Chapter X

Comparative Analysis: The Shells that Embrace Constitutional Identity

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Abstract

This book is the result of extensive and wide-ranging research aimed at understanding the constitutional jurisdictional responses of member states to the evolution of European Union (EU) law or the EU itself. This study focuses on the emerging reference to constitutional identity; however, to understand the rationale and function of this reference, we examine the context of the shells surrounding it. We identified the same or similar patterns and ideas. For enhanced examination and interpretation, we also examined the shells surrounding constitutional identity, placing it in its current context, by examining the jurisprudence of member states that joined this supranational organisation in essentially three different periods and whose legal development was thus adapted to this constantly evolving organisation. Therefore, this study focuses on questions such as whether there are similar patterns, a common approach regarding the primacy of EU law, the competences of the EU, and member states' constitutional identity and values. We aim to better understand the directions and tendencies of the institutions and laws of the EU, as well as national sovereignty, identity, and constitutional development in member states. The study followed a comparative approach, and its methodology was based on a questionnaire.

Keywords: constitutional identity, comparative analysis, historical background, constitutional courts, European Union, preliminary procedure, constitutional dialogue

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1. Introduction to the research

The book is the result of extensive and wide-ranging research, which sought to examine no less a question than to understand the constitutional jurisdictional responses of the member states to the evolution of European Union (EU) law or the EU itself. The idea for this research arose from the widespread realisation that the actual implementation of EU law and the decisions of the Court of Justice of the EU are increasingly a matter of debate, both in the political and legal arenas. Debates focus on issues such as the relationship between the primacy of EU law and constitutions, the protection of constitutional traditions and constitutional identity, the role of national constitutional courts, the role of constitutional dialogue, and the legal identity of the EU. Questions arise regarding constitutional identity: what can be considered part of the constitutional identity of a Member State, what are the issues that form an indisputable part of it, and which must be defended by the Constitutional Court? There is also a legal debate about the extent, justification, and existence or lack of authority of EU institutions to extend their powers.

These questions could have been explored over many years and volumes, and even then, we may not have obtained a tangible result. In this study, we identified the same or similar patterns, trends, and ideas. The world is changing, as is the EU. The organisation that once sought to avoid previous war conflicts, based on peace and economic prosperity, has now moved on and started on the road to a political union. Although it is notable, as Giacinto della Cananea points out[1], that from the outset, the economic dimension of European integration was accompanied by a political dimension, it is widely believed that this change really began after the Treaty of Maastricht and that economic issues had dominated before that. The general perception has been focused on economic prosperity, and perhaps it can be argued that when the regime-changing states joined, it was this economic prosperity, alongside the 'return to the West', that they most desired, as they had not had this development for the previous half century.

However, soon after the accession of regime-changing countries, a series of crises swept the region—economic crisis, refugee crisis, epidemic, and war—in a short period of time, which did not favour calm development but, on the contrary, exacerbated differences. Therefore, the system established by the Lisbon Treaty and its political community of values are being tested under difficult circumstances. It is a system that is intended to synthesise a variety of interests and values: the interests of the states that have been involved in the development of the EU (almost) since its founding, which have been developing organically with it over a long period of time, and the interests of the states that joined in the mid-2000s and on, which have been rapidly reforming their structures and legal systems as a result of the change of regime and adapting them to the existing system to join, and which have now

1 della Cananea, 2023, p. 82.

been joined by the interests and perceptions of the EU as an institutional system. In this multi-stakeholder system, which seeks to achieve a state of equilibrium, there is tension between the principle of subsidiarity, which protects the values and interests of the member states, the principle of recognition of the specific identity of the member states, and the interests that go beyond these, which are embodied in the primacy of EU law. Cogs meet and drive the engine of progress, but sometimes these cogs do not fit properly, get stuck, or get caught.

