Guest Editors' Introduction

National Constitutional Identity Ten Years on: State of Play and Future Perspectives

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This introductory article lays out the background of the inquiry proposed by the contributions of this special issue, while also presenting its main findings and adopting a forward-looking stance. To this end, it first briefly recalls what the origins of the identity clause are, before it discusses what meanings this clause could have. Subsequently, the main conclusions of the various articles are presented. The final part concludes by restating that national identity remains an undefined concept, which can only be defined on a case-by-case basis by means of dialogue between national and European courts.

Keywords: National identity – constitutional identity – constitutional courts – European Court of Justice – judicial dialogue

1 NATIONAL CONSTITUTIONAL IDENTITY AND THE RELATIONSHIP BETWEEN THE EUROPEAN UNION (EU) AND ITS MEMBER STATES

It has been recently noted that '[t]he protection of constitutional identity is a rising star in the current discussion about Europe's future'.[1] There is indeed little doubt that the European Union (EU) is currently at a decisive juncture that will influence its future role and operating mode as is evidenced by several phenomena including the fact that one of its Member States has left for the first time ever, that its core values are increasingly and recurrently under threat, while it is, at the same time, called to play a major role to counter the negative effects of the current pandemic. The Conference on the Future of Europe, launched on 9 May 2021, will have to address, among other questions, that of the relationship between the EU and its Member States. As the European integration

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1 Anita Schnettger, *Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System*, in *Constitutional Identity in a Europe of Multilevel Constitutionalism* 9–37 (C. Calliess & G. van der Schyff eds, Cambridge Univ. Press 2019).

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process deepened, this relationship has become increasingly conflictual, and has more and more revolved around the issue and concept of national identity.

This relationship was unproblematic for a long time. When the six founding Member States initiated the process of European integration in the 1950s, the project they were pursuing arguably bore little resemblance with the EU that has since developed on its basis. The European Coal and Steal Community (ECSC) of 1951, and the European Economic Community (EEC) that followed it in 1957, had as their main objective the economic integration among the participating states with a view to guaranteeing peace and prosperity on the European continent. During several decades – that is: at least until the accession of more eurosceptic states in the 1970s – , the integration process could move forward as an elite project carried out primarily by political leaders, with little to no direct involvement of citizens.[2] The EEC's limited scope of activity, as well as the output legitimacy it achieved through its capacity to bring tangible benefits for the participating countries, sufficed for the integration process to remain largely accepted and supported by citizens.

Yet, as the integration process progressed and deepened, and, as a consequence of this, as some of the core values of the Member States started to become more recurrently affected by it, constitutional courts (primarily the German and the Italian ones) erected themselves as defenders of these core (constitutional) contents in their dialogue with the European Court of Justice (ECJ). The Italian Constitutional Court famously devised its 'counter-limits' (*controlimiti*) doctrine, whilst the German Federal Constitutional Court refrained from applying its own standards of review 'as long as' (*solange*) those used by the ECJ could, in its view, be considered equivalent to its own standards.

After the adoption of the Single European Act (1986), which was followed by a new acceleration in the integration process, the need arose to circumscribe the European Communities' capacity to (allegedly) unduly expand their power to the detriment of national and regional competences. That need was addressed, in the Maastricht Treaty, by the inclusion of the principle of subsidiarity and the concept of constitutional identity in the treaty text. At the same time as it established the EU and two intergovernmental pillars, the Maastricht Treaty explicitly underlined, for the first time, that '[t]he Union shall respect the national identities of its Member States',[3] even if that duty had, arguably, always been present in the process of European integration.[4] This inclusion, which amounts to the anchoring

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[2] Despite the fact that this possibility had been foreseen in the Treaties ever since the creation of the ECSC, it was not until 1979 that the first elections to the European Parliamentary Assembly could be organized.

[3] Article 7(1) Treaty on the European Union (TEU). On the origins of the identity clause: Monica Claes, *National Identity: Trump Card or Up for Negotiation?*, in *National Constitutional Identity and European Integration* 109–139 (A. Saiz Arnaiz & C. Alcoberro Llivina eds, Intersentia 2013).

