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The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case

By Monica Claes & Jan-Herman Reestman*

Abstract

This contribution revisits the *Bundesverfassungsgericht's* order for reference in the *Gauweiler* case and focuses on two aspects of that order that until now have not received much scholarly attention. The first concerns the German federal constitutional court's dissociation of constitutional identity review under the German Basic Law from national identity review under Article 4(2) TEU. While the decision on the Lisbon Treaty had suggested that the two go "hand in hand", the *Bundesverfassungsgericht* now emphasizes the "fundamental" difference between the concept of national identity under Article 4(2) TEU on the one hand and the German concept of constitutional identity on the other. The second element is the German federal constitutional court's contention that its approach to *ultra vires* and constitutional identity review can also be found in the constitutional law of many other member states. Yet, careful analysis demonstrates that while there does indeed seem to be a trend in that direction, and several elements of the German approach can also be found in other countries, very few national courts are as adamant as the *Bundesverfassungsgericht*, and only a handful have developed their position with the same level of detail and ardor.

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A. Introduction

In its *Gauweiler* reference for a preliminary ruling, the *Bundesverfassungsgericht* (German Federal Constitutional Court) seemed to dare the Court of Justice of European Union. Even if the ECJ would consider the OMT decision valid under EU law, this would leave unaffected the power of the *Bundesverfassungsgericht* to review whether it was *ultra vires* and/or violated Germany's constitutional identity under the German Basic Law. Both courts finally seemed to be on collision course, as had been time and again predicted since *Solange*, *Maastricht* and *Honeywell*. Each time, the court was all barks and no bite, or to put it differently — the courts chose to avert the conflict. In its decision in *Gauweiler* the ECJ chose not to pick up the gauntlet thrown by the *Bundesverfassungsgericht*. In a sober decision, the ECJ resisted the temptation to restate its classic claims regarding the autonomy and the primacy of EU law, and its exclusive jurisdiction to rule on the validity of EU law. Instead, the ECJ relied almost entirely on the force of its substantive arguments that the OMT decision of the European Central Bank falls within the Bank's mandate and is not *ultra vires*. It only permitted itself to remark, almost in passing, that

it is settled case-law of the Court that a judgment in which it gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings.¹

The ball is now clearly in the *Bundesverfassungsgericht's* court.

In this contribution we will not focus on the merits of the ECJ's decision in *Gauweiler*. Instead, we revisit the *Bundesverfassungsgericht's* order for reference in the case² and focus on two aspects of the order that until now have not received much scholarly attention. The first concerns the German federal constitutional court's dissociation of constitutional identity review under the German Basic Law from national identity review under Article 4(2) TEU. While the decision on the Lisbon Treaty had suggested that the two go "hand in hand", the *Bundesverfassungsgericht* now goes out of its way to emphasize the "fundamental" difference between the concept of national identity under Article 4(2) TEU on the one hand, and the German concept of constitutional identity on the other.

¹ Case C-62/14, *Peter Gauweiler and Others v. Deutscher Bundestag*, para. 16 (June 16, 2015), <http://curia.europa.eu/>.

² *Bundesverfassungsgericht* [BVerfG] [Federal Constitutional Court], Jan. 14, 2014, 2 BvR 2728/13, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/01/rs20140114_2bvr272813.html.

The second element is the German federal constitutional court's contention that its approach to *ultra vires* and constitutional identity review can also be found in the constitutional law of many other member states. While admitting that variations exist concerning the absolute or qualified nature of these constitutional obstacles, it made reference to the constitutional case law of ten other member states — Denmark, Estonia, France, Ireland, Italy, Latvia, Poland, Sweden,³ Spain and the Czech Republic — suggesting that there is a common approach to the issue. Yet, careful analysis demonstrates that while there does indeed seem to be a trend in that direction, and several elements of the German approach can also be found in other countries, very few national courts are as adamant as the *Bundesverfassungsgericht*, and only a handful have developed their position with the same level of detail and ardor.

The structure of this article is as follows. As we set out to compare the position of the *Bundesverfassungsgericht* on *ultra vires* and constitutional identity review with that of the ECJ on the identity clause in Article 4(2) TEU and with the jurisprudence of other national (constitutional or highest) courts, the relevant case law of *Bundesverfassungsgericht* will first be sketched, as point of comparison (section II). We then compare the German concept of *Verfassungsidetitat* with the EU concept of national identity as set out in Article 4(2) TEU and as interpreted by the ECJ (section III). In section IV, we test the claim of the *Bundesverfassungsgericht* that its approach to the protection of German constitutional identity and of the limits of the transfer of sovereign powers to the European Union "can also be found, with modifications depending on the existence or non-existence of unamendable elements in the respective national constitutions, in the constitutional law of many other Member States of the European Union". We conclude with an appreciation of the ECJ's decision not to take up the gauntlet in *Gauweiler*.

B. German Constitutional Identity

I. The Emergence of the Notion

While the ECJ in its judgment in the *Gauweiler* case is almost completely silent on the *Bundesverfassungsgericht's* claim to have the right and even the duty to submit EU acts to *ultra vires* and constitutional identity review, Advocate-General Cruz Villalon did not miss the opportunity to react to it. He noted that the common constitutional traditions of the member states are also foundational for the EU legal order and suggested that

...The Union has thus acquired the character, not just of a community governed by the rule of law, but also of

³ For Sweden, the reference is not to the constitutional case law, but to the Constitution itself. Indeed, the constitutional provision referred to (Article 6 of Chapter 10 of the Swedish *Instrument of Government*) is new and has not yet given rise to constitutional case law, which is not surprising given the Swedish tradition of not having these issues decided by the courts.

a ‘community imbued with a constitutional culture.’⁴ That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the member states.⁵

The passage reveals that the AG reasoned on the basis of a notion of “constitutional identity” which is not that of the *Bundesverfassungsgericht*. Key to understanding the German concept of “*Verfassungsidentität*” or “*Identität der Verfassung*” (constitutional identity or identity of the constitution) is the distinction which is best known in French terms between the “*pouvoir constituant originaire*” (original constituent power) and the “*pouvoir constituant dérivé*” (or *institué*; derived – or constituted – constituent power). The *Bundesverfassungsgericht* reads this distinction,⁶ as positive law into the German Basic Law.⁷ The original constituent power, the “*verfassungsgebenden Gewalt*”, which exists

⁴ With a touch of malignance the AG here makes reference to Andreas Voßkuhle, *DER EUROPÄISCHE VERFASSUNGSGERICHTSVERBUND 22* (TranState Working Papers No.16, Staatlichkeit im Wandel – Transformations of the State, Bremen, 2009) (citing Peter Häberle & Markus Kotzur, *EUROPÄISCHE VERFASSUNGSLEHRE* 478 (6th ed. 2009)).

⁵ Opinion of Advocate General Cruz Villalón at para. 61, Case C-62/14, *Gauweiler and Others v. Deutscher Bundestag* (Jan. 14, 2015), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=161370&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=>.

⁶ The distinction goes back to the French revolution and has its roots in the Middle-Ages. See Martin Loughlin, *The Concept of Constituent Power*, 13 *EUR. J. POL. THEORY* 218, 221 (2014). In 1789, Emmanuel Josef Sieyès presented the distinction between “*pouvoir constituant*” and “*pouvoirs constitués*” in his famous *QU’EST CE QUE LE TIERS ETAT?*; in his thinking, the distinction encompassed that between “*pouvoir constituant originaire*” and “*pouvoir constituant institué*,” see Alain Laquière, *La réception de Sieyès par la doctrine publiciste française du XIXème et du XXème siècles*, 6 *HISTORIA CONSTITUCIONAL (REVISTA ELECTRONICA)* 229, 256 (2005). The distinction is an offshoot of social contract theories; Jürgen Habermas, *Zur Prinzipienkonkurrenz von Bürgergleichheit und Staatgleichheit im supranationalen Gemeinwesen. Eine Notiz aus Anlass der Frage nach der Legitimität der ungleichen Repräsentation der Bürger im Europäischen Parlament*, 53 *DER STAAT* 167, 180–81 (2014).

⁷ On the reception of the distinction in German scholarship and case-law, see for instance Ingolf Pernice, *Carl Schmitt, Rudolf Smend und die europäische Integration*, 120 *ARCHIV DES ÖFFENTLICHEN RECHTS (AÖR)* 100 (1995); Karlheinz Röde, *VERFASSUNGSIDENTITÄT UND EWIGKEITSGARANTIE. ANMERKUNGEN ZU EINEM MYTHOS DER DEUTSCHEN STAATSRICHTSLEHRE* (2012).

prior to the constitution, is the author of the constitution, the constitution-making power. The German people (“Deutsche Volk”) are designated as such in the preamble of the German constitution.⁸ The derived constituent power is the power that is endowed by the constitution to amend it. This is the parliamentary constitutional legislature, the “*verfassungsändernden Gesetzgeber*”, the *Bundestag* and the *Bundesrat* acting together with a qualified majority of two thirds of the votes (Article 79 (2)GG). This leads to a second distinction between amending the constitution on the one hand and changing the basic framework or the fundamental principles of the constitution on the other. The competence of the parliamentary constitutional legislature to amend the constitution is limited and cannot infringe or change the core of the fundamental constitutional principles, the *Verfassungsidetität*. This would amount to enacting a new constitution, which is the exclusive prerogative of the original constituent power, the people.⁹ On the most fundamental level, the protection of Germany’s constitutional identity amounts to the protection of the constituent power of the German people and everything that it entails in terms of self-determination, sovereignty and statehood.¹⁰

The fundamental principles which the parliamentary constitutional legislature has to respect are those declared unamendable by the “*Ewigkeitsklausel*” (eternity clause) of Article 79(3) GG: the principles of human dignity and fundamental rights protection, democracy, rule of law, the social state and the federal state.¹¹ The *Bundesverfassungsgericht* requires respect for these principles not only in case of amendment of the German constitution, but also when competences are transferred to the EU: The identity of the (German) constitution is “*unübertragbar*” and “*integrationsfest*”.¹² The consequence is that until the German people as the original holder of sovereignty decides otherwise, Germany may not become part of a federal European state and must remain a democratic, rule of law based, fundamental rights protecting, social and federal state in its own right.¹³

⁸ “(V)on dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen, hat sich das deutsche Volk kraft seiner verfassungsgebenden Gewalt dieses Grundgesetz gegeben.” See also Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 20, 2009, Case No. 2 BvE 2/08, para. 216, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

⁹ BVerfG, Case No. 2 BvE 2/08 at paras. 217–18.

¹⁰ Perhaps even the *pouvoir constituant originaire* is bound by the principles of human dignity, freedom and equality, due to their “universal nature.” BVerfG, Case No. 2 BvE 2/08 at para. 217.

¹¹ *Id.*

¹² *Id.* at para. 235.

¹³ *Id.* at para. 216. The interpretation that Germany’s current constitutional settlement prohibits Germany to abandon its sovereign statehood is disputed, inter alia on the basis of the statement in the German constitution’s

The use of the concept constitutional identity by the German court can be traced back to one of its earliest decisions in 1951.¹⁴ It was first developed in the context of EU integration in the famous 1974 *Solange I*-judgment. At that time the concept was mainly used to denounce rule of law and democratic deficiencies in the EU and to promote the “strukturelle Kongruenz” (structural equivalence) between the EU and the German state. Constitutional identity presented a limit to the constitutional changes that a transfer of powers on the basis of Article 24 of the Basic Law permitted.¹⁵ Fundamental rights formed part of that immutable constitutional identity. As a consequence, as long as the EU had no adequate fundamental rights protection, the *Bundesverfassungsgericht* would review the compatibility of secondary EU law with German fundamental rights. Both branches of the case-law were codified in 1992, at the occasion of the approval of the Treaty of Maastricht, in Article 23(1) GG. The first sentence of that section, the so called “struktursicherungsklausel,” requires that the EU is built on the same principles as the German state; the third sentence states that Article 79(3) needs to be respected when establishing the EU or changing its foundations substantively affects the German Basic Law.

Although the term “constitutional identity” was absent from the *Maastricht-Urteil*, the underlying idea was implied.¹⁶ What was missing in *Maastricht* when compared to *Lisbon* was the notion of constitutional identity review, as the focus then was completely on *ultra vires* review. In the *Lissabon-Urteil* the notion of constitutional identity took center stage, mostly as a limit to further integration and a standard for review of secondary EU law. As such it has subsequently been further developed, especially in the field of the Economic and Monetary Union, with the decisions on the Greece and Euro rescue packages and on the ESM-Treaty and the Fiscal Compact.¹⁷

preamble that the German people wants to promote world peace as an “equal partner in a united Europe,” see Pernice, *supra* note 7, at 116.

¹⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 23, 1951, 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 14, 32, 50; see also Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 24–25.

¹⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 29 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271, 279 [hereinafter *Solange I*]; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 22, 1986, 73 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 339, 375–76 [hereinafter *Solange II*].

¹⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Feb. 7, 1992, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155, 171–72, 181 [hereinafter *Maastricht Decision*].

¹⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Sept. 7, 2011, Case No. 2 BvR 987/10, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/09/rs20110907_2bvr098710en.html; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Sept. 12, 2012, Case No. 2 BvR 1390/12, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html. On the development of the concept in the BVerfG’s case-law, see Christian Tomuschat, *The Defence of National Identity by the German Constitutional Court*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION

*II. Constitutional Identity in the Bundesverfassungsgericht's Case Law*¹⁸

It should be noted that the case-law on constitutional identity is not, and is not meant to be, an academic treatise.¹⁹ The judgments give only a fragmented picture of that identity: Here and there some elements of it lighten up, but much remains in the dark. Only in rare instances does the *Bundesverfassungsgericht* define specific 'integration proof' elements of German constitutional identity. The court's reasoning is shaped by the arguments put forward by the complainants, the instruments under review and the context in which the decision is made. So far, no instrument has been found to violate German constitutional identity. Undoubtedly, the court deliberately avoids getting too specific when it comes to future consequences of its case-law, probably in order to have a free hand in later cases. Discussing the scope and implications of German constitutional identity therefore is and remains a delicate matter. Even in the area of the economic monetary union, where the case-law is the most elaborate, it remains hard to predict where the limits to further integration really lie.

In general, respect for German constitutional identity requires that Germany remains a sovereign state under international law and a viable and independent political community.²⁰

1. A Sovereign State Under International Law

German constitutional identity demands first of all that Germany remains a sovereign state under international law.²¹ The required continued existence of Germany's sovereign statehood implies deference for each of the three defining elements of a state — territory, people and the authority exercised upon these.²² Respect for German state territory and people for instance requires that the EU only exercises authority in Germany on the basis

205 (Alejandro Saiz Arnaiz & Carina Alcobero Llivina eds., 2013); Franz Mayer, L'identité constitutionnelle dans la jurisprudence constitutionnelle allemande, in *L'IDENTITÉ CONSTITUTIONNELLE SAISIE PAR LES JUGES EN EUROPE* 62 (Laurence Burgogue-Larsen ed., 2011).

¹⁸ See also Hèctor López Bofill, *What is not Constitutional Pluralism in the EU: National Constitutional Identity in the German Lisbon Judgment*, in *NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION* 221, 230–37 (Alejandro Saiz Arnaiz & Carina Alcobero Llivina eds., 2013); Stefan Theil, *What Red Lines, If Any, Do the Lisbon Judgments of European Constitutional Courts Draw for Future EU Integration?*, 15 *GERMAN L.J.* 600 (2014).

¹⁹ Jacques Ziller, *The German Constitutional Court's Friendliness towards European Law*, 16 *EUR. PUB. L.* 53, 69–70 (2010).

²⁰ López Bofill, *supra* note 18, at 221.

²¹ BVerfG, Case No. 2 BvE 2/08 at para. 216.

²² *Id.* at para. 298.

of the German act of approval of the EU treaties — and thus not on the basis of the autonomous legal order of the EU itself.²³ It also requires that the German “state people” is not dissolved into a “European people” with its own right of self-determination, which implies for instance that EU citizenship has to remain a status derived from member state nationality.²⁴

The consequences of the third criterion, authority, are manifold. It requires that Germany has the right to withdraw from the EU;²⁵ that Germany and the other member states remain the “Master(s) of the Treaties”;²⁶ that the competences of the EU have to be governed by the principle of conferred powers;²⁷ that the EU may not be given the *Kompetenz-Kompetenz*;²⁸ that the primacy of EU law in Germany is based on the national constitution, limited to *intra vires* acts and those which respect German constitutional identity;²⁹ and that the *Bundesverfassungsgericht* must be able to perform an *ultra vires* and an identity review of secondary EU law.³⁰

The *Bundesverfassungsgericht*'s competence to exercise fundamental rights review of secondary EU law is also an effect of the third criterion, even if it is currently no longer exercised — as stated in *Solange II* and *Bananas* and reaffirmed in *Lisbon*.³¹ Nevertheless, some of the “integration proof” particles of German constitutional identity which the court has identified in *Lisbon* and subsequent case-law concern fundamental rights. This begs the question of what the relationship is between the *Solange II/Bananas* case law on the one hand,³² and constitutional identity review *à la* Lisbon on the other, as the latter apparently can equally lead to fundamental rights review.³³

²³ *Id.* at paras. 240, 344–45.