This study focused on the concept of constitutional identity. As Rosenfeld stated, constitutional identities such as national identity can be conceived as belonging to a collective self, which can be constructed on the basis of sameness or selfhood, based on the dynamic interaction between projections of sameness and images of selfhood. The interaction in question may, at times, evoke complementarity or contradiction.[2] Constitutional identity can also have multiple functions. The starting idea of the research was that the concept emerged in the Eastern European states in the context of the frictions between the EU and the member states and thus has a close connection with conceptions of sovereignty. As Jacobsohn points out, it can be assumed that the dynamics of constitutional identity are less a result of any specific set of cultural or historical background factors than the expression of a developmental process endemic to constitutionalism. With significant differences in political, cultural, and institutional arrangements, there will be great variations across countries in the specific ways in which the process unfolds.[3] Simultaneously, we must also consider that answers to legal questions depend on the system from which the researcher attempts to find them: the validity of viewpoints needs to be tested repeatedly to determine whether their relative worth has changed and to see whether new viewpoints or factors have arisen.[4] Therefore, identifying starting points and common questions that would provide answers on a similar basis is crucial.

One of these starting points was the idea that if the EU and its member states' scope for action are at the heart of constitutional identity, they must have a strong link with the field of political debate. Thus, two tendencies can be discerned in the legal literature: one approach argues that the concept of constitutional identity should be at the centre of constitutional theory, while critics of the principle 'have been sceptical that identity can be anything more than a tendentiously applied label used to advance a politically and constitutionally desirable result'.[5] Moreover, Fabbrini and Sajó summarise the contradiction as follows: the respect for national identity inherent in the fundamental, political, and constitutional structures is an accepted principle of EU law and it reflects a compromise in the integration process, the concept of national constitutional identity as applied by an increasing number of constitutional courts and governments represents a real and present danger to the

2 Rosenfeld, 2012, p. 2.
3 Jacobsohn, 2010, p. 348.
4 Vranken, 2011, p. 115.
5 Jacobsohn, 2010, p. 3.

process of European integration, as the doctrine is drenched with neo-sovereigntist features and is contrary to the rule of law.[6] Similarly, a recent work considers the rise of constitutional identity in the fact that while there is constitutional pluralism in the EU, in which EU constitutionalism and national constitutionalism coexist in principle, they are in fact irritating each other, each claiming the final say but ultimately neither being able to have it. However, constitutional identity can also be abused, as the author criticises, for example, its use for political purposes to detach it from constitutionalism.[7]

As the above references highlight, in many cases, authors have a sharp attitude towards the role of constitutional identity, while there are few (if any) constitutional institutions that do not interconnect with political values and interests. Therefore, this study aims to demonstrate a much more complex reality. This complexity is already present in the study by Tímea Drinóczi, who concluded that 'there can be three models, two attitudes, two legal procedures, and one communication channel detected in which the notion of constitutional identity displays legal relevance. The three models are confrontation with EU law, confrontational individualistic detachment, and cooperation with embedded identity; the two attitudes are EU-friendly and antagonistic; the two legal procedures are against EU law and constitutional amendments; and one communication channel is a preliminary ruling procedure.[8] The study, which summarised the results of her research, was written in 2018 and focused mainly on the case law of three countries: Germany, Hungary, and Italy.

The present research covers a wide range of issues and recent developments, but the focus is still on the reasons for and function of reference to constitutional identity. To make this effectively explorable and meaningful, the shells surrounding constitutional identity were also examined. Therefore, this study focuses on questions such as whether there are similar patterns, a common approach regarding the primacy of EU law, the competences of the EU, and member states' constitutional identity and constitutional values. The idea was that through this research, we can better understand the directions and tendencies of the institutions and laws of the EU as well as national sovereignty, identity, and constitutional development in member states. Through these shells—the relationship between EU law and national law, the competences of the EU and the member states, and the constitutional means of resolving frictions—we can situate and understand the role of constitutional identity and its changes in the practice of Constitutional Courts.