[4] Opinion of Advocate General Maduro of 8 Oct. 2008 in the Michaniki case (C-213/07), para. 31.

of a domestic concern in EU law,[5] was though viewed as a political statement at the time.[6] The 'exact meaning and aim of the provision [indeed] remain[ed] vague'.[7]

Regardless of this, the inclusion of the identity clause may be interpreted as the beginning of the 'constitutional *volte face* [: f]rom a Community turning away from and beyond the Member States, depriving them of their sovereign essence, the Treaty acknowledged that the Union was based on the Member States'.[8] It must be understood against the background of an additional transfer of competences to the supranational level in areas closely related to national sovereignty, resulting *in fine* in the creation of a true polity as opposed to the mere project of economic integration it had been until then.[9] In fact, the reference to identity appears to have replaced (or potentially also reinforced) the 'traditional sovereignty narrative' from the late 1980s onwards.[10] Perhaps somewhat paradoxically, though, the Treaty of Maastricht recognized the importance of national identity while also laying the ground for a European identity to emerge thanks to the European citizenship established by the same Treaty.[11] At any rate, and whatever the reasons for its emergence, the concept of 'constitutional identity' was subsequently to be increasingly used by (some) constitutional courts.[12] The concept, whose original introduction in the Treaty of Maastricht may be viewed as a means to counterbalance the reinforcement of the supranational character of the European integration process and to preserve Member States' statehood, therefore developed over time towards providing a seemingly absolute protection to the national identities of the Member States against actions of the Union.[13] It may therefore be considered as the 'apex of a constitutional crescendo'.[14]

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5 Julien Sterk, *Sameness and Selfhood: The Efficiency of Constitutional Identities in EU Law*, Eur. L.J. 281–296, 282 (2018).

6 Elke Cloots, *National Identity in EU Law* 36 (Oxford University Press 2015).

7 Claes, *supra* n. 3, at 116.

8 L. F. Besselink, *National and Constitutional Identity Before and After Lisbon*, Utrecht L. Rev. 6, 41 (2010).

9 Claes, *supra* n. 3, at 116.

10 Alejandro Saiz Arnaiz & Carina Alcoberro Llivina, *Introduction. Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty*, in *National Constitutional Identity and European Integration* 1–15, at 4 (A. Saiz Arnaiz & C. Alcoberro Llivina eds, Intersentia 2013). Monica Claes argues in turn that the idea of sovereignty has not vanished but rather that '[t] rise of "national or constitutional identity" seems even to coincide with the persisting or renewed concern for sovereignty'. Claes, *supra* n. 3, at 109. *See* further on the relationship between the two concepts and their standing in the process of European integration: Roberto Toniatti, *Sovereignty Lost, Constitutional Identity Regained*, in *National Constitutional Identity and European Integration* 49–73 (A. Saiz Arnaiz & C. Alcoberro Llivina eds, Intersentia 2013).

11 On the recognition of these two types of identities: Claes, *supra* n. 3, at 115–116.

12 *See* the contributions to this special issue.

13 Toniatti, *supra* n. 10, at 64.

14 Giuseppe Martinico, *What Lies Behind Article 4(2) TEU?*, in *National Constitutional Identity and European Integration* 93–108, at 94 (A. Saiz Arnaiz & C. Alcoberro Llivina eds, Intersentia 2013).

Following the rather defensive trend launched at Maastricht, the Lisbon Treaty further enhanced the importance of the respect of Member States' national identities by the EU. Article 4(2) Treaty on EU (TEU) now clearly states that '[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. The role of this principle was thus reinforced, and its components detailed.

Furthermore, whereas this concept had only been addressed by the ECJ on very few occasions pre-Lisbon owing to its falling outside of the scope of the Court's review powers,[15] it has since been the object of several court cases. Beyond this, in the first decade after the entry into force of the Lisbon Treaty, the concept of national constitutional identity has generally been more commonly used than it had been before: a series of authors already noted that this was the case in 2013,[16] and this tendency has certainly been reinforced since.

