscent of the ECJ's *Cassis de Dijon* jurisprudence, which extended the application of an Internal Market rule beyond the standard of art. 34 TFEU. See Aistė Mickonytė, *Effects of the Rule-of-Law Crisis in the EU: Towards Centralization of the EU System of Judicial Protection*, Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, Vol. 79, No. 4, 2019, p. 831.

[163] For a broader discussion over the ECJ's daring quest of consolidating the rule of law within the EU, see Laurent Pech & Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (May 20, 2021). SIEPS, Stockholm, 2021-3, SSRN Electronic Journal, 2021, https://ssrn.com/abstract=3850308 (25 March 2022).

[164] See Polish Government's *White Paper on the Reform of the Polish Judiciary*, 17 March 2018, https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chanceller-white-paper-3-18.pdf (23 April 2022).

[165] Ibid. para. 207.

stitutional identity gliding over the entirety of the national court system. Furthermore, according to the Government, constitutional identity enables the arbitrary change of the NCJ's leadership's composition, as "tensions between the executive and the judiciary are natural for any democratic state".[166] But it was ultimately the Polish Constitutional Tribunal (TK) which undertook the role as a guardian of the Republic's constitutional identity.

Before the events of 2015 which led to the constitutional crisis, the TK highlighted the *axiological convergence* between European and Polish law, which embrace the same sources of inspiration in constructing their identities.[167] This interpretation creates the premise of a constitutional identity conveying values worthy of protection in the *Verbund* – such as the system of democratic governance and observance of human rights.[168] Yet, the analysis of the constitutional reality following the events in 2015 leads to the conclusion that the content of these values is hollowed out by the mechanism of ordinary legislation and political practice.[169] Indeed, from a procedural standpoint, the National Council of the Judiciary was subordinated by means of ordinary legislative action and, substantively, it was justified by a selective[170] and formalistic[171] reading of the Constitution. In the white paper, the Government made no reference to the values encompassed by the Polish constitutional identity. Instead, one such value referenced to in the earlier case law of the Constitutional Tribunal – the separation of powers – has been deliberately ignored in justifying the reforms of the judiciary.[172] Moreover, the arguments trying to use Art. 4 (2) TEU as a justification for the reforms were further rejected by the ECJ,[173] which argued that "although the organization of justice in the Member States falls within their competence, when exercising that competence, Member States are required to comply with their obligations deriving from EU law, particularly the independence of the judiciary". However, the ECJ's ruling is not the result of a judicial dialogue with the TK as an overseer of constitutional identity, but a result of a preliminary ruling request raised by the ordinary courts. Furthermore, as the new legislation regulating the Council ignores the voices of the Polish judges' positions as reflected by several bills presented to the Parliament,[174] the requirement of popular legitimacy seems to be absent as well if constitutional identity would be supposed to procedurally justify this measure.

The saga of the Disciplinary Chamber allowed a more detailed use of constitutional identity. As the ECJ stated its new form's incompatibility with the requirements of Art. 19 TEU,[175] the TK issued a mirror-ruling arguing against the primacy of EU law over matters pertaining to the judiciary. Specifically, the TK linked the organization of the Polish judiciary with the constitutional identity

[166] White Paper 2018, para. 207.

[167] See Case K-32/09, *Judgement of 24 November 2010*, para. 28.

[168] Ibid. para. 26.

[169] Miroslaw Wyrzykowski, *Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland*, Hague Journal on the Rule of Law, Vol. 11, No. 2-3, 2019, p. 418.

[170] Stowarzyszenie Sędziów Polskich 'Iustitia', *Response to the White Paper Compendium on the Reforms of the Polish Justice System, Presented by the Government of the Republic of Poland to the European Commission*, 2018, https://www.statewatch.org/media/documents/news/2018/mar/pl-judges-association-response-judiciary-reform-3-18.pdf (30 April 2022) para. 9.

[171] Marcin Matczak, *The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense*, Hague Journal on the Rule of Law, Vol. 12, No. 3, 2020, p. 433.

[172] Tomasz Tadeusz Koncewicz, *Farewell to the Separation of Powers – On the Judicial Purge and the Capture in the Heart of Europe*, Verfassungsblog, 2017/7/19, https://verfassungsblog.de/farewell-to-the-separation-of-powers-on-the-judicial-purge-and-the-capture-in-the-heart-of-europe/ (27 April 2022).

[173] See Case C-824/18, *A.B. and Others (Nomination des juges à la Cour suprême - Recours)*, [EU:C:2021:153].

[174] Iustitia 2018, para. 11.