Three founding member states—France, Germany, and Italy—and the regime-changing countries of Central Europe—Poland, the Czech Republic, Slovakia, Romania, Hungary, and Croatia—participated in the research. The study followed a comparative approach, and its methodology was based on a questionnaire. The questionnaire primarily focused on the constitutional perception of the relationship

6 Fabbrini and Sajó: p. 458.
7 Scholtes, 2023, p. 27, 321.
8 Drinóczi, 2020, p. 122, 84.

between EU law and national law, the cases and limits of constitutional court intervention, and the role of constitutional identity and dialogue as balancing factors. The questions were as follows:

- How are EU legal acts incorporated into national law?
- What is the approach of member states when additional powers are transferred, compared to those conferred at the time of accession? Does this require formal legislation, or is it subject to (constitutional) court interpretation?
- Has there been any internal examination or legal procedure at the member-state level of the entry into force of the Constitutional Treaty and the Lisbon Treaty and its impact on the legal order of the member states?
- On which issues has the National Constitutional Court refused to intervene to protect national law and competence, and on what grounds?
- On which issues has the National Constitutional Court acted in defence of national law and competence, and how? What was the scope of the case from the perspective of the exercise of competence by the EU and by the member states?
- Has the interpretation of Article 2 of the TEU (in particular with regard to the rule of law) been reflected in the practice of national constitutional courts and Supreme Courts, and if so, on what grounds did the court base its decision?
- Has the interpretation of Article 4 of the TEU (in particular with regard to national identity) been reflected in the practice of national constitutional courts and Supreme Courts, and if so, on what grounds did the court base its decision?
- How has the academic position changed from accession to the present day with regard to the assessment of the impact of EU law on member states (e.g., primacy of EU law, relevance of Court of Justice decisions)?
- In connection with the above questions, is there a method of constitutional dialogue in force in a member state? Which institutions have developed this practice?

To put it simply, we aimed to identify which level in the hierarchy of norms the EU legal acts are incorporated into, how the courts (and law enforcement) resolve the conflict in this hierarchy, whether disputes arose regarding the level of incorporation, the reactions to the tendency of how the EU institutions widened their jurisdiction, whether this question arose either when the Constitutional Treaty or the Lisbon Treaty was adopted or afterwards, what were the core questions when the constitutional courts decided to intervene, and why these questions arose. To examine these questions, the authors had to present not only the basic functioning of their own legal system but also the specific circumstances under which any questions of interpretation or conflicts arose. In some cases, this meant reviewing an extremely long period, but simultaneously, this focal point allowed us to adequately highlight whether there were common patterns, typical areas where issues arose, and whether there was a clear interplay between national practices.

2. EU law meets national law, before Maastricht

One of the basic findings that emerged from the national chapters was that, overall, at the legislative and constitutional levels, the conflict between EU law and national law did not emerge as a major issue until the 1990s. The basic pattern is that the constitutions are narrow on the issue (they regulate the division of powers but not the place and role of EU law); rather, it was the national constitutional courts that gave substance to the issue, and this jurisprudential practice was taken over by subsequent constitutional amendments. In the case of countries that joined in the mid-2000s, these patterns may have been familiar, but in the period leading up to accession, there were few decisions at the constitutional court level in which the constitutional court itself told the constituent powers the issues it should decide on. Perhaps the Romanian Constitutional Court, which was the most open in this respect, explicitly drew the attention of the constitutional legislature to the fact that one of the key issues for the proper regulation of accession at the constitutional level was the integration of the acquis communautaire into national law and the definition of the relationship between community normative acts and national law.[9]

Returning to the founding states, the type of constitutional development described above also means that in the early decades, the development of EU law was not so significant in the eyes of the legislating, constituent power – that is, sovereignty, the operation of the state, and the exercise of rights – which would have required detailed constitutional regulation, even though the European Court of Justice's judgement in Costa[10], with the doctrine of supremacy, foreshadowed possible conflicts. Thus, the jurisdiction was confronted with the question on an ad hoc basis and had to answer it without significant support.

Another insight is that when constitutional courts have been confronted with these issues, they have adopted a cautious approach. During the different periods of integration, a more positive approach can be observed, with constitutional courts recognising and naming potential problems. In some cases, they have been quite vocal, only not applying their seemingly strong findings, softening them step-by-step, and seeking a balance point using different argumentation methods. The approach was essentially pro-European, and conflicts were resolved to the greatest extent feasible through legal interpretation.