This might be due to growing euroscepticism within the EU. But it could have been induced by the Treaties themselves for they have become more deferent towards the Member States. The inclusion of the 'identity clause' in the Treaties (and its evolution) is but one illustration of a growing sensibility of the EU Treaties towards the legal orders of the Member States: other clauses referring to national constitutional law have also been included,[17] and national parliaments as well as Member States territorial units have also found their way into primary EU law over time.[18]

Against this backdrop, this special issue offers a critical reflection on the use of the national constitutional identity clause during the first decade after the entry into force of the Lisbon Treaty, when its inclusion had triggered intensive (academic) debates. It aims at re-evaluating the current definition and the scope of this principle as it is now anchored in the Treaties. It also examines how this concept as it is now defined in the Treaties has been interpreted and utilized by both the national constitutional courts and the Court of Justice of the European Union (CJEU). It proposes an assessment thereof, as well as some forward-looking proposals as to how it should continue to be used in the future.

This introduction serves to first generally discuss the possible meaning(s) of the concept of national constitutional identity and to introduce the use of it made by the European and the national courts (2). It then presents the main findings of the

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15 For an account of this case law, *see* Claes, *supra* n. 3, at 130f and Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 Common Mkt. L. Rev. 1417–1454, 1422f (2011).

16 *See* the contributions to the volume edited by Arnaiz & Lllivina, *supra* n. 10.

17 Giuseppe Martinico in this special issue.

18 Diane Fromage in this special issue.

articles included in this special issue (3). A final section concludes by reflecting on the way forward (4).

2 WHAT MEANING(S) FOR THE CONCEPT OF 'NATIONAL CONSTITUTIONAL IDENTITY'?

When seeking to determine what meaning(s) may be attributed to the concept of 'national identity' within the EU, it should first be borne in mind that it has undergone several textual amendments since its first inclusion in the Treaties.[19]

In the Maastricht Treaty, it was indeed phrased as follows: '[t]he Union shall respect; the national identities of its Member States, whose systems of government are founded on the principles of democracy'.[20] The Treaty of Amsterdam stated in simpler terms that 'The Union shall respect the national identities of its Member States', but the same article also specified that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.[21] The Lisbon Treaty, like the Treaty establishing a Constitution for Europe before it, added the constitutional dimension, and detailed the clause's content, but the democratic dimension that had been included earlier on was removed and inserted in a separate treaty article (Article 2 TEU). Nonetheless, the meaning of national identity was clarified since it now explicitly refers to Member States' 'fundamental structures, political and constitutional, inclusive of regional and local self-government'. As outlined further below and in the contributions to this special issue, this has not prevented national courts from seeking to rely on this clause on grounds unrelated to institutional features of their national constitutions.

The importance of the concept of 'national constitutional identity' post-Lisbon was reinforced by its inclusion in the preamble to the EU's Charter of Fundamental Rights. Core questions regarding, for instance, whether '[we are] discussing the identity of a constitution or rather the identity of a people subject to a certain constitution?' nevertheless remained.[22] Also, the identity clause was still a polysemic term referring both to the prohibition set on the EU to negatively affect

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19 *See* for a more detailed account of this evolution the article by P. Faraguna in this special issue and further: Besselink, *supra* n. 8, at 6, Claes, *supra* n. 3 and Barbara Guastaferro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, 31(1) Y.B. Eur. L. 263–318 (2012).

20 Article 7(1) TEU.

21 Article 6(1) and (3) TEU.

22 Arnaiz & Llivina, *supra* n. 10, at 2. This question is further examined for instance by José Luis Martí: José Luis Martí, *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, in *National Constitutional Identity and European Integration* 17–36 (A. Saiz Arnaiz & C. Alcoberro Llivina eds, Intersentia 2013).

its Member States' national identities and to the outer limits of the EU's conferred competences, i.e., the 'constitutional limits of EU integration'.[23]

The Lisbon Treaty additionally modified the clause's standing in the Treaties; this change could lead to its meaning being affected if it were interpreted in isolation. To prevent this, as proposed by Giuseppe Martinico in this special issue, it should rather be read in conjunction with the other principles enshrined in Article 4 TEU and elsewhere in the Treaties. In this regard, the equality of the Member States in the Union, and the ensuing equality of their constitutional identity,[24] their common constitutional values, EU values, the principle of conferral or the duty of sincere cooperation appear to be particularly relevant.