²⁴ *Id.* at paras. 298, 346–50.

²⁵ *Id.* at paras. 329–30.

²⁶ *Id.* at paras. 231, 298.

²⁷ *Id.* at paras. 233–34, 300–03.

²⁸ *Id.* at paras. 233, 322–28.

²⁹ *Id.* at paras. 331–40.

³⁰ *Id.* at paras. 240–41, 33–40.

³¹ *Id.* at paras. 331–337.

³² *Solange II* at 339; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 7, 2000, Case No. 2 BvL 1/97, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/06/Is20000607_2bvl000197en.html [hereinafter *Bananas*].

³³ See Daniel Thym, *Europäische Integration im Schatten Souveräner Staatlichkeit. Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts*, 48 DER STAAT 559, 569 (2009) (including note 48); see also Hans-Georg

2. A Viable and Independent Political Community.

In addition to the preservation of German statehood, German constitutional identity demands that Germany remains a viable and independent political community. Here the democracy principle takes center stage. In order to prevent interference with the inviolable core of the right of German citizens to elect the *Bundestag* (Article 38 GG) and to legitimate and influence the exercise of public authority, transfers of competences to the EU must remain limited: The *Bundestag* needs to retain substantial budgetary and legislative competences of its own in order for Germany to be able to “democratically shape itself”.³⁴ In the *Lisbon* judgment, the *Bundesverfassungsgericht* identified five areas of competences which are “(p)articularly sensitive” in this respect. These areas of competences relate to substantive and formal criminal law, the use of force within Germany and the employment of the German military forces abroad, the budget, social policy, and “decisions which are of particular importance culturally, for instance as regards family law, the school and education system and dealing with religious communities”.³⁵

This part of the case law is tainted by a fundamental ambiguity. On the one hand the required respect for Germany’s sovereignty does not seem to imply that certain legislative competences are excluded from transfer to the EU from the outset: Even competences which belong to the nucleus of stately competences can in principle be transferred.³⁶ Moreover, the court suggests that if the EU actually becomes more democratic, especially by the development of a “europäische Öffentlichkeit” (European public space), more competences may be transferred, and the need for a restrictive interpretation of competences already transferred diminishes.³⁷ To this extent, the democracy principle sets limits to the transfer of competences to the EU which are not absolute and which do not ensue from German constitutional identity.³⁸

Dederer, *Die Grenzen des Vorrangs des Unionsrecht – Zur Vereinheitlichung von Grundrechts-, Ultra-vires- und Identitätskontrolle*, 69 JURISTENZEITUNG (JZ) 313, 317 (2014), (opining that the BVerfG should abandon *Solange II* and should return to “zur einzelfallbezogenen Grundrechtskontrolle” because fundamental rights review is only a specific expression of identity review, which itself is “einzelfallbezogen”).

³⁴ *Maastricht Decision* at 172, 186; BVerfG, Case No. 2 BvE 2/08 at paras. 175, 249, 252.

³⁵ BVerfG, Case No. 2 BvE 2/08 at para. 252.

³⁶ *Id.* at para. 248.

³⁷ *Id.* at paras. 251, 261, 262, 266.

³⁸ *Id.* at para. 247. Dieter Grimm, *Das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union. Zum Lissabon-Urteil des Bundesverfassungsgerichts*, 48 DER STAAT 475, 490 (2009) (pointing out that the BVerfG has not attached legal effects to violations of the democracy principle which are not simultaneously also violations of German constitutional identity).

On the other hand, the *Bundesverfassungsgericht* emphasizes that Germany must retain “sufficient space (...) for the political formation of the economic, cultural and social living conditions”.³⁹ This condition is fulfilled if the *Bundestag* in the relevant fields has “responsibilities and competences of substantial political importance” of its own, or if the German government, under the political control of the *Bundestag*, is “in a position to exert a decisive influence on European decision-making procedures”.⁴⁰ Article 79(3) GG would be violated “if the extent of competences, the political freedom of action and the degree of independent opinion-formation on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state.” This would be the case if for example “the legislative competences, essential for democratic self-determination, were exercised *mainly* at Union level.”⁴¹ To the extent that the German political institutions should retain substantial legislative and political power of their own, the five areas of competences are linked to German constitutional identity; in this perspective the areas of competences do refer to the need of what has been called a “democratic reserve competence” for Germany.⁴²

In general it is impossible to state where within these five areas German constitutional identity begins and where it ends: As we have seen, much depends on the volume of competences transferred, the way they are exercised on the EU level and the democratic state of the Union. Therefore, this part of the jurisprudence provides a very flexible — and slippery — standard:⁴³ it does not refer to “a catalogue of non-transferrable powers”, as one of the court’s brethren thought,⁴⁴ but to competences which are constitutional identity *prone*.⁴⁵ At the same time the court here and there positively identifies specific elements of German constitutional identity which are integration *proof*. For instance, the principle that the deployment of the German armed forces is not permissible without approval of the *Bundestag* is “*integrationsfest*”,⁴⁶ as is the *nullum crimen sine culpa*

³⁹ BVerfG, Case No. 2 BvE 2/08 at para. 249; *cf. Maastricht Decision* at 186 (“Aus alledem folgt, daß dem Deutschen Bundestag Aufgaben und Befugnisse von substantiellem Gewicht verbleiben müssen.”).

⁴⁰ BVerfG, Case No. 2 BvE 2/08 at para. 246. The statement concerning the German government only adds to the confusion. It makes one wonder whether all legislative competences may be transferred as long the EU Council of Ministers decides unanimously.

⁴¹ BVerfG, Case No. 2 BvE 2/08 at para. 264 (emphasis added); *see also id.* at para. 175.

⁴² Thym, *supra* note 33, at 569. *See also Maastricht Decision* at 181.

⁴³ Christoph Ohler, *Herrschaft, Legitimation und Recht in der Europäische Union – Anmerkungen zum Lisbon-Urteil des BVerfG*, 135 AÖR 153, 175 (2010).

⁴⁴ *Ústavní Soud České republiky* (Czech constitutional court), judgment of 3 November 2009 - Pl. ÚS 29/09: Treaty of Lisbon II, para. 110-111; *see also* Jo Eric Khushal Murkens, *Identity trumps Integration. The Lisbon Treaty in the German Federal Constitutional Court*, 48 DER STAAT 517, 521 (2009); *supra* Theil, *supra* note 18, at 60–10.

⁴⁵ Grimm, *supra* note 38, at 490–91.

⁴⁶ BVerfG, Case No. 2 BvE 2/08 at para. 255; for the exception to this rule, *see id.* at para. 383.

principle⁴⁷ and the principle that the “citizens’ enjoyment of freedom may not be totally recorded and registered”.⁴⁸

The right of the *Bundestag* to decide freely on the German budget is to large extent also an integration proof element of German constitutional identity.⁴⁹ Due to the euro crisis, the measures adopted to combat it and the complaints filed against these measures, this limb of the case-law, to which we now turn, is the most developed. As we will see, the *Gauweiler* reference is a direct off-spring of this case-law.

3. Budgetary Powers as Elements of German Constitutional Identity.

The *Bundestag* cannot abandon its “*haushaltpolitische Gesamtverantwortung*”, its overall budgetary responsibility, and must remain “*Herr seiner Entschlüsse*”, master of its own decisions, when it comes to the German budget. A transfer of the right to adopt the budget and to control its implementation by the government would violate the principle of democracy and the right to elect the German *Bundestag* in its essential content.⁵⁰

Therefore, the determination of the type and amount of the taxes cannot be supra-nationalized, at least not to a considerable extent, and the *Bundestag* must be able to decide freely, or to the utmost with limited interference of EU institutions or other member states, on state expenditure.⁵¹ That is why Germany may not agree to intergovernmental or supranational instruments which amount to accepting liability for decisions of other states if they entail consequences which are difficult to calculate and which might practically lead to the depletion of German budgetary autonomy for a considerable period of time.⁵²

⁴⁷ *Id.* at para. 364.

⁴⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Dec. 8, 2010, Case No. 1 BvR 256/08, para. 218, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/12/rs20101208_1bvr025608.html.

⁴⁹ BVerfG, Case No. 2 BvE 2/08 at para. 256.

⁵⁰ BVerfG, Case No. 2 BvR 1390/12 at paras. 104–08 (208–13 in the English translation); this decision of 12 September 2012 concerns the applications for the issue of a temporary injunction. For the final decision of 18 March 2014, see ECLI:DE:BVerfG:2014:rs20140318.2bvr139012, para. 164.

⁵¹ BVerfG, Case No. 2 BvE 2/08 at para. 256.

⁵² BVerfG, Case No. 2 BvR 1390/12 at paras. 109–13 (213–17 in the English translation); ECLI:DE:BVerfG:2014:rs20140318.2bvr139012, paras. 165–66.

In this light, the full-fledged introduction of Eurobonds may be considered to be anathema.⁵³ This does not imply that all interference of EU institutions or other member states with the German budget is taboo. The *Bundesverfassungsgericht* has considered the balanced budget requirements in the Fiscal Compact to be acceptable because in the longer run they protect the budgetary prerogatives of the *Bundestag* and its successors, and thereby German democracy.⁵⁴ Moreover, the German parliament may in a spirit of solidarity agree to certain financial aid arrangements such as the European Stability Mechanism, even if the financial consequences might be of structural importance for the German budget.⁵⁵ Yet, the financial engagements thus undertaken must be quantitatively limited and they must leave the overall budgetary responsibility of the *Bundestag* intact. In addition, the *Bundestag* must be able to approve each large-scale aid measure and to influence the conditions and the administration of the aid, and it must be fully informed.⁵⁶

Directly connected to the safeguarding of *Bundestag's* overall budgetary responsibility is the requirement that the EMU is and must remain a "stability community". The current design of the EMU is to a large extent dictated by German constitutional law in general and German constitutional identity in particular, and forms an essential condition for Germany's participation in it. The independence of the ECB, the objective of price stability, the prohibition of monetary financing, the "no-bail out" clause and the obligation of a sustainable budget all protect the "*haushaltpolitische Gesamtverantwortung*" of the *Bundestag*. The EMU design is not immutable and may be changed to a certain extent. The *Bundesverfassungsgericht* accepted for instance the new Article 136(3) TFEU. Although the amendment puts the principle of the independence of the national budgets and that of the Eurozone states' reliance on the money markets for the financing of their debts into perspective, it does so only to a limited extent. Nevertheless, the court emphasized that the prohibition of monetary financing by the ECB, the ECB's autonomy and the requirement of budgetary discipline remain essential elements of the EMU.⁵⁷

⁵³ Sebastian Müller-Franken, *Eurobonds und Grundgesetz*, 67 JZ 219, 221–24 (2012); Christoph Gröpl, *Schritte zur Europäisierung des Haushaltsrechts*, 52 DER STAAT 1, 15 (2013).

⁵⁴ BVerfG, Case No. 2 BvR 1390/12 at paras. 110–14 (224–28 in the English translation); see also ECLI:DE:BVerfG:2014:rs20140318.2bvr139012, paras. 168–72; BVerfG, Case No. 2 BvR 1099/10 at para. 104.

⁵⁵ BVerfG, Case No. 2 BvR 1390/12 at para. 110 (214 in the English translation); see also BVerfG, Case No. 2 BvE 2/08 at para. 256.

⁵⁶ BVerfG, Case No. 2 BvR 1390/12 at para. 111 (215 in the English translation).

⁵⁷ *Id.* at paras. 116–17, 128–130 (220–21, 232–234 in the English translation); ECLI:DE:BVerfG:2014:rs20140318.2bvr139012, paras. 177–81.

4. *Ultra Vires* Review and Constitutional Identity Review and their Effects

The relationship between *ultra vires* and constitutional identity review and their potential effects can be analyzed from two perspectives —the German perspective and the EU perspective, which we will not address.⁵⁸

First, before the *Bundesverfassungsgericht* may declare an EU act *ultra vires*, the ECJ has to be given the opportunity to rule on the act's validity in preliminary ruling proceedings under Article 267 TFEU. The judgment of the ECJ binds the *Bundesverfassungsgericht* "in principle", but it cannot be excluded that an act which has been declared *intra vires* by the ECJ, such as the OMT decision of the ECB, is nevertheless subsequently considered *ultra vires* by the *Bundesverfassungsgericht*.⁵⁹

Second, while the *Bundesverfassungsgericht* in the *Lisbon*-judgment left the possibility open that not only *ultra vires*, but also *intra vires* secondary EU law could violate German constitutional identity,⁶⁰ the OMT-reference clearly places *ultra vires* acts and acts violating German constitutional identity in one, continuing line: Although not every secondary EU act which is *ultra vires* act also violates German constitutional identity, any act violating German constitutional identity seems to be for that matter *ultra vires*.⁶¹ Indeed, what the German parliament cannot amend, it cannot transfer to the EU. In other words, because German constitutional identity functions as a limit to the transfer of powers to the EU, any EU act violating German constitutional identity is necessarily *ultra vires*, as the power to infringe the constitutional identity cannot have been transferred.

⁵⁸ Franz C. Mayer, *Rebels without a cause? Zur OMT-Vorlage des Bundesverfassungsgericht*, 5 *EUROPARECHT* 473, 495–96 (2014).

⁵⁹ Bundesverfassungsgericht [BVerfG][Federal Constitutional Court], July 6, 2010, Case No. 2 BvR 2661/06, para. 60, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html [hereinafter Honeywell]; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 14, 2014, Case No. 2 BvR 2728/13, para. 24, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html.

⁶⁰ BVerfG, Case No. 2 BvE 2/08 at para. 339 ("[W]enn innerhalb oder außerhalb der übertragenen Hoheitsrechte diese mit Wirkung für Deutschland so ausgeübt werden, dass eine Verletzung der durch Art. 79 Abs. 3 GG unverfügbaren und auch durch das europäische Vertragsrecht, namentlich Art. 4 Abs. 2 Satz 1 EUV-Lisbon, geachteten Verfassungsidentität die Folge ist.").

⁶¹ BVerfG, Case No. 2 BvR 2728/13 at para. 25 ("Das ist nicht nur dann der Fall, wenn sich eigenmächtige Kompetenzerweiterungen auf Sachbereiche erstrecken, die zur Verfassungsidentität der Mitgliedstaaten rechnen oder besonders vom demokratisch diskursiven Prozess in den Mitgliedstaaten abhängen (...); allerdings wiegen hier Kompetenzüberschreitungen besonders schwer.").

Third, while the *Bundesverfassungsgericht's* assessment of the *ultra vires* character of an EU act requires a preliminary question to the ECJ, whose interpretation the German court follows in principle,⁶² and thus is determined in a "relationship of cooperation" between the courts, the assessment of whether an EU act violates the German constitutional identity is for the German court alone to decide.⁶³ Also, when it comes to the effects an important distinction should be made between acts which are only *ultra vires* and those that also violate German constitutional identity. In the first instance the effects of both are similar: The relevant act is inapplicable in Germany and all German institutions, including the *Bundesbank*, have to refrain from implementing or executing it.⁶⁴ Moreover, the German government and the *Bundestag* should actively strive for termination of the illegality for instance by persuading the relevant EU authorities to withdraw the relevant act or by promoting a Treaty amendment remedying the illegality.⁶⁵ Yet, while the German parliament may authorize a Treaty amendment to remedy an act that is only *ultra vires*, if need be with a qualified majority (Article 23(1), second and third sentence, GG), it could never agree to a Treaty amendment remedying an act violating German constitutional identity. That would require an amendment of the constitution to which only the original constituent power can consent, i.e. the German people.⁶⁶

Precisely what this popular consent would imply remains unclear. The current German Basic Law provides no means for the German people to directly express itself in a referendum. Article 146 GG, on the other hand, stipulates that "this Basic Law (*Grundgesetz*) loses its validity on the day on which a constitution (*Verfassung*) freely adopted by the German people takes effect." The *Bundesverfassungsgericht* has ruled that the relinquishment of German statehood would require the adoption of a new constitution under Article 146.⁶⁷ Perhaps in that situation such a new constitution does not necessarily have to be approved by the German people in a referendum; its adoption by a directly elected constitutional convention may also do.⁶⁸ Yet, it has also been suggested that in

⁶² *Honeywell* at para. 60.

⁶³ BVerfG, Case No. 2 BvR 2728/13 at para. 103.