Germany is a prime example of such development. In the chapter on Germany, we first observe the absence of any major constitutional legislation[11]. Until the 1992 constitutional amendment, it was virtually the German Federal Constitutional Court that gave substance to the constitutionality of EU membership. In 1992, an extensive

9 Decision 148/2003.

10 C-6/64 – *Costa v. ENEL*.

11 European integration had not been specifically addressed in the Basic Law, there was only a brief reference in the preamble, and it has also been silent regarding the interaction between domestic and international law.

provision was inserted in Article 23, which followed the German Federal Constitutional Court's view that the eternity clause in Basic Law operates as a limit to European integration and also stated guidelines for the interaction between domestic and supranational institutions in the post-Maastricht world. Regarding the interaction between domestic and international law, the Constitutional Court essentially followed the principle that, since international law generally requires national implementation, it is inferior to constitutional norms, and in addition to that, even the *lex posterior* rule was followed.[12] A similar approach was observed by another founder, Italy.[13]

However, there is also a consistent (and self-evident) pro-European approach that tilts concerns raised in the direction of the EU's powers and laws. The German Basic Law's 'friendliness towards international law' (*Völkerrechtsfreundlichkeit*) and the Federal Constitutional Court's approach, affording special treatment to the law of the EU, are examples of this[14], but the research shows that there is no major difference in this respect in either state.

However, there are nuances in the way this pro-European approach and the special perception of EU law are reflected in case law. From the beginning, the German Federal Constitutional Court has gone along with all the pertinent rulings of the European Court of Justice, allowing for the direct effect and supremacy of European law, both primary and secondary, including even the European Court of Justice's partial extension of these principles to directives. From the 1970s onwards, it began to address whether there were any limits under German law to the supremacy of an evolving law of the EU, and the Constitutional Court has consistently emphasised that there were such limits and that it was itself the competent institution to enforce them (see the well-known Solange decisions). In fact, the Federal Constitutional Court had not done this until the 1990s, when the Maastricht Treaty was adopted.[15]

In contrast, the Italian Constitutional Court initially refused to consider EU law 'superior' to national law, also on the basis of the classical and universal principle of *lex posterior* interpretation.[16] However, the practice began to soften, and in the 1984 *Granital* decision, the Court of Cassation accepted the primacy of EU law over national law. However, it reserved the power to assess the conformity of community norms with the principles of the constitutional order and the inalienable rights of the human person, thus remaining on the grounds of constitutional protection, imposing conditions, and limiting the validity of supremacy. Thus, the approach to supremacy has been essentially flexible, with the language of the Constitutional Court in favour of the Constitution, but the basis for the meeting of the two legal systems is that they are mutually autonomous but coordinated and communicating.[17]

12 Graser, 2023, p. 16.
13 della Cananea, 2023, p. 88–90.
14 Graser, 2023, p. 17.
15 Graser, 2023, p. 23.
16 ICC, Judgment 14/1964, [1964] CMLR, p. 425, and ICC, Judgment 183/1973, *Frontini [*1974] CMLR
17 della Canaea, 2023, p. 84.

3. The meeting of EU law and national law, after the Maastricht Treaty

The change in the perception of EU law in Western Europe was marked by the anticipation of its enlargement to Eastern Europe and the building of the road to political unions through the Maastricht Treaty. Although there was basic euphoria surrounding the enlargement, the period of preparation coincided with the process of EU transformation following the Maastricht Treaty.[18] A crossover point came with the adoption of the European Single Act (which implied the completion of the single market and the introduction of several hundred directives) and the ratification of the Maastricht Treaty, loaded with changes, both substantive and symbolic (e.g., currency, justice and home affairs, defence, and security). As Yves Mény pointed out, the functional shift in powers between member states and European institutions first led to a progressive but continuous transfer of powers to the benefit of Brussels bodies and the detriment of national institutions, a process marked by blockages followed by sharp accelerations. Despite some hesitation, this evolution has never stopped because staging posts have always been found onwards.[19] These issues have already reached a level that has moved the constituent powers, and the attitude has been cautious.