The polysemy of this concept, as well as an arguably ever-growing scepticism of (some) national constitutional courts vis-à-vis the process of European integration *per se*, have led these courts, as well as the Court of Justice, to provide a variety of interpretations of it. The central role of the courts results from the fact that most national constitutions do not mention constitutional identity or, at any rate, do not define what belongs to it. The articles included in this special issue discuss at length the case law related to the concept of national constitutional identity as it has been used and interpreted by national constitutional courts and by the ECJ. Therefore, the aim of this subsection is more modestly to present a summarized account of its main features and characteristics.

As already anticipated, it is only in recent years that the concept of 'national identity' has been frequently used by national courts, and even more recently that it has been the subject of judicial review by the Court of Justice, even if some of the pre-Lisbon cases, among which the *Anita Groener*, the *Omega*, the *Grogan* and the *Azores* cases, have been viewed as implicitly addressing identity.[25] There is, however, no doubt that this principle had always been (implicitly) shaping the relationships between the European Communities and their Member States. Even now, in post-Lisbon times, the Court of Justice does not always pick up on references to identity made by the national courts or the Member States appearing before it. Identity has so far been used by the ECJ in cases related to linguistic issues, nobility titles and regional peculiarities, and the possibility now offered to the European Court to interpret the identity clause 'did not lead to explosive consequences' as noted by Faraguna in his contribution.

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[23] Schnettger, *supra* n. 1, at 10–11.

[24] Toniatti, *supra* n. 10, at 64–65.

[25] Case 379/87, *Anita Groener v. Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt* [2004] ECLI:EU:C:2004:614, Case C-159/90, *SPUC v. Grogan* [1991] CLI:EU:C:1991:378, Case C-88/03, *Portugal v. Comm* [2006] ECLI:EU:C:2006:511.

Turning now to national supreme and constitutional courts, it appears that they have used identity in dealing with different matters, ranging from economic issues as illustrated by the *Gauweiler* case,[26] to questions of criminal law as in the *Taricco saga*, pension benefits like in the *Landtova* case, labour law like in the *Dansk industri ex parte Ajos* case, or the distribution of asylum seekers. In fact, some authors, including Matteo Bonelli, Monica Claes and Pietro Faraguna in this special issue, have argued that national courts have used the 'identity card' more often than the CJEU. What belongs to 'their identity', according to constitutional and supreme courts, differs from country to country. For instance, the understanding of the French and the German constitutional courts differs radically in that the French focuses on those characteristics that distinguish France from the other major European states, whereas for the German court, identity refers to those parts of the Basic Law which may not be altered even by the German legislature.[27] Furthermore, constitutional and supreme courts have also abusively relied on the idea of identity, either implicitly or explicitly, as they have sought to oppose the primacy of EU law on the ground of national specificities.

The trend towards an increasing use by national courts of the concept of 'constitutional identity' with a view to resisting to the interpretation provided by a supranational or international court is not visible only in the framework of the EU: it has also emerged in the relationship between national courts and the European Court of Human Rights (ECtHR) as a justification for derogations from the uniform interpretation of the European Convention on Human Rights (ECHR).[28] The implicit recognition of the importance of *constitutional identities* could therefore be interpreted as an increased deference and perhaps even caution of the ECtHR towards States. The possibility open to the states party to the ECHR to invoke their national identities before the ECtHR is nonetheless obviously not absolute, and such type of arguments have occasionally been rejected by the Strasbourg court in the past.[29]

This evolution in favour of an increasing reliance on identity before the Strasbourg court is particularly noteworthy, seeing as the ECtHR has always admitted the existence of a 'national margin of appreciation'. Accordingly, the

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[26] The applicants before the German Federal Constitutional Court indeed made a clear link between the supposed *ultra vires* action of the European Central Bank in announcing its Outright Monetary Transaction programme and the breach of the principle of democracy guaranteed in the German Basic Law they would amount to, leading therefore to a breach of the German Constitutional identity. *See* further on the case law of the German Federal Constitutional Court: Mattias Wendel in this issue.