⁶⁴ *Maastricht Decision* at 188; BVerfG, Case No. 2 BvR 2728/13 at paras. 27, 45. However, it is perhaps not excluded that German institutions apply of their own free will EU law which is declared *ultra vires* and which is not contrary to the *Grundgesetz*. Mayer, *supra* note 58, at 481.

⁶⁵ 2 BvR 2728/13 of 14 January 2014 (Gauweiler), para. 49.

⁶⁶ BVerfG, Case No. 2 BvE 2/08 at para. 179.

⁶⁷ *Id.*

⁶⁸ However a referendum might be politically unavoidable. Martin Nettesheim, *Wo "endet" das Grundgesetz? – Verfassungsgebung als grenzüberschreitender Prozess*, 51 DER STAAT 313, 316 (2012); Volker M. Haug, *Über Partizipation zu einer postgrundgesetzlichen Verfassung. Zum Potential des Art. 146 GG im Licht der europäischen Integration*, 138 AöR 435, 459–61 (2013).

case of the abandonment of statehood the adoption of a formally new constitution is not necessary and a referendum on the basis of a procedure inserted in the Basic Law by the derived constituent power would suffice.⁶⁹ Of course, it could be argued that if the proposal that Germany becomes a member of a European federal state is adopted by such a referendum, the *Grundgesetz* has become a “new constitution,” despite all appearances of continuity. Be that as it may, an issue that needs to be distinguished from the previous one is that arguably not every single violation of German constitutional identity implies the abandonment of statehood.⁷⁰ In case of an identity infringement short of such abandonment a referendum held on the aforementioned basis might *a fortiori* be an adequate way of redeeming the infringement.

C. National Constitutional Identity and Article 4(2) TEU

I. Introduction

In its order for reference in the *Gauweiler* case, the *Bundesverfassungsgericht* contended that the EU’s duty to respect national identity under Article 4(2) TEU differs from the duty of the German institutions under German constitutional law to protect German “constitutional identity” in three respects. The first is conceptual: Article 4(2) TEU is “based on a concept of national identity which does not correspond to the concept of constitutional identity within the meaning of Art. 79 sec. 3 GG but reaches far beyond”.⁷¹ The second concerns the intensity of the protection due: The duty to respect national identity under Article 4(2) is relative, as it may be balanced against “rights conferred by Union law”, while the duty of the German institutions to protect German constitutional identity is absolute and may “not be balanced against other legal interests”.⁷² And third, the protection of German constitutional identity is a task of the German court alone,⁷³ implying that the ECJ has no say in it.

The *Bundesverfassungsgericht*’s opinion that the concept of national identity in Article 4(2) “reaches far beyond” the concept of constitutional identity under German constitutional law is rather puzzling. Earlier, in its *Lisbon-Urteil*, the court had emphasized that the two duties go “hand in hand,” suggesting thus that the two duties run parallel and that the duty

⁶⁹ Grimm, *supra* note 38, at 490; Peter M. Huber, *The Federal Constitutional Court and European Integration*, 21 EUR. PUB. L. 83, 91 (2015). See also Haug, *supra* note 68, at 453 (opining that in such referendum the German “people” would not act as “pouvoir constituant”, but as “pouvoir constitué” and would therefore be bound by Art. 79(3) GG).

⁷⁰ Nettesheim, *supra* note 68, at 318–22.

⁷¹ BVerfG, Case No. 2 BvR 2728/13 at para. 29.

⁷² *Id.*

⁷³ *Id.*

imposed on the EU to respect the national identities of the member states by and large corresponds to duty the Basic Law imposes on German bodies to respect German constitutional identity.⁷⁴ This seems to suggest that the *Bundesverfassungsgericht* disapproves of the approach of the ECJ, or at the very least, that it now realizes that “national identity” as protected under Article 4(2) TEU is very different from constitutional identity as protected under Article 79 (3) of the Basic Law. The court suggests that compliance with the obligation under Article 4(2) TEU under the purview of the ECJ is one thing, but does not guarantee that national constitutional courts in the member states will consider this sufficient, and that they will accept that EU acts which according to the ECJ respect Article 4(2) TEU also respect the national (constitutional) identity as protected under national constitutional law. It is useful, therefore, to briefly return to the concept of “national identity” under Article 4 (2) TEU as interpreted by the ECJ.

II. Different Interpretations of National Identity Protection Under Article 4(2) TEU

The concept of “national identity” entered the stage of EU law in Article F(1) of the Maastricht Treaty.⁷⁵ The reference — which was not justiciable and served mainly symbolic (“expressivist”) and political functions — was to the national identities “of the Member States,” and was closely linked to their democratic system of government. Also, the identity that had to be respected was that of the member states, rather than of their peoples or citizens.⁷⁶ Therefore, what seemed to be aimed at here was the preservation of the member states as independent states and the confirmation that the Union would not transform itself into a federal United States of Europe absorbing the member states.⁷⁷ The provision was re-numbered and revised with the Treaty of Amsterdam and was detached from any reference to democratic principles.⁷⁸ An attempt in the Constitutional

⁷⁴ BVerfG, Case No. 2 BvE 2/08 at para. 240.

⁷⁵ “The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.”

⁷⁶ Monica Claes, *National Identity: Trump Card Or Up For Negotiation?*, in NATIONAL IDENTITY AND EUROPEAN INTEGRATION 116 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013).

⁷⁷ See also Opinion of Advocate General Poiras Madura at para. 31, Case C-213/07, *Michaniki AE v. Ethniko Symvoulío Radiotileorasis and Ypourgos Epokrateias* (Oct. 8, 2008), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=68940&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=76129>; Opinion of Advocate General Kokott at para. 51, *Joined Cases C-428/06 to C-343/06, Unión General de Trabajadores de La Rioja v. Juntas Generales del Territorio Histórico de Vizcaya and Others* (May 8, 2008), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=69673&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=76190>.

⁷⁸ Article 6(3) TEU read,

1. The 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. 2. The

Convention to carve out core areas of national sovereignty and essential state functions and list exclusive competences of the member states failed, and ultimately resulted in a much more sober Article 4(2) TEU in Lisbon, which reads in full:

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Perhaps, the addition of the phrase “inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government” lead the *Bundesverfassungsgericht* in its *Lisbon* decision to consider the duty under EU law to respect the national identities of the member states and the duty under the Basic Law to respect German constitutional identity going “hand in hand.” Indeed, the phrase is reminiscent of the idea, expressed in *Solange I* of “the basic structure of the Constitution, which forms the basis of its identity” as a barrier to EU integration, while in *Solange II*, it stated that Germany may not surrender the identity of the German constitutional order by “an infringement of its basic construction, of its constituent structures”.⁷⁹ The *travaux préparatoires* of the provision suggest that the terminological similarity (“fundamental structures” v. “basic construction” and “constituent structures”) is rather accidental,⁸⁰ but even so, it may have enticed the *Bundesverfassungsgericht* to read the phrase as a reference to German *Verfassungsidentität*: “the fundamental political and constitutional structures of sovereign Member States (...) are recognised by Article 4.2.”⁸¹ Several commentators have drawn similar conclusions; the identity clause in Article 4(2) has been

Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. 3. The Union shall respect the national identities of its Member States. 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

⁷⁹ *Solange II* at 375–76; *Solange I* at 279 *et seq.*.

⁸⁰ Barbara Guastafarro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, 31 Y.B. EUR. L. 263, 271 *et seq.* (2012); Carina Alcoberro Llivina, *Identity and Diversity in EU Law: Contextualising Article 4(2) TEU* 247 (2014) (unpublished doctoral thesis, Universitat Pompeu Fabra, Barcelona).

⁸¹ BVerfG, Case No. 2 BvE 2/08 at para. 240.

depicted as the *Europeanisation of the controlimiti* case law of the German constitutional court and of that of the Italian constitutional court.⁸²

Others have however proposed alternative readings of the identity clause. One of these is based on the finding that only some of the issues protected under German *Verfassungsidentität* find refuge in specific Treaty provisions, *inter alia* in Article 4(2) itself — internal and external security. This suggests that the national identity clause under Article 4(2) TEU has a more limited scope than German *Verfassungsidentität*. On this basis it has for instance been argued that Article 4(2) TEU distinguishes between constitutional identity and state identity. Under state identity the internal and external security competences and statehood would be protected,⁸³ according to some even better than constitutional identity.⁸⁴ In this line of thinking, and in contrast to German *Verfassungsidentität*, the national identity clause in Article 4(2) TEU would (only) refer to national constitutional provisions or principles which are “crucial and distinctive”, differentiating one particular member state from the others — and not to sovereignty, statehood and reserved competences.⁸⁵ In this interpretation there is, therefore, an important difference in the contents of German constitutional identity and that of the identity clause in Article 4(2). While *Verfassungsidentität* alludes to principles which are not only foundational for the national legal orders but also for the EU’s legal order (democracy, rule of law, solidarity etc., see Articles 2 and 3 TEU), this interpretation of 4(2) TEU touches on fundamental principles which are (more or less) specific to a particular national constitutional order: Only fundamental national constitutional provisions or principles which are not recognized as such in the EU’s legal order would be eligible for protection under Article 4(2) TEU.⁸⁶ This is also the meaning which is often attributed to the concept of *identité constitutionnelle de la France* (French constitutional identity) in the case-law of the *Conseil constitutionnel* and the *Conseil d’État*. Like *Verfassungsidentität*, French *identité constitutionnelle* functions as a limit to the applicability of secondary EU law, but its scope is arguably much more limited than that of its German counterpart.

⁸² Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identities Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1426 (2011); Giuseppe Martinico, *What lies behind Article 4(2) TEU?*, in NATIONAL IDENTITY AND EUROPEAN INTEGRATION 93, 96 (Alejandro Saiz Arnaiz & Carina Alcobarro Llivina eds., 2013). As is well known, the Italian constitutional court has stipulated repeatedly that EU must respect the “fundamental principles of our constitutional order.” Corte Costituzionale (Constitutional Court), 27 Dec. 1973, n. 183/1973 (Frontini); Corte Costituzionale (Constitutional Court), 8 June 1984, n. 170/84 (Granital).

⁸³ Ingolf Pernice, *Der Schutz nationaler Identität in der Europäischen Union*, 136 AÖR 185, 189–93 (2011); FRANÇOIS-XAVIER MILLET, L’UNION EUROPEENNE ET L’IDENTITE CONSTITUTIONNELLE DES ETATS-MEMBRES 175–78 (2013).

⁸⁴ MILLET, *supra* note 83, at 175–81.

⁸⁵ *Id.* at 71, 181.

⁸⁶ See also Julien Sterck, *Expressing sovereignty in the European Union: An Irish Perspective on Constitutional Identity* 20–21 (UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 3/2014).

III. The Case Law of the ECJ

Article 4(2) TEU has not yet played a prominent role in the case law of the ECJ. Only in a handful of cases has the ECJ dealt with a claim that a derogation from EU law is justified on grounds of the EU's duty to respect national identity. *Runevic-Vardyn and Wardyn* and *Las* concerned the protection of national languages, which was recognized as part of the national identity of the relevant states, and could justify a derogation from an obligation under free movement rules if proportionate;⁸⁷ *Ilonka Sayn-Wittgenstein* concerned the Austrian Law on the abolition of the nobility, which has constitutional status and was qualified as a reliance on public policy.⁸⁸

In *Digibet*, the Court made reference to the duty to respect national identities of the member states to confirm the existing principle often referred to as "procedural autonomy". When provisions of the Treaties or of regulations confer powers or impose obligations upon the member states for the purposes of the implementation of EU law, the question of how the exercise of such powers and the fulfilment of such obligations is entrusted to specific national bodies is solely a matter for the constitutional system of each State.⁸⁹

In several other cases, the Government or the referring court had claimed that national identity was at stake, but the ECJ did not pick up on it, and decided the case on other grounds.⁹⁰ In *Torresi*, the Court rejected a claim that EU secondary law was invalid for infringement of the national identity of Italy on factual grounds.⁹¹ There have also been

⁸⁷ Case C-391/09, *Runevic-Vardyn and Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, 2011 E.C.R. I-03787; Case C-202/11 *Anton Las v. PSA Antwerp NV*. (Apr. 16, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136301&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=76426>; Case C-473/93, *Comm'n v. Luxembourg*, 1996 E.C.R. I-3207 (pre-*Lisbon*).

⁸⁸ Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, 2010 E.C.R. I-13693.

⁸⁹ Case C-156/13, *Digibet Ltd. and Gert Albers v. Westdeutsche Lotterie GmbH & Co.* (June 12, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153584&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=76572>.

⁹⁰ Case C-51/08, *Comm'n v. Luxembourg*, 2011 E.C.R. I-4231 (a pre-*Lisbon* case, in which the Luxembourg government argued that the use of the Luxembourgish language was necessary in the performance of notarial activities, and that the nationality condition for the position of notary was intended to ensure respect for "the history, culture, tradition and national identity of Luxembourg" within the meaning of Article 6(3) EU); Case C-193/05 *Comm'n v. Luxembourg*, 2006 E.C.R. I-8673; Case C-364/10, *Hungary v. Slovakia* (Oct 16, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=128561&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=76647> (on Article 4(2) TEU as protecting the sovereignty of member states and carving out a EU-free space for member states).

⁹¹ *Joined Cases C-58/13 & C-59/13, Torresi and Torresi v. Consiglio dell'Ordine degli Avvocati di Macerata* (July 17, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=155111&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=76681>. In Case C-393/10, the Court rejected a claim based on national identity put

cases in which the Advocate General — typically with an academic interest — did frame the issue in terms of national identity, even if the argument had not been put forward by the Government or the referring court, but the Court did not follow its Advocate Generals.⁹² Finally, there is a number of landmark cases of EU law that have not been framed as “national identity” cases, but are today considered as prime examples of what is at stake in Article 4(2) TEU: the cases of *Anita Groener*,⁹³ *Omega*⁹⁴ (mentioned also by the *Bundesverfassungsgericht* in the *Gauweiler* order for reference and discussed below) and sometimes also *SPUC v Grogan*⁹⁵ and the *Azores* judgment.⁹⁶ These are cases in which the ECJ is responsive to national (constitutional) specificities and sensitivities that it considers worthy of protection and allows derogations from EU obligations for one member state, which do not necessarily extend to others. But the ECJ did not take recourse to the concept of national identity in these cases.

What are we to make of the ECJ case law on national identity under Article 4(2) TEU? In practical effect, the only cases in which a claim based on the need for respect of national

forward by the intervening Latvian Government, without much explanation. Case C-393/10, *O’Brien v. Ministry of Justice* (Mar. 1, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=119901&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=76749>.

⁹² See, e.g., Opinion of Advocate General Maduro, Case C-160/03, *Spain v. Eurojust* (Dec. 16, 2004), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=49769&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=76852> (relating to language requirements); Opinion of General Advocate Maduro, Case C-213/07, *Michaniki AE v. Ethniko Symvoulío Radiotileorasis and Ypourgos Epokrateias* (Oct. 8, 2008), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=68940&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=76906> (relating to a peculiarity in the Greek Constitution establishing an incompatibility between the public works sector and that of the media); Opinion of Advocate General Colomer, Case C-205/08, *Unweltsanwalt von Kärntner v. Kärntner Landesregierung* (June 25, 2009), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=77932&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=76967> (concerning the national identity and national constitutional autonomy of member states to decide which body has jurisdiction under the constitution to dispense justice); Opinion of Advocate General Kokott, Case C-566/10, *Italy v. Comm’n* (June 21, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=124201&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=77085> (on the principle of multilingualism); Opinion of Advocate General Bot, Case C-399/11, *Melloni v. Ministerio Fiscal* (Oct. 2, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=127841&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=77144> (on whether a particular manner of protecting fundamental rights could pertain to the national identity of a member state).

⁹³ Case C-379/87, *Groener v. Minister for Education and the City of Dublin Vocational Educational Comm.*, 1989 E.C.R. 3967.

⁹⁴ Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-09609.

⁹⁵ Case C-159/90, *SPUC v. Grogan*, 1991 E.C.R. I-04685.

⁹⁶ Case C-88/03, *Portugal v. Comm’n*, 2006 E.C.R. I-7115.

identity was successful are *Sayn-Wittgenstein* and *Runević-Vardyn and Wardyn*. The practice so far shows that the ECJ, understandably so, follows the lead of the relevant governments making the claim based on national identity when assessing whether a particular concern pertains to a State's "national identity". Indeed, the content of a State's "national identity" is hard to ascertain and it is arguably not for the ECJ to decide whether a specific national rule or principle does or does not pertain to what States consider to be their national identities. So, where no such argument is made, the Court will not of its own motion introduce it. Where the claim is made and is framed by reference to Article 4(2) TEU, the Court is careful to refer back to what the Government representing the relevant State has argued before the Court. It usually does not scrutinize the assessment made by the Government.⁹⁷

Thus far, the claims that have been made have pertained to a variety of elements: To what could be termed the more cultural or socio-psychological aspects of "national identities", *in casu* national language or language policies (*Runević-Vardyn and Wardyn, Las*) and the abolition of the nobility (*Sayn Wittgenstein*), as well as to the organization of the State, more particularly the federal structure of the State (*Digibet*), and to rules regulating access to certain professions (*Torresi*); claims also have been made to ensure respect for certain choices in the sphere of fundamental rights protection (*Melloni*), or to protect statehood and sovereignty (*Hungary v Slovakia*). In all these cases, the respect owed to the national identities of the member states under EU law has not been understood as an absolute obligation on the EU to defer, or to carve out an EU-free zone for the member states, but was balanced against other interests, although sometimes the proportionality test performed was "the thinnest possible", in favor of the invoked national constitutional provision.⁹⁸

Now, why does the *Bundesverfassungsgericht* distance itself from the approach of the ECJ?