[175] See ECJ, Case C-791/19 *Commission v Poland*, [EU:C:2021:596].

argument, referencing broader constitutional rules and principles.[176] Thus, it appears the Tribunal circumvents the ECJ's negative integration rationale, by inferring the latter is exercising competences Poland did not transfer.[177] In fact, the ECJ is drawing fundamental principles in a functionalist manner. The judicial independence standard of art. 19 stems from the necessity to ensure that only independent bodies qualify as courts in 267 TFEU – fashion, being thus entitled to engage in the preliminary ruling procedure. The EU does not assume a competence to regulate the national judiciaries, but conveys that an arbitrary exercise of the Member States' exclusive competences may ricochet in the effectiveness of EU law.[178] As such, the TK's approach reframes constitutional identity as a basic 'sovereign' carve-out exception, tied to a broad legal realm which would ensure its intangibility from the ECJ's reach.[179] P-7/20 echoes other recent constitutional courts' decisions which tie the identity argument to the organization of the judiciary. In Decision 390/2021, the Romanian Constitutional Court (RCC) reached a similar conclusion. Specifically, the identity referenced by the RCC isolates the organization of the judiciary as a sovereign discretionary power of the law-maker.[180] In its more recent K-3/21 ruling, the Tribunal went further in broadening the horizons of the Polish constitutional identity. Confirming the Prime Minister petition,[181] the TK established the right of the President to appoint judges as an element of the constitution's identity. Moreover, as speculated in P-7/20, the Tribunal extended the primacy of the Constitution over EU law in its entirety, making the 'identity' argument redundant, eventually returning the case law to the early days of integration, when sovereignty itself was postulated as an implicit limit of EU law.

As such, the TK's usage of constitutional identity implies the concept is gliding over a broader interpretation of the 'rule of law' as a constitutional principle. Aside from the questionable composition[182] of the TK affecting its legitimacy as a constitutional actor and its refusal to use Art. 267 TFEU as a gateway to dialogue, one can hardly trace a specific institution referenced by the Tribunal's reasoning. This expansive interpretation stands, however, at odds with the elective nature of the 'identity' argument. In other words, the Tribunal's definition of constitutional identity shifts the focus from any particular institution to a broader category of judicial organization. Likewise, the TK's reasoning, specifically in K-3/21, departs from the GCC's practice. Whereas the Karlsruhe Court accepts the primacy of EU law over the German Constitution, the TK postulates a 'blanket primacy' of the Polish Constitution, while isolating itself from judicial dialogue with the ECJ.[183] Even if framed in a technical constitutional discourse over the conferral of powers, the TK's identi-

[176] P-7/20, para. 204.

[177] Ibid. para. 145.

[178] See Matteo Bonelli & Monica Claes, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses*, European Constitutional Law Review, Vol. 14, No. 3, 2018, p. 631.

[179] Throughout the early Market integration phases, Member States have historically relied on an implicit 'sovereignty exception' supposedly enshrined by the Community Treaty which would shield national measures related to direct taxation from EU law, albeit discriminatory. The Court challenged this conception in the landmark *Avoir Fiscal* case (C 270/83, *Commission of the European Communities v. French Republic*, [EU:C:1986:37]), leading to a wave of case law testing the compatibility of national direct tax regimes with the principles undergirding the Internal Market. See Servaas van Thiel, *The Direct Income Tax Case Law of the European Court of Justice: Past Trends and Future Developments*, Tax Law Review, Vol. 61, 2008, p. 146.

[180] See Decision 390/2021, published in the Romanian Official Gazette, No. 612 of 22 June 2021, para. 85.

[181] See Polish Prime-Minister's motion to the Constitutional Tribunal regarding EU Treaties conformity with the Polish Constitution (case K 3/21), comment available at: https://ruleoflaw.pl/on-the-pm-morawiecki-motion-to-the-constitutional-tribunal-regarding-eu-treaties-conformity-with-the-polish-constitution-case-k-3-21/ (1 May 2022).

[182] See European Court of Human Rights: *Xero Flor w Polsce sp. z o.o. v. Poland* (Application no. 4907/18), ECHtR (2021).

[183] Alexander Thiele, *Whoever equates Karlsruhe to Warsaw is wildly mistaken*, VerfBlog, 2021/10/10, https://verfassungsblog.de/whoever-equals-karlsruhe-to-warsaw-is-wildly-mistaken/ (28 April 2022).

ty review fails to nuance the boundaries of the 'identity' argument and its interrelation with EU law. If one were to frame the interactions of the EU and Polish legal order in a multilevel perspective, the TK disables its built-in dialogic dimension by proclaiming a radical supremacy of the constitutional order, at the expense of the Union's guiding principles.