[27] *See* further on this: Sterk, *supra* n. 5, at 281–296.

[28] Federico Fabbrini & András Sajó, *The Dangers of Constitutional Identity*, 25 Eur. L.J. 457, 457 (2019).

[29] Luis López Guerra, *National Identity and the European Convention on Human Rights*, in *National Constitutional Identity and European Integration* 305–321, 315f (A. Saiz Arnaiz & C. Alcoberro Llivina eds, Intersentia 2013).

ECHR has to be interpreted in the light of the national context of each of its state parties.[30] Even if it does not contain any identity clause equivalent to Article 4(2) TEU, the ECHR may be viewed as implicitly acknowledging 'national identity'.[31] There is, however, a notable difference between this concept of '*national* identity' and that of '*constitutional* identity' as it is understood within the EU: in the Strasbourg System, national identity is understood as encompassing 'political, economic, cultural or social characteristics'.[32] Consequently, States' 'constitutional identity' is only a component of this broader 'national identity'.[33] As outlined above, and as shown in more detail by the contributions to this special issue, even if national specificities of this order are not ignored by the EU, their protection is arguably not to be found in Article 4(2) TEU which protects Member States' '*fundamental structures, political and constitutional*'.

3 TAKING STOCK TEN YEARS AFTER THE ENTRY INTO FORCE OF THE LISBON TREATY

The articles included in this special issue provide complementary insights that allow us to take stock of the 'identity clause' ten years after the entry into force of the Lisbon Treaty.

They mainly adopt two perspectives: the first one, comprising the articles by Pietro Faraguna, Giuseppe Martinico and Mattias Wendel, aims at *re-situating the identity clause in its historical and Treaty context and at considering how national constitutional and supreme courts have used it*, whereas the second one, comprising the articles by Monica Claes, Diane Fromage, Matteo Bonelli, Bruno de Witte and François-Xavier Millet, presents an account *of uses and interpretations of this clause by the Court of Justice of the EU in the course of the past decade*. Leonard Besselink offers some general reflections in his concluding article.

Pietro Faraguna revisits the evolution of the clause in the Treaties. In so doing, he shows that the EU law concept of identity has undergone what he calls a 'legalisation' or 'constitutionalisation', inter alia because it has now become reviewable by the Court of Justice, and because it now contains an explicit reference to 'fundamental structures, political and constitutional'. He also examines the use of the concept by the Court of Justice and national constitutional and supreme courts, and finds that the latter have been keener to rely on it than their

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30 *See* further on the margin of appreciation: Dean Spielmann, *Allowing the Right Margin. The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, CELS working paper series, 381–418 (2012).

31 On the reasons for this, and the implicit nature of the recognition, *see* Guerra, *supra* n. 29, at 305–307.

32 Guerra, *supra* n. 29, at 307.

33 *Ibid*, at 309.

European counterpart, even if they do not always specifically use the term 'constitutional identity'. Additionally, he offers a thorough analysis of the Italian *Taricco* saga, which led the Court of Justice to eventually accept an Italian constitutional specificity. He then proposes a solution to try and counter the excessive use made of the concept by some constitutional courts. In his opinion, the link between the EU's fundamental principles enshrined in Article 2 TEU and the identity clause, which existed before Lisbon, should be re-established.