⁹⁷ See, e.g., *Las*, Case C-202/11 (where the Court seems to be more careful than the Advocate General) (see Elke Cloots, *Respecting linguistic identity within the EU's internal market: Las*, 51 COMMON MKT. L. REV. 623 (2014)); see also *Sayn-Wittgenstein*, Case C-208/09; *Torresi*, Joined Cases C-58/13 & C-59/13 (where the ECJ rejected a claim based on national identity on factual grounds); Opinion of Advocate General Bot, *supra* note 92, at para 141, (stating "the Kingdom of Spain itself stated, at the hearing, relying inter alia on the exceptions in Spanish law to the holding of a retrial following a judgment rendered in absentia, that the participation of the defendant at his trial is not covered by the concept of the national identity of the Kingdom of Spain"). The ECJ did not mention the issue of national identity in that latter case. In *O'Brien* the Court rejected a claim based on the national identity of the UK put forward by the intervening Latvian Government, without much explanation. *O'Brien*, Case C-393/10.

⁹⁸ Leonard F.M. Besselink, *Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010*, 48 COMMON MKT. L. REV. 671, 692 (2012).

IV. "A concept of national identity reaching far beyond Article 79(3) Grundgesetz"

In its *Gauweiler* order for reference, the *Bundesverfassungsgericht* stated that the duty contained in Article 4(2) TEU to respect the national identities of the member states was "based on a concept of national identity which does not correspond to the concept of constitutional identity within the meaning of Art. 79 sec. 3 GG, but reaches far beyond."⁹⁹ While the German court points to six ECJ decisions to illustrate that the protection offered under Article 4(2) TEU by the ECJ is less extensive than that required by the German constitution for national constitutional identity because it is balanced against the rights conferred by EU law,¹⁰⁰ it refers to only one of these decisions to underpin the conceptual difference of both duties: the *Sayn-Wittgenstein* judgment of 22 December 2010.¹⁰¹

In *Sayn-Wittgenstein* the ECJ accepted a derogation from the free movement of EU citizens on the basis of the Austrian Law on the abolition of the nobility. This statute, which has constitutional status in Austria, forbids Austrian citizens to have a title of nobility registered in Austria, even if the citizen has acquired this title by means of adoption in another EU member state. Before the ECJ the Austrian Government contended that the statute "intended to protect the constitutional identity of the Republic of Austria". It argued that "even if it is not an element of the republican principle which underlies the Federal Constitutional Law, (it) constitutes a fundamental decision in favor of the formal equality of treatment of all citizens before the law" (para 74). Therefore, proportionate restrictions on free movement rights should be "justified in the light of the history and fundamental values of the Republic of Austria" (para 75). The ECJ qualified the statute "in the context of Austrian constitutional history" as an element of national identity (par. 83), accepted the ban as a measure of "public policy" (para 83), stated that the EU in accordance with Article 4(2) TEU is bound to respect the national identities of its member states "which include the status of the State as a Republic," and concluded that it is not "disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility" (paras 92-93).

⁹⁹ BVerfG, Case No. 2 BvR 2728/13 at para. 29 ("Dem liegt ein Begriff der nationalen Identität zugrunde, der dem Begriff der Verfassungsidentität im Sinne von Art. 79 Abs. 3 GG nicht entspricht, sondern weit darüber hinausreicht.").

¹⁰⁰ *Id.*

¹⁰¹ *Sayn-Wittgenstein*, Case C-208/09. The list of ECJ judgments which the BVerfG links to Article 4(2) is conspicuously short. Scholarship has connected many more judgments to the provision. Claes, *supra* note 76, at 130–33; Laurence Burgorgue-Larsen, *A Huron at the Kirchberg Plateau or a Few Naive Thoughts on Constitutional Identity in the Case-law of the Judge of the European Union*, in NATIONAL IDENTITY AND EUROPEAN INTEGRATION 275 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013).

The *Bundesverfassungsgericht* does not explain why in its view the *Sayn-Wittgenstein* judgment demonstrates that the scope of the identity clause in Article 4(2) TEU is substantively broader than that of the identity of the German Basic Law. This could relate to two issues: the fundamental constitutional principles at stake and their actual application in the specific case. Indeed, *Verfassungsidentität* consists of fundamental constitutional principles, but these always have to be concretized and applied in a specific context before they can function in practice, here as limit to EU integration. This is what the *Bundesverfassungsgericht* has done when it, for instance, identified as specific integration-proof elements of German constitutional identity the rule that the deployment of the German armed forces is not permissible without approval of the *Bundestag* (application of the democracy principle), or that the “citizens” enjoyment of freedom may not be totally recorded and registered’ (application of the rule of law principle).

The *Bundesverfassungsgericht*’s appreciation of the conceptual difference between the two identities is presumably not caused by the ECJ’s assessment that “the status of the State as a Republic” is part of national identity in the sense of Article 4(2) TEU and neither by the Austrian government’s appraisal as such of equality of treatment of all citizens before the law. We may presume that the republican nature of a state is also part of the identity of a national constitution in the way the *Bundesverfassungsgericht* perceives the notion.¹⁰² The equality principle also belongs to German constitutional identity. So, on the level of the principles *Sayn-Wittgenstein* cannot or should not have bothered the German court.

Why then does the German court insist that *Sayn-Wittgenstein* does not match with the German concept of constitutional identity? Could it simply be because there is no German rule prohibiting the acquisition or use of noble titles, and that the statute therefore by definition does not fall under the notion of German constitutional identity? It is not very likely that the *Bundesverfassungsgericht* would adopt such an utterly Germany-centered interpretation and it would be at odds with the *Bundesverfassungsgericht*’s unusual effort in the decision to engage with the positions of a number of other (constitutional) courts as regards *ultra vires* and identity review.¹⁰³

Or could it be that the *Bundesverfassungsgericht* does not consider the ban on noble titles fundamental or structural enough to be part of any State’s *Verfassungsidentität*? When compared to integration-proof elements of German constitutional identity as that regarding the deployment of the German armed forces abroad or regarding the citizens’ privacy, it might be argued that while the latter two are of a fundamental or structural

¹⁰² Pernice, *supra* note 83, at 189–90; Von Bogdandy and Schill, *supra* note 82, at 1438.

¹⁰³ BVerfG, Case No. 2 BvR 2728/13 at para. 30.

importance in a democratic State based on the rule of law, the ban on noble titles is more symbolical in nature.¹⁰⁴

If the *Bundesverfassungsgericht* would indeed find the issue of noble names not fundamental or structural enough to bring it under the notion of *Verfassungsidentität*, two new questions arise. The first is why the Court includes *Omega* in the list of references to illustrate that the protection offered by Article 4(2) TEU is of another caliber and involves a proportionality review, and not to argue that the substantive scope of Article 4(2) and German constitutional identity differ. The famous case — usually mentioned as a prime example of how the EU and the ECJ respect fundamental values even if they are applied differently in different member states — concerned the value of human dignity, the alpha and omega of the German Basic Law, the foundational principle of the entire German constitutional edifice, which cannot be balanced against any other interest. But the principle was to be applied in a case concerning laser games and services provided from the UK. While human dignity certainly forms part of the unamendable and integration-proof core of the German Basic Law, it does not seem plausible that the particular application in the case at hand concerning a ban on a laser game, is part of German *Verfassungsidentität*.¹⁰⁵ In any case, the laser game can hardly be said to have the same structural or fundamental importance as the earlier mentioned integration-proof elements of German constitutional identity. So, why would *Omega* concern German constitutional identity and not *Sayn-Wittgenstein*?

The second question is the following. If the German Court indeed finds the ban on noble titles in *Sayn-Wittgenstein* not fundamental or structural enough to range under what it conceives of as “constitutional identity”, why then does the court consider the protection offered under Article 4(2) TEU wanting for including a balancing test? Such a balancing test can only be problematic if what is protected under Article 4(2) TEU is also protected under national constitutional identity interpreted as *Verfassungsidentität*. What the Court seems to suggest here, is that the manner in which Article 4(2) TEU is applied in practice — to “futile cases” so to say — does not come anywhere near to what its responsibility is when protecting the constitutional identity of Germany. Where constitutional identity as *Verfassungsidentität* is at stake, there should be no more balancing against other interests, and the assessment is to be done exclusively according to German constitutional law, not Union law. There is accordingly no room for “negotiation” and the decision is for the *Bundesverfassungsgericht* alone. No references will be made to the European Court.

¹⁰⁴ G. Toggenburg, *Die 'falsche' Fürstin: Zum grenzüberschreitenden Verkehr von Adelstiteln vor dem Hintergrund der Unionsbürgerschaft*, EUR. L. REPORTER 74, 79 (2011); C. Kohler & W. Pintens, *Entwicklungen im europäischen Personen- und Familienrecht 2010–2011*, 18 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT MIT BETREUUNGSRECHT, ERBRECHT, VERFAHRENSRECHT, ÖFFENTLICHEM RECHT 1433, 1439 (2011/3); F. Swennen, *Zaken C-208/09, Sayn-Wittgenstein en C-391/09, Runevic-Vardin en Wardin*, SOCIAAL ECONOMISCHE WETGEVING 76, 80 (2012/2).

¹⁰⁵ Cf. Bundesverfassungsgericht [BVerfG][Federal Constitutional Court], 87 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 209, 229–30.

To conclude, to the extent Article 4(2) TEU offers protection in more cases beyond what is protected under Article 79(3) of the Basic Law, the *Bundesverfassungsgericht* should not be concerned. Yet it seems that what actually worries the Court is not the difference in scope between Article 4(2) TEU and Article 79(3) Basic Law, but that the application of Article 4(2) TEU involves a balancing exercise also in cases in which *Verfassungsidentität* is at stake. In those cases, the *Bundesverfassungsgericht* claims sole responsibility.

D. Comparative Analysis¹⁰⁶

I. Introduction

In its order for reference, the *Bundesverfassungsgericht* made reference to decisions of the Danish *Højesteret*, the Estonian *Riigikohus*, the French *Conseil constitutionnel*, the *Supreme Court of Ireland*, the Italian *Corte costituzionale*, the Latvian *Satversmes tiesa*, the Polish *Trybunał Konstytucyjny*, the Spanish *Tribunal Constitucional*, and the Czech *Ústavní Soud*, as well as to Chapter 10 Article 6 sentence 1 of the Swedish Form of Government to support its position that *ultra vires* and identity review could be found in the constitutional law of many other member states of the European Union.¹⁰⁷ The reference is remarkable. It is no secret that it has usually been the other way around: the German Federal Constitutional Court has significantly impacted on the jurisprudence of other national courts in this field.¹⁰⁸ Even if the *Bundesverfassungsgericht* has on previous occasions cited

¹⁰⁶ This part partially draws on Leonard Besselink, Monica Claes, Šejla Imamović & Jan-Herman Reestman, *National Constitutional Avenues for Further European Integration*, European Parliament's Committees on Legal Affairs and on Constitutional Affairs (Feb. 2014), available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET\(2014\)493046_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET(2014)493046_EN.pdf).

¹⁰⁷ BVerfG, Case No. 2 BvR 2728/13 at para 30.

¹⁰⁸ See, e.g., Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 EUR. L.J. 389 (2008); Wojciech Sadurski, "Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union (EU), Working Paper LAW No. 2006/40; ALLAN F. TATHAM, CENTRAL EUROPEAN CONSTITUTIONAL COURTS IN THE FACE OF EU MEMBERSHIP. THE INFLUENCE OF THE GERMAN MODEL IN HUNGARY AND POLAND (2013); GENERAL REPORT FOR THE XVITH CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS 2014 ON CO-OPERATION OF CONSTITUTIONAL COURTS IN EUROPE – CURRENT SITUATION AND PERSPECTIVES, available at <http://www.confconstco.org/en/common/home.html> ("Many national reports mention the German Federal Constitutional Court as the most frequently cited foreign constitutional court, regardless of regional or linguistic factors, especially in cases relating to fundamental rights"). See, for instance, from the Czech Report, drafted by the Czech Constitutional Court: "However, other European constitutional courts (German Constitutional Court in *Solange I*, *Solange II*, *Maastricht*, *Bananenmarkt*; Italian Constitutional Court in *Frontini*) also ruled that there are certain boundaries beyond which unreserved respect for ECJ's postulate on the primacy of any European law is not appropriate. The Constitutional Court of the Czech Republic was inspired in particular by the case law of its German counterpart."

decisions from its brethren in other member states, also in EU related issues, it is usually the one that is referred to.¹⁰⁹

In general, courts may have several reasons to cite foreign case law, but usually they seek to increase the acceptance of their decision by borrowing legitimacy from other, often stronger and more powerful courts.¹¹⁰ References to decisions rendered by other courts in individual cases may also enable courts to draw on common European standards, contribute to developing them, and apply them to back up their own decisions. In this case, however, the reason for the reference to foreign sources seems different: The *Bundesverfassungsgericht* is not simply seeking comparative inspiration, but presents itself as one among many constitutional and highest courts claiming jurisdiction to protect the constitutional identity and the limits of transferred powers. In so doing, the *Bundesverfassungsgericht* increases the pressure and raises the stakes for the ECJ, the ECB and the EU. The German court suggests that is not just one rebelling court, but speaks also for others. The court concedes that there are differences between the positions mentioned, in the sense that some of them have a *Ewigkeitsklausel*, or an unamendable core, and others do not. But on the whole, so it maintains, the positions in these systems are comparable.

But just how similar are these positions really? Is it fair to suggest, as the Court does, that the same principles can be found in those countries? We have taken the citations of the Court in the OMT reference one by one, in order to critically assess whether on the basis of the same material we arrive at the same conclusion as the *Bundesverfassungsgericht*. Before embarking on the detailed analysis, a couple of remarks are necessary. To begin with, the comparative work done by the *Bundesverfassungsgericht* seems a bit imprecise. The Court cites specific paragraphs in decisions of some courts, while referring to entire decisions for others — Italy —, and in the case of Sweden, it makes reference only to a constitutional provision and not its application. Some of the cited decisions do not seem well chosen, because they do not seem to confirm the same principles mentioned — such as the *Giampaoli* decision of the Italian *Corte costituzionale* — or no longer represent the most recent position of the relevant court — the *Maastricht* decision of the Danish *Højesteret*.

Second, as always in comparative work, what is omitted from the comparison may be as interesting as what is included. Why, for instance, does the Court make reference only to the old *Maastricht* decision of the Danish *Højesteret* and not to its more recent *Lisbon* decision? And what is the situation in the member states that have not been referred to?

¹⁰⁹ For a detailed analysis, see generally Mattias Wendel, *Comparative reasoning and the making of a common constitutional law: EU-related decisions of national constitutional courts in a transnational perspective*, 11 INT'L J. CONST. L. 981 (2013).

¹¹⁰ On comparative reasoning, see MICHAL BOBEK, *COMPARATIVE REASONING IN EUROPEAN SUPREME COURTS* (2013).

We will return to this shortly at the end of this section, but it seems that while it may well be true that the *Bundesverfassungsgericht* is indeed not the only court signaling constitutional limits to EU law and retaining jurisdiction to conduct *ultra vires* and identity review, it is not at all obvious that this is the majority position. In most of the member states that are not cited, the legal position is much less clear, and courts have not or not explicitly claimed jurisdiction to review EU law.