7. Conclusion

Constitutional identity is a multi-dimensional concept, around which a rich and fruitful academic debate began to flourish in the last decades. Recent turbulent events, such as those in Hungary and Poland ignited a hazardous search of political agents for legal justifications when confronted by international bodies in regards to rule of law issues. On this background, constitutional identity was detached from its natural evolution as a normative tool for dialogue between the national and supranational polities, and weaponized by populist state actors. My contribution further nuances the predicament that 'institutional capture' does not drastically change the constitutional identity of a Member State, which, moreover, as seen from the EU's perspective, incorporates parts of a shared European identity.[184] By applying the proposed test to the constitutional realities of Hungary and Poland, one may reach a similar conclusion. As both Hungary and Poland gradually departed from a shared premise of modern constitutionalism by veering toward an illiberal model, constitutional identity became an entrancing justification for counterbalancing the application of the Union's efforts to impose its authority amidst this upheaval.

The findings of my work hint that, when viewed from a pluralistic perspective (more specifically, following the basic premises of Multilevel Constitutionalism), the usage of constitutional identity as a jurisprudential limit of primacy, is for the most part mishandled by illiberal Member States' actors. Specifically, the CCH and TK's relevant rulings easily escape the multilevel reading of the 'ideal' interplay between the national and EU legal orders. Firstly, the identity referenced by the CCH in Decision 22/2016 sketches a radical interpretative model, tied to a seemingly historicist understanding of constitutionalism, which, in light of the FL's adoption procedure, could hardly be seen as stemming from a coherent will of the constituent power. However, as the subsequent case law of the CCH departed from this initial statement of force, one may argue that even the elusive 'historic constitution' as the conceptual anchor of Hungary's constitutional identity can be seen as allowing modern interpretations which depart from an illiberal view. From the Polish perspective, the Government and the TK, likewise building on contested legislative measures, created a broad definition of constitutional identity, which negates its fundamental nature as an elective argument meant to shield *specific* institutions from the ambit of EU law. However, the common issue with the approach followed by the two constitutional courts is the tacit refusal to engage in judicial dialogue. Thus, what may be considered the foundational mechanism of Multilevel Constitutionalism – the dialogical interaction of constitutional actors – is downplayed in favour of a sort of "judicial Manicheism",[185] where constitutional identity becomes a magic formula meant to preclude Member

[184] Nanette Neuwahl & Charles Kovacs, *Hungary and the EU's Rule of Law Protection*, Journal of European Integration, Vol. 43, No. 1, 2021, p. 24.

[185] One may even re-theorize constitutional identity as a tool of political contention. The over-arching definition given by the CCH in 2016 prompted governmental actors to claim a victory against an antagonized Union. For instance, PM Viktor Orban's words soon after Decision 22/2016 entered the public debate are illustrative in explaining the role of constitutional identity as a discursive tool of contention: "I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary's constitutional identity. This means that the cabinet cannot support a decision made in Brussels that violates Hungary's sovereignty". See HGV.hu, *Brüsszel meg akarja szüntetni a rezsicsökkentést*, 2 December 2016, http://hvg.hu/itthon/20161202_Orban_beszed_pentek_reggel (30 April 2022).

States from complying with EU law. However, recent constitutional practice shows signs that even a 'packed' court has the potential of conserving the normative aspirations of modern constitutionalism.

As the ECJ gradually acknowledged the legitimacy of constitutional identity as a limitation of primacy,[186] the multilevel constitutional reading of Art. 4 (2) TEU invites constitutional courts to submit their own interpretations of the concept via the preliminary ruling procedure. While the CCH has already created a stirring conceptualization around the 'historic constitution', future usages of Hungarian constitutional identity should, perhaps, follow a more *Europafreundlich* dimension by using Art. 267 TFEU as a gateway towards a validation of its claims. While the present case law of the TK is more problematic vis-à-vis the elective nature of constitutional identity, the *Lisbon* decision might serve as a starting platform for a coherent identity review, which takes into account specific constitutional values or institutions. However, whether the CCH will project its poetic constitutionalism in new colours, or the TK will return to its case law and redesign its identity review in a GCC-styled fashion, it remains for the two courts to follow the path of dialogue and answer the question of *ultimate authority* harmoniously.

[186] See the findings of the ECJ in C-156/21 *Hungary v. European Parliament*, [EU:C:2022:97].