In his contribution, Giuseppe Martinico proposes a renewed systematic understanding of Article 4(2). He first highlights the abusive practice of the Hungarian constitutional court to show why a new reading is necessary, asking whether we should 'ban "identity" from the terminology employed by courts after decisions like that endorsed by the Hungarian Constitutional Court in 2016? Or, rather, [whether we should …] conclude that the only court entitled to say something on Article 4(2) TEU is the CJEU?'. Giuseppe Martinico, like Pietro Faraguna, suggests that the EU values and the identity clause have to be interpreted consistently. In line with the original aim pursued by the Working Group of the Convention on the Future of Europe that drafted Article 4, namely to better define the division of competences between the EU and its Member States, one should take account of the other components of Article 4 TEU (namely, essential state functions, equality of the Member States, sincere cooperation etc.) when defining the meaning of the identity clause. The principle of conferral is, too, called to play a role. Martinico argues in favour of national constitutional courts defining 'their' national identity and submitting their view to the Court of Justice by means of preliminary reference, but unlike François-Xavier Millet he suggests that this (national) interpretation be non-binding on the European Court which should rather, more modestly, 'respectfully take it [the constitutional court's view] into account, by giving reasons in case of an outcome which does not take their view on board'.

A further contribution dedicated primarily to the use of identity by national courts is the one by Mattias Wendel who focuses on the case of the German Federal Constitutional Court. He distinguishes between preventive and defensive identity review, that is: review that intervenes *ex ante*, before a Treaty is adopted, and review *ex post*, after it has already entered into force. He shows how the Constitutional Court has created a 'fog of identity' by signaling that the German constitutional identity sets some limits to European integration without, however, clearly defining those limits. As a consequence of this, legal uncertainty exists, especially in the field of the Economic and Monetary Union, and Germany's participation in the EU is constrained as a result of this. He also underlines recent developments in the Constitutional Court's case law in the area of fundamental rights in which it has accepted that the EU Charter may be relied upon directly 'to

the extent that secondary EU law does not leave discretion'. This, according to Wendel, could 'reduce the (perceived) need for the FCC to conduct defensive identity reviews'. As a second step, the Constitutional Court, or ordinary courts on its advice, could make a preliminary reference if unclarified issues remained, and, in so doing, the Constitutional Court could 'take the opportunity to help shape the interpretation of EU fundamental rights through its first word on the subject and on the basis of a long tradition of fundamental rights case law'. Only if this preliminary reference dialogue fails could the Constitutional Court legitimately exert its defensive identity control.

After these three complementary analyses of the practice of a series of national constitutional courts, the remaining articles focus instead on the interpretation provided by the Court of Justice so far.

Monica Claes revisits the well-known question of how to deal with divergences between European and national protection of fundamental rights. This question, which first emerged in the 1970s, is nowadays increasingly framed in terms of national or constitutional identity. Article 4(2) TEU, in fact, does not refer to fundamental rights as a component of constitutional identity, and the Court of Justice tends to steer clear from dealing with fundamental rights questions in the language of national constitutional identity. In contrast, the constitutional courts in a number of countries have included the protection of rights in their own concepts of constitutional identity, and the Court of Justice cannot altogether ignore this. Claes notes that EU law offers a number of ways in which diversity on fundamental rights can be accommodated, and recommends the Court of Justice to relax its insistence on the uniform application of EU law in this domain, especially when the Member States seek to achieve a higher level of protection for commonly recognized fundamental rights.

Diane Fromage focuses on the reference to the local and regional dimension newly added to the 'identity clause' by the Lisbon Treaty. She asks what the origin of this new provision is and how it has fared over the past decade. She argues that the mention of sub-national entities is to be viewed as the mere acknowledgement of their existence as part of the institutional structures of the Member States which, as part of their constitutional identity and in the name of Member States' institutional autonomy, are to be protected. No specific rights or duties may, however, be inferred from this specific mention which should be interpreted against the background of the Treaties having ceased to suffer from 'regional and constitutional blindness'. She concludes that this evolution has resulted in an unsatisfactory state of ambivalence and ambiguity towards regional (and national) entities within the EU legal framework, a situation that requires urgent clarification.