Third, as any student of comparative law is well aware, judicial decisions have to be read in their legal, institutional, political, social, cultural and historical context. It is not clear from the citations in the relevant passage that the *Bundesverfassungsgericht* has actually conducted what is often referred to as “deep-level” comparative research.¹¹¹ The procedural context in which the relevant decisions have been rendered are quite diverse: Out of 15 cited decisions, 6 were handed in the context of a constitutionality review of a Treaty tabled for approval and ratification,¹¹² concerning accession,¹¹³ Treaty amendments,¹¹⁴ or the ESM Treaty.¹¹⁵ In such situations, courts are entirely free under EU law to draw constitutional boundaries and even to decide that a particular Treaty is unconstitutional; it is only natural for these courts to then emphasize that there are constitutional limits to further transfers of powers or limitations of sovereignty, and that there are conditions attached to participation in terms of respect for fundamental constitutional values. And even then, no court has ever actually prevented ratification; at most, constitutional courts have called for constitutional amendment before ratification could take place.¹¹⁶ While several constitutional courts have announced, in these cases, that secondary EU law could be reviewed after ratification — usually in the light of fundamental rights protection, *ultra vires* review or identity review —, only a few have actually conducted such review, and only one has actually declared EU law *ultra vires*,

¹¹¹ This is the rule rather than the exception for non-mandatory use of foreign law by courts. See BOBEK, *supra* note 110, at 196–97. On the comparative method, see PRACTICE AND THEORY IN COMPARATIVE LAW (Maurice Adams & Jacco Bomhoff eds., 2012).

¹¹² In the case of Denmark and Poland, the Treaties under review had already been ratified. This has to do with the particular procedural conditions for standing.

¹¹³ Poland (Accession Treaty).

¹¹⁴ Ireland (SEA in Crotty); Latvia (Lisbon); Poland (Lisbon) and Spain (Constitutional Treaty) and Denmark (Maastricht Treaty). The Danish and Polish cases are somewhat peculiar, since the relevant Treaties had entered into force when the courts rendered their decisions.

¹¹⁵ Estonia (ESM).

¹¹⁶ Conseil constitutionnel (Maastricht; Constitutional Treaty); Carlos Closa Montero & Pablo Castillo Ortiz, *National Courts and Ratification of the EU Treaties: Assessing the Impact of Political Contexts in Judicial Decisions*, in MULTILAYERED REPRESENTATION IN THE EUROPEAN UNION. PARLIAMENTS, COURTS AND THE PUBLIC SPHERE 129 (T. Evas, C. Lord & E. Liebert eds., 2012). These decisions have proven less intrusive on the whole: Upon constitutional amendment, the Treaty could be ratified and is henceforth considered to be constitutional.

namely the Czech constitutional court in its *Holubec* decision concerning the Slovak pensions. It should be remembered that courts do not always do as they say, and that their decisions should also be appreciated as “speech acts.”

So, just how comparable are the cited decisions and how accurate is the comparison? Surely, in all of them, something is said about constitutional limits to European integration, but not all of them involve *ultra vires* and identity review of the kind set out by the German Federal Constitutional Court. This makes it difficult at times to fully grasp what the Court implies with the reference and what it was after. Careful analysis shows, that while in most of the cited passages one or more aspects of the German position is indeed expressed, very few cited courts fully endorse the overall position of the *Bundesverfassungsgericht*. Thus, the position of the Danish *Højesteret* is comparable on the issue of statehood — Denmark must remain an independent State — and to an extent also on the point that transfers must be limited, but it is much less explicit on a claim of jurisdiction to review. In line with the Danish constitutional traditions, the court chooses to leave much more room to the political branches. The *Swedish Instrument of Government* is comparable only to the extent that it makes participation in European integration conditional on compliance with “the basic principles by which Sweden is governed”, but it does not so much as mention the competence issue and again it is not very likely, given the Swedish constitutional traditions, that the courts will step in to protect Sweden’s “constitutional identity”. Similarly, the cited passage of the *Latvian* Court does make mention of unamendable core principles of the Latvian Constitution, and of the right of citizens to decide upon the issues that are substantial for a democratic state, which cannot be affected by a delegation of competences. Yet, on the whole, as we shall see, the position of the Latvian court is much more nuanced than that of the German Court, and shows a great deal of trust in the EU respecting the statehood and fundamental values of the member states. The Irish *Crotty* case is similar to the German position to the extent that it states that any qualification, curtailment or inhibition of the existing sovereign power under the Constitution requires recourse to the people “whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good”, which is drawn from Article 6 of the Irish Constitution. The *Bundesverfassungsgericht* probably found the insistence on the need to involve the people resemble its own recourse to the people as the original holders of sovereignty. Yet, in the Irish context, all changes in the exercise of public authority as set out in the Constitution require constitutional amendment, which under the Irish Constitution is always done by referendum. The *SPUC v Grogan* case, on the other hand, relates to the responsibility of the Irish courts to protect and uphold the constitutionally guaranteed right to life of the unborn, even if EU law and the ECJ should want to balance it against the right to travel in order to receive services. Implicitly and without using the concept, it may touch on the more cultural aspects of “national identity” understood as national value choices that may distinguish a particular member state from most of the rest of the Union, and must remain in its own hands. Only a few of the citations mention the concept of national or constitutional identity explicitly: the French *Conseil constitutionnel*, the Polish *Trybunał*

Konstytucyjny and the Czech *Ústavní Soud* use the concept.¹¹⁷ Yet, in the French case, the protection of “*identité constitutionnelle*” is not absolute to the extent that a constitutional amendment by the parliamentary constitutional legislature may remedy an infringement, and is therefore necessarily different from what the German court has in mind, as explained later.

So, it seems that most of the cited decisions do indeed relate to one or two elements in the position of the *Bundesverfassungsgericht*, but usually they do not match the full amalgam. The Czech and especially the Polish cases come closest to what the *Bundesverfassungsgericht* has in mind, complete with references to sovereignty, national democracy, national and constitutional identity, *ultra vires* and identity review, core principles and so forth. So, a brief perusal already shows that the cited passages are quite disparate. In what follows, the passages are analyzed one by one, in the order of appearance in the OMT reference.

II. Denmark

In the decision to which the *Bundesverfassungsgericht* refers, the Danish *Højesteret* was essentially asked whether Denmark could ratify the *Maastricht* Treaty under Article 20 of the Constitution, or rather, whether the procedure for constitutional amendment under Article 88 was in place.¹¹⁸ This is striking, as more recently the issue was whether the *Lisbon* Treaty required the procedure of Article 20 or rather the normal procedure for Treaty ratification under Article 19 of the Constitution. In both cases thus, the Supreme Court was asked to decide whether the choice of procedure for the ratification of an EU Treaty was in accordance with the Constitution.

The *Bundesverfassungsgericht* refers to para 9.8. of the Danish *Maastricht* decision, in which the *Højesteret* held that “it must be considered to be assumed in the Constitution that no transfer of powers can take place to such an extent that Denmark can no longer be

¹¹⁷ The reference of the Spanish Constitutional Tribunal is to Article 4(2) TEU’s predecessor in Article 1-5 of the Constitutional Treaty and is used to support the holding that the primacy principle in the Constitutional Treaty does not infringe the Constitution. The same is true for the Latvian Court, which read in Article 4(2) TEU a guarantee that the EU would not infringe the statehood and fundamental principles and values of the Latvian Constitution.

¹¹⁸ Article 20 of the Constitution provides that “Powers vested in the authorities of the Realm under this Constitutional Act may, to such extent as shall be provided by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation. (2) For the enactment of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing is required. If this majority is not achieved, whereas the majority required for the passing of ordinary Bills is, and if the Government maintains the Bill, it shall be submitted to the electorate for approval or rejection in accordance with the rules on referenda laid down in Article 42.”

considered an independent state.”¹¹⁹ The Danish Constitution, like the German Basic Law as interpreted by the *Bundesverfassungsgericht*, thus contains absolute limits to European integration, basically consisting in the condition that Denmark should remain an independent state, which finds a parallel explicitly or implicitly in many national Constitutions and also underlies the EU Treaties.¹²⁰

The *Højesteret* went on to say that “the determination of the limits to this must rely almost exclusively on considerations of a political nature”. The role of the Danish courts in reviewing EU Treaties is apparently rather limited, which is certainly not what the *Bundesverfassungsgericht* has in mind.

One would have expected the *Bundesverfassungsgericht* to be more interested in another passage in para 9.6., not cited, where the *Højesteret* stated that

The fact that the detailed determination of the powers vested in the institutions of the Community may give rise to doubts, and that the jurisdiction to give rulings concerning the interpretation of such questions is transferred to the EC Court of Justice cannot in itself be regarded as incompatible with the requirement for specification in Section 20 of the Constitution.

And that

if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the transfer of sovereignty according to the Act of Accession, that Danish courts must rule that an EC act is inapplicable in Denmark.

This is a clear announcement of *ultra vires* review, be it that it is restricted to extraordinary situations.

¹¹⁹ *Højesteret, Carlsen and Others v. Prime Minister, UfR [1998] 800*, reported in English in [1999] 3 COMMON MARKET LAW REPORTS 854.

¹²⁰ Mainly in constitutions adopted shortly after (re-)gaining independence. Examples include Article 5 of the Irish Constitution and Article 1 of Chapter 1 of the Latvian Constitution. Note that independence is not mentioned in the Danish Constitution, but must be presumed. The TEU also starts from the presumption that it is made up of independent States, as is clear from Articles 48, 49 and 50 TEU, Article 4(2) TEU (the EU respects the equality of member states as well as their national identities and their essential State functions), from the principle of conferral, Article 10, and so forth. Independence and statehood are not mentioned in so many words in the German Basic Law.

What is even more notable is that the *Bundesverfassungsgericht* did not cite the recent *Lisbon* decision of the Danish Supreme Court, handed down in January 2013.¹²¹ In that case, the Danish courts were asked to decide whether the Government had breached the Constitution when it chose to ratify the Lisbon Treaty in accordance with the procedure for ratification of “ordinary” treaties under Section 19 of the Constitution, rather than the special procedure provided in Section 20 relating to treaties transferring competences to a supranational organization. So in a sense, the *Lisbon* decision is the mirror image of the *Maastricht* decision: While the latter dealt with the upper limit of Section 20 and how much of a constitutional change it can carry, the former is concerned with the question just how intrusive the amendments to a Treaty have to be before the procedure of Section 20 is warranted. The *Højesteret* held that after Lisbon the EU would remain an organization consisting of independent, mutually obliged states functioning on the basis of powers delegated by each member state, and found that the changes made to the EU’s organization, working method, voting rules and general administration were not so fundamental that the EU has in effect assumed a new identity. Accordingly, there was no need to use the procedure of Section 20. But the Supreme Court also confirmed and further developed its statements on *ultra vires* acts, although according to one commentator it spoke more restrictive language than in its *Maastricht* decision. This same author also expressed his expectation that the Supreme Court, given the Danish judicial traditions, would not actually “take the lead in ruling against the EU.”¹²²

In addition, the Supreme Court in that decision also developed its views on whether the transfer of sovereignty by the Accession Act contravened the constitutional precondition of a democratic form of government. The Court stated that any transfer of Parliament’s legislative powers to an international organization would entail some intervention in Denmark’s democratic form of government. According to the Supreme Court, this was taken into account when the extensive procedures in Section 20 were designed. Most legislative power in the EU rests with the Council in which the Danish Government sits, and the Government is responsible to Parliament. It is up to the Danish Parliament to decide whether more democratic control of the Government is needed.¹²³

¹²¹ Højesteret, decision of 20 February 2013, Hausgaard and Others v. Prime Minister, [2013] UfR 1451, available at <http://www.hoejesteret.dk/hoejesteret/nyheder/ovrigenheder/Documents/199-12engelsk.pdf>.

¹²² Henrik Palmer Olsen, *The Danish Supreme Court’s decision on the constitutionality of Denmark’s ratification of the Lisbon Treaty*, 50 COMMON MKT. L. REV. 1489 (2013) (“Denmark might be among the more skeptic EU members, and this may be reflected in the Courts decision, but the Danish Supreme Court is not known for making watershed decisions, preferring instead a low profile for itself.”). However, Helle Krunke thinks that Danish courts will act as guardians to ensure that the EU institutions interpret the Lisbon Treaty within the limits of the powers delegated to them by Denmark. According to her, this decision opens the door wide for litigation on EU acts, and Danish citizens are more or less invited to file lawsuits against the State challenging aspects of the constitutionality of the Lisbon Treaty. Helle Krunke, *The Danish Lisbon judgment Danish Supreme Court, Case 199/2012, Judgment of 20 February 2013*, 10 European Constitutional Law Review (EUCONST) 542 (2014).

¹²³ Krunke, *supra* note 122.

This may well be the reason why the *Bundesverfassungsgericht* omitted the reference to this decision: It did not really suit its purposes. The Danish Supreme Court is much less restrictive with regard to the transfer of powers than the German Federal Constitutional Court. The *Højesteret* has not defined “inalienable” policy domains, nor does it emphasize the need to protect national democracy to the same extent. Instead, it respects the Government’s and the *Folketing’s* constitutional assessment that the Lisbon Treaty does not imply delegation of powers requiring application of the Section 20 procedure.¹²⁴ The Supreme Court did not so much as mention the concept of constitutional or national identity. This all fits in the Danish tradition of courts steering away from political decisions and or interfering in the legislative process.¹²⁵ The courts only declare legislation unconstitutional if it manifestly breaches the Constitution, and political practice can become a legally binding constitutional convention, which can even alter the Constitution. In short, the *Lisbon* judgment of the *Højesteret* expresses a different worldview than that of the *Bundesverfassungsgericht*. The point on which they do seem to agree — the retention of judicial power to review respect for the *vires* of EU competences — is not the central issue in the paragraph the *Bundesverfassungsgericht* referred to.

III. Estonia

In the decision of the Estonian *Riigikohus*, the Supreme Court, the central issue was whether the constitutional principle of parliamentary democracy and the Constitution of the Republic of Estonia Amendment Act (CREAA) permitted ratification of the ESM Treaty.¹²⁶ In the first paragraph the *Bundesverfassungsgericht* cites, the Supreme Court *en banc* held that despite the strict wording of the sovereignty clause of the Constitution the present-day context must be considered in shaping the concept today (para 128). In the second cited paragraph, the Court pondered on what should be done if the ESM Treaty

¹²⁴ To be sure, Denmark has a number of opt-outs on issues that are sensitive also for the *Bundesverfassungsgericht*.

¹²⁵ See Ran Hirschl, *The Nordic counternarrative: Democracy, human development, and judicial review*, 9 INT’L J. CONST. L. 449 (2011) and other contributions to the same Symposium on Nordic Juristocracy.

¹²⁶ The CREAA has been enacted as a “separate constitutional act” in order to permit accession to the EU. It has not formally amended the *Põhiseadus* (Constitution), but has nevertheless substantively amended the entire Constitution. The effects of the CREAA are far reaching: EU law has not only become one of the grounds for the interpretation of the *Põhiseadus*, but also of its application: only those parts of the Constitution which are in conformity with EU law or which fall outside the scope of EU law are still applicable; the applicability of all the other constitutional provisions is suspended. On the basis of the CREAA, EU law is assimilated with Estonian constitutional law and (temporarily) sets aside any constitutional provision which is incompatible with it; it can also be argued that the CREAA gives EU law primacy (of application) on the *Põhiseadus*. See Julia Laffranque, *A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act*, JURIDICA INT’L 55 (2007/XII); Julia Laffranque, *The Constitution of Estonia and Estonia’s accession to the European Union*, 1 BALTIC Y.B. INT’L L. ONLINE (2011); Raul Narits, *About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia*, JURIDICA INT’L 58 (2009/XVI).

would be incorporated in primary or secondary EU law (para 223). It held that the CREA was to be considered as an authorization to be a part of the *changing* European Union; it did not, however, “authorize the integration process of the European Union to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent”. But it was primarily for the *Riigikogu*, the Estonian Parliament, to deliberate and decide whether an amendment to the founding Treaties of the European Union or an entirely new EU Treaty would lead to a deepening of the integration process, and thereby to an additional delegation of competences of Estonia to the EU and a more extensive interference with the principles of the Constitution. If so, it was necessary to seek the approval of the holder of supreme power, being the people, and presumably amend the Constitution once again. So in fact, the relevant passages do not mention any reservation of review powers of acts adopted by the EU. It did not hint at *ultra vires* review or identity review; the word identity is not mentioned. It is likely that the *Bundesverfassungsgericht* cited these passages of the Estonian decision for the reference to the “holder of supreme power, i.e. the people”. Yet, the situation in which the people should be consulted and the role of the court in this context is very different from what the *Bundesverfassungsgericht* has set out for the German Basic Law.

Nevertheless, it is not excluded, at least theoretically, that secondary EU law can be reviewed in the light of fundamental principles of the Estonian legal order. Article 1 CREA states that “Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia”. These fundamental principles are not defined in law, nor in case law,¹²⁷ but scholars agree that they include national sovereignty; a state that is based on liberty, justice, and law; the defense of internal and external peace; preservation of the Estonian nationality and culture through the ages; human dignity; the social state; democracy; the rule of law; honoring of fundamental liberties and freedom; and the proportionality of the actions taken under state authority.¹²⁸ This list draws on the general provisions of Chapter I of the *Põhiseadus* (Estonian Constitution), on Article 10 of that Constitution and on the Constitution’s preamble. The fundamental principles, which have been characterized as those values without which Estonia and its Constitution would lose their “essence”,¹²⁹ may to a certain extent be compared to German constitutional identity.