In Germany, the amendment to the Basic Law, while incorporating the Solange criteria, stipulates conditions for the participation of domestic institutions in activities at the supranational level, with a focus on the requirements of democracy.[20] France followed a path similar to the Maastricht Treaty, but the focus was on sovereignty issues. At the heart of the conception of sovereignty, the fundamental conditions for the exercise of sovereignty lay in the obligation of the state to ensure respect for the institutions of the republic, continuity of the life of the nation, and a guarantee of the rights and freedoms of its citizens. The Conseil d'Etat has also been consistent in examining, on a sovereign basis, the intersection of EU law or powers with national law. According to decisions on the Maastricht Treaty (most notably the Maastricht I Treaty decision of 9 April 1992[21]), the Treaty undermines sovereignty in three ways: by allowing foreigners to participate in elections for the appointment of members of the Parliamentary Assembly, by allowing France to impose monetary and exchange rate policies without its consent, and by depriving France of its discretionary right to regulate the entry of foreigners into its territory.[22] However, no major obstacles to progress have been put in place here either. Surprisingly, in Italy, the Maastricht Treaty did not receive much attention from most leading politicians or voters. One reason is the lack of a constitutional theory that would reconcile the

18 On the perception of accession in Eastern Europe, see e.g. Baldwin, Francois and Portes, 1997; Devrim and Schulz, 2009.
19 Mény, 2001, p. 35.
20 Graser, 2023, p. 23.
21 9 April 1992, 92-308 DC.
22 Mathieu, 2023, p. 72.

principles of national sovereignty with the reality of European integration and its new structures and processes. The constitutional amendment to place EU law in the legal system also had to wait until 2001.[23]

Thus, the pre-Maastricht period was a period of constitutional courts seeking their way without the support of constituent powers, on similar principles and solutions, without seriously stalling the integration process. Following the adoption of the Maastricht Treaty and its constitutional tests, there was again a quieter period in which the supremacy of EU law was increasingly reinforced, not only by the development of the Court of Justice of the EU but also by the partnership of ordinary courts, which were very active in initiating preliminary rulings, while the national constitutional courts did not intervene in these matters. In France, in 2004, the Conseil Constitutionelle established that the transposition of community directives into national law was a constitutional requirement.[24] While it reserves the right to examine whether European law is contrary to the rule or principle inherent in France's constitutional identity[25], as Bertrand Mathieu has pointed out, the application of the requirements here is also restrained, serving more as a deterrent than an effective means of dividing powers between matters covered by national law and those covered by EU law.[26]

Article 11 of the Italian Constitution also fits into this conceptual framework, since at its root lies the idea that shared sovereignty is not only conceivable and acceptable but also necessary in light of the goals—peace and justice among the peoples of the world—that the state, no state, could achieve alone. Membership in international organisations was therefore seen as the only legitimate way to achieve constitutional goals.[27]

Comparatively, the accession preparations of the regime-changing countries and their post-accession years showed different attitudes. As Petar Bacic[28] and Alena Krunková[29] explicitly point out, a constitutional identity search and construction took place in these countries after the regime change, which involved both a confrontation with the historical past and its closure, the imprint of which was reflected in the constitutions and the development of the desired democratic system. Accession to the EU was one of the culminations of this process, which entailed the necessary amendments to the constitutions. The basic pattern was the (necessary) definition at the constitutional level of the transfer of powers (Slovakia has followed a particular path in this respect, not transferring its powers but excising some of its rights[30]). However, the question of the relationship between EU law and national law

23 della Cananea, 2023, p. 86.
24 10 June 2004, 2004-496 DC.
25 27 July 2006, 2006-540 DC; 15 October 2021 2021-940 QPC (Sté Air France).
26 Mathieu, 2023, p. 72.
27 della Cananea, 2023, p. 81.
28 Bacic, 2023, p. 106.
29 Krunková, 2023, p. 354.
30 Krunková, 2023, pp. 365–366.

and the definition of the supremacy of EU law has been a matter of mixed solutions, ranging from silence to explicit designation.