Matteo Bonelli firmly rejects the idea that the primacy of EU law has been modified by the identity clause, and he examines whether and how the identity

clause impacts on the division of competences between the EU and its Member States. In particular, Bonelli asks whether the identity clause has served 'to limit the reach of Union law in national legal orders'. He focuses on three areas closely linked to national identity (religion, family and nationality) in which the EU does not have law-making competences, and which national courts have sought to exclude from the scope of EU law. He shows how the Court of Justice has, rightfully in his view, refused this interpretation for it would undermine basic EU principles such as primacy and the effectiveness of EU law. Nonetheless, such a development, he argues, does not necessarily lead to a restriction of national autonomy or diversity as it also provides a means to 'influence the concrete interpretation and application of EU law in a specific case and puts limits to the scope of EU intervention, guaranteeing the preservation of domestic choices and preferences'. This is possible in 'smaller identity claims' where the EU may decide to accept diversity, whereas '"big" identity claims' should be best framed in terms of 'common values' claims, as also argued by L. D. Spieker.[34] Bonelli concludes by calling the Court of Justice to clarify its approach.

Bruno de Witte offers a critical view of the use made of the identity clause in recent years, arguing that it has been excessive. For this reason, he argues in favour of limiting the scope of this clause to the constitutional *structures* of the Member States only, as, in fact, the text of Article 4(2) TEU says, and he calls on the Court to adopt this strict interpretation. This restrictive use of the identity clause is also justified by the existence of other Treaty provisions that allow for the protection of national diversity and constitutional values.

Finally, François-Xavier Millet underlines the paradox that stems from the fact that, on the one hand, the Court of Justice increasingly reviews cases involving Article 4(2) TEU whilst, on the other, also unequivocally reaffirming the primacy of EU law. He argues that this seemingly contradictory finding is actually not a source of conflict because so far, none of the cases have concerned 'hard constitutional conflicts' between EU law and a national constitutional identity. In each case, the EU law provision at stake allowed for sufficient margin of interpretation to accommodate the specificities of the Member State's national identity. He argues that 'Article 4(2) TEU has not been recognized any autonomous value for now [that is, c]ases involving that provision have not been handled very differently by the Court than cases involving derogations to free movement or other types of exceptions to EU rules provided for in the secondary law'. On this basis, François-Xavier Millet posits that in the (limited) instances in which true

[34] Luke Dimitrios Spieker, *Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi Between the Court of Justice and National Constitutional Courts*, 57 Common Mkt. L. Rev. 361–398 (2020).

claims on the ground of national constitutional identities could be made, the Court of Justice should accept those and therefore accept a derogation to the uniform application of EU law, and he discusses how these genuine claims should be distinguished from abusive ones.

In his concluding remarks, Leonard Besselink offers general reflections. In particular, he seeks to define why the confusion that surrounds the concept of constitutional identity endures, and why it is that this concept is subject to so much controversy. In doing so, he defines what the scopes of identity are and posits for instance that multiple and mixed identities (as opposed to exclusive identities) are the norm. He also examines what meaning may be given to the 'constitutional structures' Article 4(2) TEU refers to, and finds that 'national identity' and 'constitutional structures' should not be strictly separated, and that the focus may not only be placed on the 'structures' because '[c]omparative constitutional law suggests that specific elements and features of a member state constitution can only be understood in terms of the specificities of that member state's history'. He argues in favour of a broader interpretation of the political and constitutional structures referred to in Article 4(2) TEU that not only encompasses institutional aspects, but also sociocultural phenomena, fundamental rights and broader conceptions of the rule of law. He concludes by affirming that the lack of clarity that has surrounded the concept of identity is likely to remain, but that this is not necessarily problematic.

4 THE WAY FORWARD

The overall picture that emerges from the contributions to this special issue points to a still limited use by the Court of Justice of the identity clause. The Court seems to be reluctant to fully resort to this principle and to fully define it. It has actually dismissed some of the references to it made by national courts and governments, or by its own Advocates-General. What is clear nonetheless is that the identity clause may not be used to refuse the primacy of EU law, nor to carve out certain specific policy fields which would be within the Member States' exclusive competence and be shielded from any influence of EU law. However, as argued by Matteo Bonelli, in those areas in which the EU has no competence, national demands for accommodation have a stronger standing. Furthermore, the specific reference to the regional and local dimension in the identity clause has not had major consequences. It should rather be viewed as the explicit recognition of the principle of national autonomy that has always guided the process of European integration. This explicit recognition has formally ended the EU's 'constitutional blindness' to national internal structures.