So then, are the Estonian courts allowed to test EU law against principles belonging to Estonian “constitutional identity”? The possibility of review of secondary EU law is

¹²⁷ Carri Ginter, *Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty*, 9 *EUConst* 335, 340 (2013).

¹²⁸ Narits, *supra* note 126, at 62; see also Tanel Kerikmae & Katrin Nyman-Metcalf, *Karlsruhe v. Lisbon An Overture to a Constitutional Dialogue from an Estonian Perspective*, 12 *EUR. J. L. REF.* 373, 384–85 (2010); Heinrich Schneider, *Constitution in a Blast of Changes*, *JURIDICA INT’L* 4, 11 (2007/XII).

¹²⁹ Narits, *supra* note 126, at 62.

accepted by at least a part of Estonian legal scholarship. Also lower court judges consider it possible “that an act of (...) secondary Community law can be set aside in a national court procedure” on the basis of Article 152 *Põhiseadus*.¹³⁰ This constitutional provision prescribes that the “courts shall not apply and that the Supreme Court shall declare invalid” any legislation which conflicts with “the provisions and spirit of the Constitution”.¹³¹ The position of the Supreme Court on the matter is not clear. On the one hand, the Court has ruled that “only that part of the Constitution is applicable, which is in conformity with the EU law or which regulates the relationships that are not regulated by the EU law”, without even hinting to any exception with regard to the fundamental principles.¹³² Similarly, the Supreme Court refuses to review an act of parliament implementing EU law on referral by a lower court if the lower court has not first established that the act is not mandated by EU law. The reason is that the Supreme Court would otherwise subject secondary EU law to a constitutionality test, which would be contrary to both the case law of the Court of Justice and Article 2 of the CREA.¹³³ On the other hand the Supreme Court has stated that “*as a rule*, the courts are not competent to review the constitutionality of the EU law”, thus perhaps leaving the possibility of such review open in exceptional cases. It would seem, therefore, that review of the constitutionality of secondary EU law is a “*rather theoretical and emotional*” possibility.¹³⁴

So whether or not Estonian courts will assume the competence to review secondary EU law remains to be seen. For the time being, the Estonian Supreme Court while indicating that there are limits to what can be transferred, and that there may be situations in which Treaty amendment (and possibly even secondary EU law?) require constitutional amendment and involvement of the holder of sovereignty, has not announced a stringent *ultra vires* and identity review, but rather has demonstrated a realistic view of the consequences of membership of the Union on national sovereignty.

¹³⁰ Ivo Pilving (Tallinn Circuit Court) & Villem Lapimaa (Tallinn Administrative Court), ANNUAL MEETING OF ADMINISTRATIVE JUDGES, BEAULIEU-SUR-MER, (MARCH 10–11, 2006) ESTONIAN REPORT, under A, available at <http://www.aeaj.org/index.php/en/independence-efficiency/events/beaulieu-sur-mer-2006/40-doc-beaulieu-2006/153-meeting-beaulieu-sur-mer-10-11-march-2006-estonia>.

¹³¹ “In a court proceeding, the court shall not apply any law or other legislation that is in conflict with the Constitution. The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution.” *Põhiseadus* Art. 152.

¹³² Opinion 3–4–1–3–06 of the Constitutional Review Chamber of the Supreme Court of 11 May 2006, para. 16 .

¹³³ Opinion. 3–4–1–5–08 of the Constitutional Review Chamber of the Supreme Court of, 26 June 2008, para. 29–31.

¹³⁴ Pilving & Lapimaa, *supra* note 130, under A (emphasis added).

IV. France

The two passages from decisions of the *Conseil constitutionnel* do, on the other hand, concern indirect review of secondary EU law, and they do contain the concept of constitutional identity. In both cases, the constitutionality of a French *loi* implementing an EU directive was challenged.¹³⁵ In the second case, the applicants argued that the implementing legislation was manifestly incompatible with the directive it was intended to transpose. The *Conseil* decided that implementation of EU directives is a constitutional obligation ex Article 88-1 of the Constitution which it would enforce, but that its competence to do so was subject to a twofold limit: first, the transposition of a directive could not run contrary to a rule or principle that was inherent in the *constitutional identity* of France, unless the constituent power has consented to it, and secondly, that because it cannot make a reference to the ECJ given the time constraints it works under, it would only be able to rule that a legislative provision was incompatible with Article 88-1 of the Constitution if it was *manifestly* incompatible with the directive that it is intended to transpose. In any case, it was for the ordinary and the administrative courts to review the compatibility of the law with France's European commitments and if need be, make a reference. The first limit may give rise to a review of the constitutionality of a directive, but it has been described, notably by a member of the *Conseil constitutionnel*, as an option that is "*assez théorique*."¹³⁶

The *identité constitutionnelle de la France* is shrouded in mystery. It is not clear whether the review extends to other types of secondary EU law than directives, and what the concept really entails.¹³⁷ So far, no piece of EU law has been found to run counter to French constitutional identity and the notion has not been clarified, which seems to be intentional.¹³⁸ The most revealing ruling so far is the 2004 *Bioethics* decision, in which the *Conseil constitutionnel* refused to test a provision in a *loi* implementing a directive against Article 11 of the Declaration of the Rights of Man and Citizens of 1789 — freedom of

¹³⁵ Conseil constitutionnel [CC] [Constitutional Council] decision no. 2006–540DC, July 27, 2006 (Loi relative au droit d'auteur et aux droits voisins dans la société de l'information in Conseil constitutionnel) ; Conseil constitutionnel [CC] [Constitutional Council] decision no. 2011–631DC, June 9, 2011 (Loi relative à l'immigration, à l'intégration et à la nationalité) . In fact, the *Bundesverfassungsgericht* cites only paragraph 19 of Decision no. 2006–540DC of 27 July 2006; paragraph 35 of Decision no. 2011–631DC, which it also cites is identical to paragraphs 19 and 20 of Decision no. 2006–540DC of 27 July 2006.

¹³⁶ O. Dutheillet de Lamothe, Le contrôle de conventionnalité (intervention lors de la visite à la Cour constitutionnelle italienne le 9 mai 2008), *available at* www.conseil-constitutionnel.fr.

¹³⁷ On the difference between the French and German concepts, see Jan-Herman Reestman, *The Franco-German Constitutional Divide. Reflections on National and Constitutional Identity*, 5 *EUConst* 374 (2009).

¹³⁸ The current president of the Constitutional Council, Jean-Louis Debré, wrote on the notion of French constitutional identity that "le Conseil constitutionnel s'est toujours bien gardé d'en définir précisément le contenu." MILLET, *supra* note 83, at xii.

expression —, because this freedom is also protected by Article 10 ECHR, and hence also in the EU legal order. Accordingly, it was for the ECJ to the rule on potential intrusions on the freedom.¹³⁹ The idea behind the reasoning seems to be that if a (constitutional) rule or principle is common to both legal orders, it is not part of the French *constitutional identity*. On this view French “constitutional identity” refers to those French constitutional rules and principles which are specific to France, i.e., those that are protected in the French legal order but *not* also in the EU’s legal order. In this sense, the French constitutional identity is defined by the constitutional “*exception française*” in relation to the Union. The principle of *laïcité*, the definition of the persons entitled to vote in French political elections, the prohibition to give specific rights to ethnic, linguistic and other minorities and the definition of the criteria for access to public functions have been offered as examples of this identity.¹⁴⁰ If this is indeed the way the *Conseil constitutionnel* interprets French constitutional identity, its scope is much narrower than German *Verfassungsidentität*. Yet, it has also been argued that the scope of French constitutional identity is broader and encompasses for instance the principles to which Article 89(5) Constitution, the French equivalent of Article 79(3) GG, refers.¹⁴¹ That provision provides that the “republican form of government” may not be amended.

Here another fundamental difference with German *Verfassungsidentität* comes to light: The French parliamentary constitutional legislature can consent to deviations from or changes to the “constitutional identity”.¹⁴² In this respect, the *Conseil constitutionnel* does not distinguish between constitutional acts which are approved by the people in a referendum and those approved by *Congrès* — the joint meeting of both houses of parliament: The Council is not competent to review either.¹⁴³ French constitutional identity

¹³⁹ Conseil constitutionnel [CC] [Constitutional Council] decision no. 2004–498DC, July 29, 2004, paras. 4–7. According to the “official” Commentaire in LES CAHIERS DU CONSEIL CONSTITUTIONNEL nos. 17, 29, “Les seules normes constitutionnelles opposables à la transposition d’une directive communautaire sont les dispositions expresses de la Constitution française et propres à cette dernière.”

¹⁴⁰ See also Bertrand Mathieu, Les rapports normatifs entre le droit communautaire et le droit national. Bilan et incertitudes relatifs aux évolutions récentes de la jurisprudence des juges constitutionnel et administratif français, REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 675 (2007/4); THIERRY S. RENOUX & MICHEL DE VILLIERS, CODE CONSTITUTIONNEL 2011 870 (2011); the “official” comment on the decisions of 10 June 2004 and 29 July 2004, *supra* note 139, at 17, 28–29.

¹⁴¹ Jean Pierre Camby, Le Conseil constitutionnel, L’Europe, son droit et ses juges, REVUE DE DROIT PUBLIC 1216, 1222–23 (2009/4); Chloé Charpy, *The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the Conseil constitutionnel and the Conseil d’Etat*, 3 EUCONST 436, 445–46 (2007).

¹⁴² This is probably even the case with Article 89(5) Constitution. Although the constituent power has to respect the provision (as long as it exists), the Conseil constitutionnel has also indicated that the constituent power is sovereign and thus competent to amend or repeal the provision as it sees fit, if it wants to even implicitly; Conseil constitutionnel [CC] [Constitutional Council] decision no. 92–312DC, Sept. 2, 1992, para. 19.

¹⁴³ Conseil constitutionnel [CC] [Constitutional Council] decision no. 2003–469DC, March 26, 2003, paras. 2–3 (concerning a constitutional amendment adopted by the Congrès). In earlier case law the Conseil constitutionnel had already made clear that it has no power to rule on texts adopted by the people in a referendum, Conseil

is necessarily very different, therefore, from German *Verfassungsidentität* which is beyond the reach of the constitution-amending power. So, while it is understandable that the *Bundesverfassungsgericht* cites the *Conseil constitutionnel*, one should not lose sight of the fact that both concepts are very different.

Strikingly, also, the *Conseil constitutionnel* had indicated that given the time constraints it is in under in the context of proceedings under Article 61 of the Constitution (one month), it would not be able to make references. This may be taken as a refusal to enter into negotiations with the ECJ, just as the *Bundesverfassungsgericht* has announced that it will not negotiate with the Court of Justice on constitutional identity: “the protection of the latter is a task of the Federal Constitutional Court alone”.¹⁴⁴ Nevertheless, in *Jeremy F*, the *Conseil* has in the meantime made such reference, questioning the compatibility of the EAW with the rights of defence,¹⁴⁵ be it in the context of a *question prioritaire de constitutionnalité* (QPC), in which it has three months to decide. While the reference did not amount to “negotiating constitutional identity”, the smooth procedure and the ECJ’s responsiveness to the concerns of the *Conseil constitutionnel* may convince the latter to change also its position on references in Article 61 types of cases.

V. Ireland

The citations of the *Irish* cases are rather puzzling. *Crotty* was essentially concerned with the question whether the ratification of the Single European Act (SEA) required constitutional amendment by referendum, or could be seen as “necessitated by membership” and would therefore have to be considered as already agreed to by the people when they agreed to the Accession Treaty in 1972. The Supreme Court decided that a constitutional amendment would be called for if the amending Treaty altered the “essential scope or objectives” of the Communities. As the SEA also included provisions on foreign policy, which had not been the subject of the original approval of the Accession Treaty, the SEA had to be subjected to a referendum: the Government which had been endowed with foreign policy could not, within the terms of the Constitution, agree to impose upon itself, the State or upon the people the contemplated restrictions upon freedom of action. Once the required popular authorization has been given, the Irish Constitution is particularly open to EU law, and provides both EU law and national acts necessitated by the obligations of membership with constitutional immunity. Again, the

constitutionnel [CC] [Constitutional Council] decision no. 62-20DC, Nov. 6, 1962 ; Conseil constitutionnel [CC] [Constitutional Council] decision no. 92-313DC, Sept. 23, 1993 .

¹⁴⁴ BVerfG, Case No. 2 BvR 2728/13 at para. 29.

¹⁴⁵ See on that case, François-Xavier Millet, *How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice*, 51 COMMON MKT. L. REV. 195 (2014).

case is thus far removed from any type of *ultra vires* or identity review described by the *Bundesverfassungsgericht* in its *OMT* reference.

The relevance of the *Crotty* decision in this context is therefore not entirely clear. Possibly, the *Bundesverfassungsgericht* was eager to condone the “going back to the people as the original holders of sovereignty”. But, the Irish constitutional context is very different from the German, as *any* constitutional amendment requires a referendum. Moreover, the Constitution does not seem to contain an immutable core that would be beyond the reach of the Irish people in a referendum: no constitutional provision is immune for amendment, and no organ of the State, including the Supreme Court, is competent to review or nullify a decision of the people to amend the Constitution.¹⁴⁶

The second Irish case cited by the Federal Constitutional Court is the well-known case of *SPUC (Ireland) Ltd. v. Grogan* relating the information student organizations distributed on abortion services provided in the UK. This case was probably cited because it can be seen as dealing with a “national identity” issue *avant la lettre*: The right to life of the unborn which must according to Justice Finlay in the Supreme Court “be fully and effectively protected by the courts.” The consequence of a decision of the ECJ on these constitutionally guaranteed rights and their protection by the courts would have to be considered by Irish courts. The right to life would not be balanced against other interests: No Community law regarding services could outweigh the right to life of the unborn. This is therefore a case of a national court claiming jurisdiction to protect a dearly held principle of the national Constitution. It also reflects the “we do not negotiate” position: The Constitution contains no explicit limits to European integration, but even such constitutional immunity cannot prevent the courts from protecting the most dearly held principles of the Irish Constitution. In fact, it was Walsh J who worded it most clearly in *SPUC v Grogan* — in a passage not cited by the German court — where he said that “. . .it cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right.” Nevertheless, it must not be forgotten that the ECJ in *SPUC v Grogan* avoided a balancing exercise by declaring the link with EU law insufficient. In order to avoid any future conflicts between free movement and the right to life of the unborn, the Irish Government managed to have Protocol 17 attached to the TEU.¹⁴⁷ So, the Irish abortion

¹⁴⁶ Re Article 26 and the Information (Termination of Pregnancy) Bill 1995, [1995] 1 I.R. 1 .

¹⁴⁷ “Nothing in the Treaty on the European Union or in the Treaties establishing the European Communities or in the Treaties or Acts modifying or supplementing those Treaties shall affect the application in Ireland of Article 40.3.3° of the Constitution of Ireland.” In June 2009, after the failed referendum on the Lisbon Treaty, the European Council adopted a Decision on the concerns of the Irish people on the TEU, giving a legal guarantee that certain matters of concern to the Irish people would be unaffected by the entry into force of the Treaty of Lisbon. The Protocol on the concerns of the Irish people on the Treaty of Lisbon, relating to right to life, family and education, taxation and security and defense was added to the TEU at the occasion of Croatian accession.

saga can also be interpreted as an example of how the EU and its member states together manage to protect the national identity of a member state and take account of national peculiarities and constitutional and societal sensitivities. In such circumstances, there is no need for unilateral action.

VI. Italy

As said, the reference to the case law of the Italian *Corte costituzionale* is limited to the reference to two entire cases with no paragraphs specified. *Frontini* is the landmark case (already cited in *Solange I*), in which the *Corte costituzionale* held that on the basis of Article 11 of the Constitution, Italian sovereignty had been limited. In the field of EU competence, functions were exercised by the EU institutions, following EU forms and procedures, and according to EU guarantees: The EU was not required to operate through Italian forms or with Italian guarantees, such as judicial review by the Constitutional Court. Every EU activity concerning a matter coming within its sphere of competence was valid if EU procedures and guarantees were observed. Yet, the EU was not empowered to infringe fundamental constitutional principles or fundamental rights — “*i principi fondamentali del nostro ordinamento costituzionale e i diritti inalienabili della persona umana*”.¹⁴⁸ Should the EU be so empowered, Italian sovereignty would be effectively nullified, which Article 11 of the Constitution does not allow. In such a case, Italian membership of the EU would be forbidden under the Constitution. *Frontini* is probably the first example of a constitutional court insisting on a constitutional core in the context of European integration, so it is no wonder that the *Bundesverfassungsgericht* includes it in its references. Yet, the *Corte* in that case rejected jurisdiction to review the constitutionality of secondary law and declare it inapplicable in concrete cases. Moreover, it has never declared EU law or its application unconstitutional, nor has it, until this day, clarified what the *principi fondamentali del nostro ordinamento costituzionale* actually are.