Michal Petr shows that in the Czech Republic, there was a significant academic debate on the latter issue before accession[31], and in the other chapters, there are several examples of constitutional courts addressing issues regarding the EU in the 2000s. In contrast, in Hungary, the question of competence and the supremacy of EU law did not raise much interest, neither during the preparation for accession nor afterwards, and for many years, the Constitutional Court itself avoided discussing the issue.[32]

In the constitutional court decisions of regime-changing states, the benefits of accession, and with it, of the EU, were very prominent. However, this did not mean that the same or similar issues of sovereignty, functioning of institutions, or application of EU law did not arise. A few examples are highlighted. In Slovakia, the question of whether the EU is a state was examined[33], and the Polish Constitutional Court ruled at the time of accession that Poland and other member states reserved the right to assess whether the EU legislative authorities had acted within the limits of the powers conferred on them when adopting a particular act (law) and whether they had exercised their powers in accordance with the principles of subsidiarity and proportionality. If this is exceeded, then the acts (laws) adopted are not subject to the principle of the primacy of community law. It also defined the scope of the non-transferable powers of the state—the core of the powers enabling the sovereign and democratic determination of the fate of the republic—in a judgement reviewing the constitutionality of the Accession Treaty. This decision was also the most far-reaching among the states that acceded in 2004, in that it explicitly stated that the relevant provisions of the Constitution could not provide a basis for conferring legislative or decision-making powers on an international organisation (or one of its institutions), contrary to the Constitution of the Republic of Poland.[34] In the Czech Republic, the Constitutional Court has also set out in detail its position on EU law in its judgement 'Sugar Quotas III'.[35] The specificity of the decision is that it included EU law in the constitutional provision on the delegation of powers in such a way that it opens up the national legal order to the operation of community law but also implies that its legal effects are determined by EU law itself.[36]

Therefore, despite the pro-European nature of the issue as described in the individual chapters, there is still a wide practice of constitutional courts in the field of the transfer of powers and the application of EU law. However, constitutional courts are under no illusions: although they detect possible danger zones, they tend to avoid them by interpreting the issue in accordance with EU law or by leaving the

31 Petr, 2023, p. 156.
32 Berkes and Varga, 2023, pp. 171–173.
33 Decision No II ÚS 171/05 of 27 February 2008.
34 Judgment K 18/04.
35 CCC Pl. ÚS 50/04, 8 March 2006.
36 Petr, 2023, p. 139.

responsibility to the legislator. In this respect, the period following the adoption of the Lisbon Treaty, although not without major turbulence, did not have a paradigm shift overall.

4. Consequences of the Lisbon Treaty: the rise of constitutional identity?

The Lisbon Treaty led to a series of comprehensive investigations. The Treaty has brought about a significant change in the relationship between the EU and member states, which has been noted by most constitutional courts and constituent powers that have expressed various reservations. However, it is not these decisions per se that are of particular importance, but the path followed by the national constitutional courts from 2009/2010 to 2023 and the results they achieved with these reservations.

In the case of Germany, Alexander Graser writes that the German Constitutional Court is likely to be in a calming period, at least in his view, with indications that no further action is likely following the surprise PSPP decision. In its 2009 Lisbon ruling, the German Constitutional Court stressed that European integration had to leave sufficient space to the 'Member States for the political formation of economic, cultural, and social living conditions'. The German Federal Constitution laid down detailed cornerstones in response to a number of petitions for protection against excessive integration. However, although it was noted that the areas listed in the decision were being pushed forcefully by the EU, the Court did not find any clause that could not be constructed in a way deemed compatible with the Basic Law's requirements. However, it left room for manoeuvring. On the one hand, it announced that in the future, it was going to perform ultra vires control, and the court also coined the term 'identity review' to safeguard against potential infringements of the inviolable core content of the constitutional identity of the Basic Law.[37] All of these seem to be a serious set of criteria, but as the author pointed out, in the following years, the Constitutional Court softened them and offered the possibility of a preliminary ruling procedure in the event of possible conflicts that seemed irresolvable. This criterion was subsequently narrowed down to the necessary cases, and the Court interpreted EU law in a way that was in line with the German Constitution (in 2015, in the European Arrest Warrant case).[38]

By 2020, the German Federal Constitutional Court had tried to balance EU law and German law with a number of criteria: fundamental rights control, democracy criteria, rule of law critique, ultra vires control, and protection of constitutional

37 Graser, 2023, p. 29.

38 BVerfGE 140, 317 – Europäischer Haftbefehl II. (Identitätskontrolle; Solange III.).

identity; however, it did not constitute a real obstacle. Perhaps these decisions can also be seen as a kind of pathfinding in which they do not fully reach their destination.