National courts have, on their part, embraced the idea of identity, oftentimes as a means to defend national specificities which they define (or better said: which they *discover*) as needs arise. This phenomenon is most acutely visible in Germany and has resulted in the existence of what Mattias Wendel qualifies as a 'fog of identity' which even influences the position of German representatives in the EU's political institutions: the mere threat of a potential backlash in Karlsruhe discourages them from agreeing to certain measures at the European level. But also other courts, such as the Hungarian one, have, as evidenced by Pietro Faraguna and Giuseppe Martinico, unduly relied on their country's national identity to try to resist the obligations deriving from membership to the EU. To counter this trend, Pietro Faraguna proposes to 'go back to the Treaties' where, in his view, 'the meaning of the identity clause seems to be much more narrowly tailored than most of the interpretations recently adopted by scholars and national constitutional courts'. He also makes the claim that like the EU's fundamental values contained in Article 2 TEU, the principle of constitutional identity included in Article 4(2) TEU is a fundamental principle of the EU legal order. As such, both principles have the same standing, and must be interpreted harmoniously. The content of the constitutional identities covered by Article 4(2) would then be limited to those features that are not common to the other Member States and, hence, are not part of the common constitutional traditions laid down in Article 2.

It thus results from the examination of the use and the interpretation made of the concept of 'national constitutional identity' during the first decade after the entry into force of the Lisbon Treaty that its definition remains unsettled, despite the fact that clarification would most certainly be welcome to avoid future abuses, or at least to prevent false expectations.

From a European perspective, the identity clause has (fortunately) not 'provide [d] a perspective for overcoming the idea of absolute primacy of EU law and the underlying assumption of a hierarchical model for understanding the relationship between EU law and domestic constitutional law', as some authors had anticipated a decade ago.[35] However, whereas it had been noted shortly after the entry into force of the Lisbon Treaty that 'the danger of constitutional cacophony in relation to national identity ha[d] not materialized [and that, w]hen looking at the valued protected by constitutional limits, the jurisprudence of domestic constitutional courts display[ed] considerable convergence',[36] the articles included in this special issue show that cacophony has since been heard indeed. National courts have provided their own definitions of this concept on which they have increasingly and often abusively relied, for example to pursue illiberal objectives in the Hungarian case.

[35] von Bogdandy & Schill, *supra* n. 11, at 1419.
[36] *Ibid*., at 1435.

As argued by some of the contributions to this special issue, Article 4(2) TEU may legitimately be understood as only covering the *constitutional structures* of the Member States and thus as only encompassing issues such as the form of government and of territorial organization. Other aspects of the diversity in Member States' identities related to, for instance, cultural or religious traditions, would, by contrast, be covered and protected by other Treaty provisions.

However, most scholars, and also the national and European courts, seem to support a broader interpretation of the identity clause, one that includes elements that are not related to institutional features only. Whilst in some cases, such as the Hungarian one, abusive conducts by constitutional courts are evident, once a broader definition of the concept of constitutional identity is deemed acceptable, it becomes admittedly an impossible task to try and define a single concept.

Considering that the interpretation of constitutions by national constitutional courts evolves over time, and that constitutions may be subject to reforms, the content of the national constitutional identities the EU has to respect may only be defined by constitutional courts, and is bound to evolve over time. As shown by practice over the past ten years, and in particular by relevant case-law, it is only by means of dialogue between European and national judges that the proper role of Article 4(2) can be shaped on a case-by-case basis, and it is only the Court of Justice that can have the final say. It has thus been mostly by means of judicial dialogue that the boundaries of this concept have been drawn, but in view of the wider implications it has in the relationship between the EU and its Member States, and for the functioning of the EU in general, this responsibility cannot, and should not, fall on courts alone. Member States pleading before the Court of Justice may also contribute to this endeavour.