The reference to *Giampaoli* is puzzling. One would have expected a reference to *FRAGD*, the real landmark case in which the *Corte Costituzionale* further refined its position on EU law in the domestic legal order,¹⁴⁹ and challenged the authority of the Court of Justice as the ultimate protector of fundamental rights in EU law.¹⁵⁰ *Giampaoli* is mostly known for the fact that the *Corte costituzionale* in an *obiter dictum* confirmed its capacity to make

¹⁴⁸ Corte costituzionale (Constitutional Court), 27 December 1973, n. 183/1973 (*Frontini*).

¹⁴⁹ In addition to decision no. 170/1984 of 8 June 1984 (*Granital*) where the Italian Court finally endorsed the mandate of the ordinary courts under EU law and permitted the disapplication of conflicting norms of national law without its prior intervention in a preliminary reference on constitutionality.

¹⁵⁰ Corte costituzionale (Constitutional Court), 21 April 1989, n. 232/1989 (*FRAGD*) (*discussed by* G. Gaja, *New developments in a continuing story: the relationship between EEC law and Italian law*, 27 COMMON MKT. L. REV. 83 (1990); HG Schermers, *The scales in balance: national constitutional court v Court of Justice*, 27 CMLREV. 97 (1990)).

preliminary references to the ECJ, but then decided against making such reference and interpreted Community law autonomously.¹⁵¹

VII. Latvia

The cited paragraphs of the *Lisbon* decision of the Latvian constitutional court are comparable to those of the other courts that have been asked to review whether the Lisbon Treaty complies with the core principles of the Constitution. The Constitutional Court acknowledged that Latvia was based on fundamental values including basic rights and fundamental freedoms, democracy, sovereignty of the State and people, separation of powers and rule of law. The State had the duty to guarantee these values which could not be infringed by introducing amendments to the *Satversme* (Constitution). Consequently, a delegation of competences could not infringe the rule of law and the basis of an independent, sovereign and democratic republic based on the basic rights and could not influence the right of citizens to decide upon the issues that are substantial for a democratic state. The Court therefore had to assess whether the Lisbon Treaty affected the sovereign power of the State of Latvia, vested in the people of Latvia, and found that it did not.

The cited passage relates only to the transfer of competences at the time of Treaty amendment. The Latvian constitutional court did mention an unamendable core of the Latvian constitution and did state that a delegation of competences cannot influence the right of citizens to decide upon the issues that are substantial for a democratic state. But there is no allusion to *ultra vires* review and no mention of identity review of secondary EU law.

VIII. Poland

The *Trybunał Konstytucyjny* (the Polish Constitutional Court) probably comes closest to the position of the *Bundesverfassungsgericht*. The *Bundesverfassungsgericht* cited three decisions of the *Trybunał Konstytucyjny*: on the Accession Treaty, on the Lisbon Treaty and on the Brussels Regulation. The first two, therefore, concerned the constitutionality of EU Treaties,¹⁵² while the third dealt with the constitutionality of secondary EU law. In none of the decisions did the *Trybunał* find inconsistencies with the Constitution.

¹⁵¹ Four years later however, the Constitutional Court reversed that declaration and ordered a general court to make a preliminary reference since the Constitutional Court did not regard itself as a court in sense of Article 234(3) of the Treaty. Today, the Corte costituzionale does refer questions for preliminary ruling to the ECJ, see Corte costituzionale (Constitutional Court), 11 May 2008, n. 103/2008; Corte costituzionale (Constitutional Court), 3 July 2013, n. 207/2013.

¹⁵² Trybunał Konstytucyjny, decision K 18/04 of 11 May 2005 (Accession Treaty); decision K 32/09 of 24 November 2010 (Lisbon Treaty) (the cases were brought after the entry into force of the Treaty); decision SK 45/09 of 16 November 2011 (Brussels Regulation) (Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

In the first *Accession Treaty* decision, it took the opportunity to express its views on the relationship between domestic and European law, stating unambiguously that the Constitution enjoys supremacy within the territory of the Republic of Poland and that this remains unaffected by Poland entering the EU.¹⁵³ The *Bundesverfassungsgericht* in its *OMT decision* cited two paragraphs: One in which the *Trybunał* stated that the Constitution prohibits a conferral of all the competences of a given organ of the state, a conferral of competences in relation to all matters in a given field as well as the conferral of the competences in relation to the essence of the matters determining the remit of a given state organ (para 4.2.) and then, the paragraph where it stated that the ECJ is the primary, but not the sole interpreter of EU law. The ECJ should act within the scope of transferred powers and should respect the principle of subsidiarity. Furthermore, the principle of mutual loyalty imposed a duty for the ECJ to be “sympathetically disposed towards the national legal systems” and a duty for the member states to show the highest standard of respect for EU norms.

The *Bundesverfassungsgericht*'s references to the decisions on the *Lisbon Treaty* and the *Brussels Regulation* are more extensive, with virtually the entire *Lisbon* decision being cited.¹⁵⁴ In that decision, the *Trybunał* drew heavily on the jurisprudence of the *Bundesverfassungsgericht* and discussed such fundamental issues as sovereignty — understood as the confirmation of the primacy of the Polish Nation to determine its own fate — and its attributes; *Kompetenz Kompetenz*; constitutional identity — described as reflecting the values the Constitution, as “a concept which determines (...) the matters which constitute (...) “the heart of the matter”, i.e. are fundamental to the basis of the political system of a given state” — as well as essential state functions,¹⁵⁵ and *ultra vires* review. The *Trybunał* also pointed out that the concepts of constitutional identity and of national identity are closely related, whereby the latter “also includes the tradition and culture.” It added that one of the objectives of the European Union, indicated in the Preamble of the Treaty on European Union, is to satisfy the desire “to deepen the solidarity between their peoples while respecting their history, their culture and their

¹⁵³ See generally K. Kowalik-Bańczyk, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, GERMAN L.J. 1357 (2005).

¹⁵⁴ The reference is to n. 2.1. *et seq.*, i.e. about forty pages of the decision.

¹⁵⁵ Excluded from conferral are: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences.

traditions.”¹⁵⁶ The reasoning strongly resembles the jurisprudence of the *Bundesverfassungsgericht*, with the exceptions pointed out by the *Trybunał*:

(..) the vital differences between the Constitution of the Republic of Poland and the Basic Law for the Federal Republic of Germany, when it comes to regulating the systemic foundations of European integration. It is the task of the Polish constitution-maker and legislator to resolve the problem of democratic legitimacy of the measures provided for in the Treaty, applied by the competent bodies of the Union.¹⁵⁷

Strikingly, like the *Bundesverfassungsgericht*, the *Trybunał* placed itself in a league of constitutional courts that had reviewed the constitutionality of the Lisbon Treaty — along with the courts in the Czech Republic, Germany and Hungary, France and Austria. The relevant decisions have in common, so the *Trybunał* argued, an emphasis on the openness of the constitutional order with regard to European integration, combined with a focus on the significance of constitutional and systemic identity — and thus sovereignty — of the member states. The Court added that if the Treaty of Lisbon entered into force, the EU would remain an association of sovereign states, and not a federation, and that the member states of the Union, an international organization, would retain full sovereignty and remain the “masters of the treaties”. The limits of permitted development of the Union were set by the circumstances where the member states would begin to lose their constitutional identity.¹⁵⁸ Overall, the reasoning strongly resembles the jurisprudence of the *Bundesverfassungsgericht*.¹⁵⁹

The third cited decision of the Polish constitutional court was the first, and so far only, in which it actually directly reviewed the constitutionality of secondary EU law. The *Trybunał* essentially rejected the claims and stated that the Regulation was not unconstitutional. The *Bundesverfassungsgericht* cited paragraphs 2.4. and 2.5., where the *Trybunał* distinguished the respective roles of the ECJ — safeguarding EU law — and of the constitutional court — safeguarding the Constitution —, and emphasized the need for due caution and restraint when examining the conformity of EU secondary legislation to the Constitution. It seemed irreconcilable with the principle of loyalty laid down in Article 4(3)

¹⁵⁶ Para 2.1. in fine.

¹⁵⁷ Para 2.6.

¹⁵⁸ Para 3.8.

¹⁵⁹ With a touch of malignance one could say that the BVerfG refers to itself (speaking through the Polish *Trybunał*).

TEU to grant powers to particular member states to declare EU law to be no longer legally binding. But then the *Trybunał* proceeded to say that

By contrast, within the meaning of Article 4(2) of the TEU, the Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional. National identity and constitutional identity, which is the essential component thereof, have already been discussed by constitutional courts, including the Constitutional Tribunal (cf. the aforementioned judgment in the case K 32/09). Also the Court of Justice makes reference in its jurisprudence to the necessity to take into account the national identities of particular Member States.¹⁶⁰

Interestingly, although it considers “national identity” as broader than “constitutional identity”, the *Trybunał* seems to consider the review of constitutional identity under national law and of national identity under EU law to go “hand in hand”, and apparently Sayn-Wittgenstein did not make it change its opinion.

The *Trybunał* also explains what the consequences would be of a declaration that an EU act infringes the Constitution. In such a case, the relevant act would be inapplicable in Poland, but more importantly, it acknowledged that this would amount to a violation of Poland’s international obligations, and hence this should happen only as “ultima ratio.” Three choices would then be available to Poland: amend the Constitution, or take measures aimed at amending the EU provisions, or withdraw from the European Union. That decision should be made by the Polish sovereign, the Polish Nation, or the organ of the state which, in accordance with the Constitution, may represent the Nation.

What the *Bundesverfassungsgericht* fails to mention, is that towards the end of its decision, the *Trybunał* seems to suggest that challenges against EU secondary law could in the future only concern fundamental rights issues, not *ultra vires* claims, and that applicants would have to make probable that the challenged act of EU secondary legislation causes a considerable decline in the standard of protection of rights and freedoms, in comparison with the standard of protection guaranteed by the Constitution.

¹⁶⁰ Compare Sayn-Wittgenstein, Case C-208/09 with Runević-Vardyn, Case C-391/09.

IX. Sweden

Article 6 of Chapter 10 of the *Swedish Instrument of Government* similarly seems to apply mainly, if not exclusively, to Treaty amendments. The provision received its present form in 2002 and reads:

Within the framework of European Union cooperation, the *Riksdag* may transfer decision-making authority which does not affect the basic principles by which Sweden is governed. Such transfer presupposes that protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The expression “the basic principles by which Sweden is governed” relates to the provisions of the first Chapter of the Instrument of Government, defining the principles of democracy, rule of law (legality), equality, minority protection and indicating the most important constitutional organs. Article 6 of Chapter 10 is usually taken to mean that the first Chapter of the Instrument of Government should not be rendered meaningless by the transfer of powers to the EU, and may thus be understood as expressing a constitutional core which is protected also in the context of European integration. It is considered to imply that the *Riksdag* must remain the primary organ of the State and a transfer of legislative power may not substantially diminish parliamentary powers.¹⁶¹

During the preparation of the provision, it was made clear that it was addressed to the legislature, and not to courts and other bodies. If a court or administrative authority would find the transfer contrary to the Constitution, they would still have to apply the relevant EU law. The question whether courts could declare EU law *ultra vires* was raised but not answered conclusively.¹⁶² The Committee that prepared the 2012 constitutional reform, however, found that the Constitution does not reserve the power to review that EU law is *ultra vires* to Parliament. It further held that it could not be argued that compliance with transfer conditions could only be assessed on the basis of the situation at the time of the transfer decision. In other words, it was considered “not impossible” that questions concerning the constitutional conditions to a transfer of powers may be subject to examination in a Swedish court, although it was thought this question would only arise “if very special circumstances exist, such as in the less probable situation that the EU

¹⁶¹ SOU 2008: 125/153, 492.

¹⁶² SOU 2008: 125/ 153, 494.

freedoms protection was greatly weakened.”¹⁶³ Yet, in light of the Swedish traditions on constitutional review, it is not likely that the courts will easily engage in such review.¹⁶⁴ For the time being, the provision has played a role only at times of Treaty amendments.

X. Spain

As was the case for the decisions of the Italian *Corte costituzionale*, the *Bundesverfassungsgericht* did not specify any particular passages of the *Declaración* of the Spanish *Tribunal Constitucional* on the Constitutional Treaty. So what could be the relevant elements of that Declaration that the *Bundesverfassungsgericht* is drawing on?¹⁶⁵ In its Declaration, the Tribunal stated that the operation of the transfer of the exercise of competences to the EU and the consequent integration of EU legislation into Spanish law imposed unavoidable restrictions on the sovereign powers of the State, which were acceptable only when European legislation was compatible with the fundamental principles of the social and democratic state governed by the rule of law established by the national Constitution. Consequently, the transfer enabled by Article 93 of the Constitution was subject to substantive limits. These limits, which are not expressly provided in the provision, were implicit in the Constitution and included respect for the sovereignty of the State, its basic constitutional structures and the system of fundamental principles and values set forth in the Constitution, where the fundamental rights acquire their own substantive nature (Article 10.1 CE).¹⁶⁶

Regarding the primacy of EU law, the Tribunal remarked that the European legal order was constructed upon common values of the EU member states’ Constitutions and their constitutional traditions. This led the Tribunal to point out that it is EU law that would guarantee, through a series of devices foreseen in the Treaties, respect for basic constitutional structures in each country, including fundamental rights.¹⁶⁷ As a result, the Court stated that upon the entry in to force, the Treaty rather than the Constitution would be the framework of validity of European legislation, even though the Constitution requires

¹⁶³ *Id.* at 500.

¹⁶⁴ See, e.g., Thomas Bull, *Judges without a Court—Judicial Preview in Sweden*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SKEPTICAL ESSAYS* (Tom Campbell, KD Ewing & Adam Tomkins eds., 2011); Carl Lebeck’s, *Sweden*, in *THE NATIONAL JUDICIAL TREATMENT OF THE ECHR AND EU LAWS - A COMPARATIVE CONSTITUTIONAL PERSPECTIVE* (Giuseppe Martinico & Oreste Pollicino eds., 2010).

¹⁶⁵ While the Constitutional Treaty never entered into force, the conception of the relations between the EU and its member states developed therein remain valid, as is evident from the Tribunal’s final decision in *Tribunal Constitucional*, Feb. 13, 2014 (DTC 26/2014) (Melloni).

¹⁶⁶ *Tribunal Constitucional*, Dec. 13, 2004 (DTC 1/2004, ground 2) (Constitutional Treaty).

¹⁶⁷ *Tribunal Constitucional*, Dec. 13, 2004 (DTC 1/2004, ground 3) (Constitutional Treaty).

that the legislation accepted as a result of the transfer be compatible with its basic values and principles.¹⁶⁸

Consequently, the Tribunal was not entitled to check the validity of the law adopted by European institutions; this control was to be carried out by the ECJ, for instance on preliminary references on validity. It was basically through these procedures that the ECJ guarantees and effectively safeguards a high level of protection for the fundamental rights contained in the Charter. Nonetheless, the Constitutional Court also held that

in the unlikely case where, in the ulterior dynamics of the legislation of the EU, said law is considered irreconcilable with the Spanish Constitution, without the hypothetical excesses of the European legislation with regard to the European Constitution itself being remedied by the ordinary channels set forth therein, in a final instance, the conservation of the sovereignty of the Spanish people and the given supremacy of the Constitution could lead this Court to approach the problems which, in such a case, would arise. Under current circumstances, said problems are considered inexistent through the corresponding constitutional procedures.¹⁶⁹

Accordingly, the Tribunal did reserve for itself in “unlikely cases” of “hypothetical excesses” some competence to act. It did not speak of “*ultra vires*” issues, but probably more of “constitutional identity” type cases, though the Tribunal did not mention the concept in this sense. It did, however, make reference to the EU law concept of national identity in the then Article I-4 of the Constitutional Treaty (now Article 4(2) TEU) as an aid to interpret the primacy provision in that same Treaty, along with Article I-2 Constitutional Treaty (now Article 2 TEU) as well as what is now Article 53 of the Charter. These provisions confirmed the guarantee of the continued existence of the states and their basic structures, as well as their values, principles and fundamental rights. The Tribunal concluded that the competences whose exercise was transferred to the EU could not, without a violation of the Treaty itself, act as a foundation for the production of European regulations whose content was contrary to the values, principles or fundamental rights of the Spanish Constitution. The Declaration can be seen as expressing a great trust in the mechanisms and principles provided in EU law and the expectation that the EU would respect of the constitutional core of the member states.

¹⁶⁸ Tribunal Constitucional, Dec. 13, 2004 (DTC 1/2004, ground 2) (Constitutional Treaty).

¹⁶⁹ Tribunal Constitucional, Dec. 13, 2004 (DTC 1/2004, ground 4) (Constitutional Treaty).