Budgetary autonomy brought about a new phase of friction, with the PSPP's decision[39] being the most prominent. The German Federal Constitutional Court exercised the possibility of a preliminary ruling procedure and, as a result of its proceedings, found that identity control had not been infringed but that ultra vires control had been. The strongest decision was made in the financial case. At the same time, as the author shows, problems arising from the decision were easily resolved by the European Central Bank. The overall effect of the decision was political rather than legal.[40] At the end of 2022, the Own Resources Decision,[41] although it maintained the previous criteria, was significantly relaxed by the Constitutional Court—in the author's words, almost completely abdicated on the part of the Court.[42]

Meanwhile, the constitutional courts of the regime-changing states showed little concern regarding the emergence of the Lisbon system. In the Czech Republic, although concerns about sovereignty and the ultra vires exercise of powers were raised in the constitutional review of the Lisbon Treaty, the Constitutional Court rejected the petitions in both cases, concluding that sovereignty was strengthened and that the EU remained based on the values of respect for human dignity, freedom, democracy, the rule of law in a substantive sense, and respect for human rights.[43] In practice, this is also organically linked to the tendency of the Constitutional Court to rule in favour of EU law and interpret Czech constitutional law in line with EU law.[44] The decision-making activity of the Constitutional Court of the Slovak Republic shows that the primary law of the EU definitely does not 'only' have precedence in application over the law but is also perceived by the Constitutional Court as a potentially supra-constitutional source, while it has not yet formulated any impenetrable limits or declared any definition of constitutional or national identity.[45] In Hungary, when the Lisbon Treaty was adopted, no constitutional review was performed, and there was no particular public law debate. During the ex-post review, similar to the Czech Republic, the Hungarian Constitutional Court seized the positive side of the treaty. Although it stated that it reserved the right to exercise control over any further transfer of powers, it also concluded that the Treaty of Lisbon had transferred sovereignty to the extent necessary, did not create a European superstate, did not fundamentally change the EU, ensured the exercise of control by the national parliaments by applying the principles of subsidiarity and

39 BVerfGE 154,17 – PSPP-Programm.
40 Graser, 2023, pp. 34–37.
41 BVerfGE, Judgment of the Second Senate of 6 December 2022 – 2 BvR 547/21.
42 Graser, 2023, pp. 38–40.
43 CCC Pl. ÚS 19/08, 26 November 2008, para 217, Petr, 2023, pp. 148–151.
44 Petr, 2023, p. 157.
45 Krunková, 2023, p. 384.

proportionality to a greater extent than before, and that the Parliament could play an active and proactive role.[46]

Croatia has followed a particular path in this respect. It has devoted a separate chapter in its Constitution to the EU, which not only contains provisions on the division of competences and cooperation with EU organisations and participation in decision-making but also regulates in detail the relationship between EU law and Croatian law (Article 145). Article 145 regulates the protection of citizens' substantive rights before Croatian courts based on the principle of equivalent legal protection. It also speaks about the direct and indirect scope of EU law as its fundamental features, as well as the principle of primacy of EU law (although without explicitly addressing it).[47] Such detailed constitutional recognition of the importance of EU law does not leave much room for the kind of pathfinding we have seen in other states. This necessarily brings with it a pro-European approach, as articulated by the Croatian Constitutional Court[48], but there is also a certain reticence. On the one hand, the Constitutional Court rarely refers to CJEU decisions, and on the other hand, it has not used the preliminary ruling procedure.[49] It could even be considered a paradigm shift to rule that 'there is no need to further examine the merits of the compatibility of the referendum question with EU law since the Constitution, by its own legal force, takes precedence over EU law'[50]. However, the Constitutional Court did not elaborate on the relationship between national law and EU law and did not link the concept of Croatian constitutional identity with the relevant provisions of the EU Treaties. Therefore, determining if it pioneers a novel constitutional legal concept remains inconclusive.[51]

This period witnessed the emergence of a more pronounced constitutional identity and an equivalent concept. While the founding states we studied have been examples of constitutionally formulating the limits to which they adhere in the supranational legal order for decades, the content and name of these limits have also changed over time. German examples have been referred to several times, from the Solange I decision to the Own Resources Decision, through which we can see the search for the way in which these specificities have been formulated. At the same time, the protection of the 'inner core' of the constitution in the regime-changing states emerged at a time when a more streamlined constitutional court doctrine was available, which may be attributed to the more uniform language of the courts in the use of concepts.