Even if the Tribunal did reserve for itself some review power, the Declaration cannot really be read as a serious threat to the applicability of EU law in Spain. Indeed, the Spanish Tribunal has never acted on such power. And in the recent *Melloni* decision, the Tribunal went along with the ECJ and adapted its standard of protection even for cases outside the scope of EU law.¹⁷⁰

XI. Czech Republic

The decision that come closest to what the *Bundesverfassungsgericht* seems to have in mind — along with the three decisions of the Polish Constitutional Court — is the *Holubec* decision of the *Czech Constitutional Court*, also known as the *Slovak Pension* case. Nevertheless, it is submitted that the decision of the Czech *Ústavní Soud* — in which it effectively declared the ECJ judgment in *Landtová ultra vires* — should not be seen as representative of that court's general position.¹⁷¹ *Holubec* is a decision rendered by a court that found itself caught in a domestic conflict with the Czech Government and the highest Administrative Court over entitlements to special supplements for Czech pensioners on Slovak pensions, which the *Ústavní Soud* had based on the Czech Constitution.¹⁷² When the ECJ decided that that position was contrary to EU law in so far as these supplements were granted exclusively to Czech nationals, the *Ústavní Soud*, in another case, declared that it had to test the judgment of the ECJ in light of the standards it had set out earlier.¹⁷³ In its *Lisbon* decisions it had held that it would review the exercise of transferred competences by European Union bodies in three situations:

the non-functioning of its institutions; the protection of
the material core of the Constitution, and, finally, the
functioning as *ultima ratio*, i.e. the authority to review

¹⁷⁰ Tribunal Constitucional, Feb. 13, 2014 (DTC 26/2014) (*Melloni*) (decision handed after the OMT reference of the *Bundesverfassungsgericht*); on this decision, see Aida Torres Perez, *Melloni in Three Acts: From Dialogue to Monologue*, 10 *EUCONST* 308 (2014).

¹⁷¹ See also Ladislav Vyhnanek, *The Eternity Clause in the Czech Constitution as Limit to European Integration. Much Ado About Nothing?*, 9 *INT'L CONST. L. J.* 240 (2015).

¹⁷² On the decision and its context, see Michal Bobek, Landtová, *Holubec*, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure, 10 *EUCONST* 54 (2014); Jan Komarek, *Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII*, 8 *EUCONST* 323 (2012). Very few commentators—except perhaps for the president of the German *Bundesverfassungsgericht*—have commented positively on the decision. See Andreas Vosskule, *Bewahrung und Erneuerung des Nationalstaats im Lichte der Europäischen Einigung*, speech held at the Hessischen Landtag in Wiesbaden (Mar. 1, 2012).

¹⁷³ Ústavní soud České republiky 26.11.2008 (ÚS) [decision of the Constitutional Court of Nov. 26, 2008] ÚS 19/08 [hereinafter *Lisbon I*]; Ústavní soud České republiky 3.11.2009 (ÚS) [decision of the Constitutional Court of Nov. 3, 2009] ÚS 29/09 [hereinafter *Lisbon II*].

whether an EU act exceeded the powers that the Czech Republic transferred to the EU under Article 10a of the Constitution; these could be, in particular, abandoning a value identity and exceeding the scope of the entrusted competences.

In *Holubec* the *Ústavní Soud* stated that the ECJ had omitted to familiarize itself with the arguments developed by the Constitutional Court and the constitutional identity of the Czech Republic, which it drew from the common constitutional tradition with the Slovak Republic, “that is from the over seventy years of the common state and its peaceful dissolution, a completely idiosyncratic and historically created situation that has no parallel in Europe”.¹⁷⁴ And so the Czech constitutional court became the first to declare EU law, more particularly a judgment of the ECJ, *ultra vires*.

In previous cases, however, the constitutional court had been much less proactive. It had indeed rejected the absolute primacy of EU law¹⁷⁵ and emphasized the constitutional limits of the Czech participation in European integration. But it refused to formulate a catalogue of non-transferrable powers and authoritatively determine substantive limits to the transfer of powers and to define the term “sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the man and of citizens” once and for all. This, the Court held, should be left primarily to the legislature to specify, because this is *a priori* a political question, which provides the legislature wide discretion.¹⁷⁶ With the clear exception of the *Holubec* decision, the Czech constitutional court has been very cooperative.¹⁷⁷

XII. Other Member States

An obvious omission in the list of references in the *OMT* order for reference of the *Bundesverfassungsgericht*, concerns the United Kingdom. This omission is comprehensible: The exceptionalism of UK constitutional law makes any comparison difficult. Moreover, the

¹⁷⁴ It concluded, “In a situation where the ECJ was aware that the Czech Republic, as a party to the proceeding, in whose name the government acted, expressed in its statement a negative position on the legal opinion of the Constitutional Court, which was the subject matter for evaluation, the ECJ’ statement that the Constitutional Court was a ‘third party’ in the case at hand cannot be seen otherwise than as abandoning the principle *audiatur et altera pars*.”

¹⁷⁵ *Ústavní soud České republiky 8.3.2006 (ÚS)* [decision of the Constitutional Court of Mar. 8, 2006] ÚS 50/04 (Sugar Quotas).

¹⁷⁶ *Lisbon II* at paras. 111–13.

¹⁷⁷ See also Vyhnánek, *supra* note 171.

most relevant UK judgment in this context was handed eight days *after* the *Bundesverfassungsgericht's* OMT-referral: The *HS2 decision*, which was clearly inspired by the German approach to constitutional identity.

In British case law issues such as respect for the UK's constitutional identity, for fundamental constitutional principles, for fundamental rights and for the division of competences between the member states and the EU (*Kompetenz-Kompetenz* issue) were until recently not well developed. The Supreme Court's judgment in the *HS2* case is however a turning point. One of the questions at hand was whether EU law requires British courts to test the compatibility of parliamentary proceedings for the adoption of a bill approving the development of a high speed railroad track with an EU directive. Such judicial interference in parliamentary proceedings is explicitly forbidden by the Bill of Rights of 1689, which is still positive law.¹⁷⁸ The Supreme Court justices unanimously decided that EU law did not require the alleged judicial action. At the same time they seized the opportunity to discuss the issue of whether they would have had to apply the relevant piece of EU law if it had required judicial oversight. Although their statements in this respect are *obiter*, the message is loud and clear.¹⁷⁹

In his unanimously endorsed opinion, Lord Reed, stated that "there is much to be said for the view, advanced by the German Federal Constitutional Court that (...) a decision of the Court of Justice should not be read by a national court in a way that places in question the identity of the national constitutional order".¹⁸⁰ Lord Neuberger and Lord Mance, whose joint opinion was unanimously endorsed by the other sitting justices, also envisaged substantive limits to the primacy of EU law:

The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as

¹⁷⁸ "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

¹⁷⁹ For the importance of the decision for the general UK constitutional landscape, see Mark Elliot, *Constitutional legislation, European Union Law and the nature of the United Kingdom's contemporary constitution*, 10 *EuConst* 379 (2104).

¹⁸⁰ On the application of *Buckinghamshire County Council and others v. The Secretary of State for Transport*, [2014] U.K.S.C. 3, para. 110.

fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.¹⁸¹

In the more recent *Pham* judgment, Lord Mance expressed his view on the constitutional relationship between the UK and the EU in way which is reminiscent of that of the *Bundesverfassungsgericht*. He claimed jurisdiction for UK courts to essentially conduct *ultra vires* and constitutional identity review, but also emphasized the need for all bodies involved to act with mutual respect and great caution, in a spirit of cooperation of which also the *Bundesverfassungsgericht* has spoken.¹⁸²

On the remaining “missing” member states we will be very brief.¹⁸³ They can be divided into three groups. In a first group of states — Bulgaria, Croatia, Malta, Slovenia, Romania — the situation simply is not entirely clear, and the courts have not developed a clear view on *ultra vires* and identity review. In the second group — Austria,¹⁸⁴ Belgium, Cyprus, Hungary, Luxemburg, and the Netherlands — the primacy of EU law more or less goes uncontested. In the third group certain elements of *ultra vires* review or some sort of constitutional (identity) review are present, for instance in the form of unamendable constitutional provisions — Greece, Portugal — or the claim of primacy of the national constitution *vis-à-vis* EU law — Lithuania, Slovakia.¹⁸⁵ In some of these latter states also the contours of a kind of (indirect) review of (secondary) EU acts can be perceived. The Greek Council of State for instance has stated that no legal norm has primacy on the Greek constitution. But it also reads in Article 28 of that same constitution the obligation to interpret national constitutional provisions in conformity with EU law.¹⁸⁶ In Finland the Constitutional Law Committee, a parliamentary committee which is considered to be the central constitutional body of Finland and whose constitutional interpretations are treated

¹⁸¹ *Id.* at para. 207.

¹⁸² *Pham v. Secretary of State for the Home Department*, [2015] U.K.S.C. 19, paras. 90–91.

¹⁸³ See more extensively BESSELINK, CLAES, IMAMOVIĆ, REESTMAN, *supra* note 106.

¹⁸⁴ Michael Holoubek, *Austrian National Report for the XVI Congress of the Conference of European Constitutional Courts 1*, http://www.confcoconsteu.org/reports/rep-xvi/LB_Autriche_EN.pdf.

¹⁸⁵ *Report of the Constitutional Court to the XVI Congress for the Conference of European Constitutional Courts 1–2*, <http://www.confcoconsteu.org/reports/rep-xvi/KF-Slovaquie-EN.pdf>.

¹⁸⁶ Panos Kapotas, *Greek Council of State, Judgment 3470/2011*, 10 EUCONST 162 (2014).

as binding by Parliament and other authorities,¹⁸⁷ has stated that national measures implementing EU law may not lower the national standard of fundamental rights protection. The Portuguese *Tribunal Constitucional* has declared provisions in the budget law for 2012 suppressing the 13th and 14th (salary) months for civil servants and pensioners unconstitutional for violating “the fundamental rights and key structural principles of the state based on the rule of law”, in particular the principle of equality.¹⁸⁸ As the suppression was agreed in the bailout program concluded between the Portuguese government, the IMF and EU institutions, this could be taken as an indicator that the Court is also willing to review the compatibility of genuine EU law instruments with the fundamental principles of the Portuguese legal order. This would be in line with the Articles 8(4) and Article 277(2) of the Portuguese Constitution.¹⁸⁹ Yet, this does not come anywhere near the *Bundesverfassungsgericht*'s constitutional identity case law.

The comparative analysis thus reveals a clear trend in the case law of national (constitutional) courts to announce constitutional limitations regarding participation in European integration and to the effect of EU law in the domestic legal order. Constitutional and supreme courts have different interests and values to consider than the ECJ, because they have to uphold the national constitution and protect national principles and values, which may lead to differences in assessment in certain constellations.¹⁹⁰ Yet, the comparative analysis also shows that the German *Bundesverfassungsgericht* may well be overstating the support for its position in foreign jurisprudence. In most cases, the court's brethren are much more nuanced and less ardent. It is important also to note the difference in power, posture, reputation, and gravitational pull between the courts involved. Moreover, the constitutional cultures vary greatly, with courts, even constitutional courts in many countries, leaving much more room to the political branches in these types of issues.

¹⁸⁷ Päivi Leino and Janne Salminen, *The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?*, 9 EUCONST 451, 459–60 (2013).

¹⁸⁸ Tribunal Constitucional (Portugal) ruling No. 353/12, 5 July 2012; see also Mariana Canotilho, Teresa Violante and Rui Lameiro, *Austerity measures under judicial scrutiny: the Portuguese constitutional case law*, 11 EUCONST (2015) (forthcoming).

¹⁸⁹ Art. 8(4) states, “The provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.” Article 277(2) provides, “The organic or formal unconstitutionality of international treaties that have been regularly ratified do not prevent the application of their provisions in Portuguese law as long as the provisions are applied in the law of the other party, except if the said unconstitutionality results from the violation of a fundamental principle.”

¹⁹⁰ See Christophe Grabenwarter, *The Co-operation of Constitutional Courts in Europe – Current Situation and Perspectives*, in GENERAL REPORT AND OUTLINE OF MAIN ISSUES FOR THE XVITH CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS 8.

E. Concluding Remarks

In his Opinion in the *Gauweiler case*, Advocate-General Cruz Villalón extensively discussed the claim of the *Bundesverfassungsgericht* to constitutional identity review. In his view, constitutional identity and national identity in the sense of Article 4(2) TEU could not be very different. He pointed to the notion of the common constitutional traditions of the member states and the EU's common constitutional culture, which is part of the common identity of the Union. Against this backdrop, he argued, the constitutional identity of each member state could not be regarded as 'light years away' from that common constitutional culture. Rather, there would be convergence between the constitutional identity of the Union and that of each of the member states'.¹⁹¹ Moreover, it would make it an impossible task to preserve the Union as we know it, if the *Bundesverfassungsgericht's* claim to an absolute and ill-defined reservation "described as 'constitutional identity'" were shared by the guardians of the constitutions of 28 member states.¹⁹²

It is obvious that the AG worked on the basis of an entirely different understanding of the concept of "identity" than that of the *Bundesverfassungsgericht*. Its urge to protect German constitutional identity vis-à-vis the EU is not diminished by the fact that the foundational principles of the EU and its member states are converging. German constitutional identity is already and almost exclusively made up of principles which are also foundational for the EU legal order: democracy, rule of law, fundamental rights protection, solidarity. German constitutional identity requires that until the German people as the original holder of German sovereignty in free self-determination decides otherwise Germany remains a democratic, rule of law based, fundamental rights protecting, social and federal state in its own right. And although the *Bundesverfassungsgericht* has clearly overestimated the support for its position in foreign jurisprudence, it is undeniable that, at least on the level of principles, several constitutional or highest courts of other member states have adopted a similar stance. This situation cannot be expected to change in the near future and implies that the EU legal order is less autonomous than the ECJ proclaims it to be.

The AG also could not resist the temptation to enter into the debate on 'subordination' of one legal order to the other.¹⁹³ But the reality is that the *Bundesverfassungsgericht* and most other constitutional and highest courts do accept that the EU is not structured according to a strict hierarchy. At the same time they do not accept that EU law has

¹⁹¹ Opinion of Advocate General Cruz Villalón, *supra* note 5, at para 61.

¹⁹² *Id.* at para. 59.

¹⁹³ *Id.* at para. 60.

unconditional primacy.¹⁹⁴ That will not change as long as sovereignty, or the ultimate legal or political authority, has not explicitly shifted to EU. As long as that has not happened, the EU will have to cope with different courts which on the basis of different ultimate authorities claim to be the court of last resort. It goes without saying that such a legal order can only be viable if each of the courts involved exercises considerable self-restraint.

In this respect the *Gauweiler* decision of the ECJ must be applauded. Several member states¹⁹⁵ had urged the ECJ to dismiss the *Bundesverfassungsgericht's* reference in *Gauweiler* as inadmissible because

a national court should not be able to request a preliminary ruling from the Court of Justice if its request already includes, intrinsically or conceptually, the possibility that it will in fact depart from the answer received. A national court should not be able to proceed in that way because Article 267 TFEU cannot be regarded as providing for such a possibility.¹⁹⁶

The AG and the ECJ were correct to reject that suggestion. The AG invoked the principle of sincere cooperation¹⁹⁷ and advised the ECJ to engage with the concerns of the referring court. And this is what the ECJ has done in *Gauweiler*. The Court resisted the temptation to restate its classic claims regarding the autonomy and the primacy of EU law over all national law of the member states, including their constitutional law. It only permitted itself to remark, almost in passing, that

it is settled case-law of the Court that a judgment in which it gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings.¹⁹⁸

¹⁹⁴ *Lisbon* at para. 340.

¹⁹⁵ Including Italy, whose Corte costituzionale the BVerfG has ranked among the league of like-minded courts.

¹⁹⁶ Opinion of Advocate General Cruz Villalón, *supra* note 5, at para. 36.

¹⁹⁷ The word “sincere” is repeated 9 times in the Opinion. The AG also suggested that there was a risk that the preliminary reference procedure was being “manipulated.”

¹⁹⁸ *Gauweiler*, Case C-62/14 at para. 16.

For the rest, it relies almost entirely on the force of its substantive arguments that the OMT decision of the European Central Bank falls with the Bank's mandate and is not *ultra vires*.

This is wisdom. Recourse to the ECJ's own authority and a restatement of the classic claims of EU law would not have impressed the *Bundesverfassungsgericht*. The German court is well aware of that Luxembourg case law and still does not entirely accept it. When a conflict cannot be settled by reference to a common ultimate legal or political authority and the use of force is excluded, there is only one remedy: the recourse to reason and arguments. That is what the ECJ has done in *Gauweiler*. Now the word is to the *Bundesverfassungsgericht*.