In this sense, constitutional identity is linked to the protection of the Constitution and to the value of the primacy of the Constitution, as pointed out, for example, by the Romanian Constitutional Court—a kind of *central identity, a* guarantee that 'must

46 Berkes and Varga, 2023, pp. 181–184.
47 Bacic, 2023, p. 122.
48 Decision U-III-1410/2007 of 13 February 2008.
49 Bacic, 2023, p. 128.
50 Decision U-VIIR-1158/2015 of 21 April 2015 (para. 43.1), NN 46/2015.
51 Bacic, 2023, pp. 130–131.

not be relativised in the process of European integration[52]. The founding states originally defined limits in terms of abstract values such as sovereignty, democracy, the rule of law, and the level of protection of fundamental rights, which can be found in the jurisprudence of later acceding states. This was reflected, for example, in Poland, where constitutional identity had an inherent meaning in relation to respect for the constitutional identity of the judiciary and where the Constitutional Court also emphasised democracy, the rule of law, the protection of human dignity, and constitutional rights in defining non-transferable powers.[53] The Polish example perhaps differs most from the decisions dealt with in the individual chapters in its openness: From the outset, the Polish Constitutional Court linked the concept of constitutional identity to the protection of sovereignty, elaborating on the content of the latter. However, this openness distracts attention from the fact that the Constitutional Court has also stated that the concept of the EU, as set out in the Lisbon Treaty, seeks to respect both the principle of preserving sovereignty in the integration process and the principle of promoting European integration and the process of cooperation between states.[54] The Czech Republic also tends to follow the classical line, whereby the Constitutional Court equates Czech constitutional identity with the material core of the Constitution.[55]

Conversely, there has been a change in recent decisions on this subject, in that while constitutional courts were formulated along the lines of the abstract values mentioned above, the protection of the specific functioning of institutions is becoming increasingly common in current conceptions. In Romania, the status of members of parliament[56], the regulation of conflicts of interest[57], the retirement of judges[58], or even the organisation of the judiciary[59] are linked to constitutional identity. This is true even if we consider that in Romania, after its publication in 2015, the concept of constitutional identity was not elaborated in detail for a long time. Although there was a demand for it, the Constitutional Court was more concerned with proving the unconditional acceptance of European law, that is, the values and principles enshrined in the European legal order.[60] The functioning of Poland's judiciary falls within the scope of its constitutional identity.[61] Similarly, in Hungary, recognition of the judiciary's powers is included among the elements of constitutional identity, albeit only in passing.[62]

52 Decision 390/2021.
53 Judgment of 24 November 2010 Ref. No. K 32/09.
54 Stepkowski, 2023, pp. 246, 251.
55 Petr, 2023, p. 145.
56 Decision No 964/2012.
57 Decision No 682/2018.
58 Decision No 533/2018.
59 For developments, see chapter 7.
60 Toader and Safta, 2023, p. 318.
61 See in details Stepkowski, 2023, Chapter 6.
62 Decision 22/2016 (XII. 5.), Berkes and Varga, 2023, p. 194.

Another trend is the convergence of constitutional identity with elements of national identity. One example is Croatia, where the idea of constitutional identity and even the primacy of the Constitution have been formulated in the context of the rights of national minorities.[63] The Romanian Constitutional Court has used the notion of national identity in several decisions, with Toader and Safta highlighting how the two components complement each other in the Constitution.[64] The Constitutional Court also considered the eternity clause in Article 152 as part of constitutional identity in its 2021 decision[65]; official language and territorial integrity are part of the eternity clause. The Hungarian Constitutional Court also, in 2021[66], linked constitutional identity and the achievements of the historical constitution, which included the protection of the values that constitute the constitutional identity of the country (including linguistic, historical, and cultural traditions, and certain steps in the struggle for sovereignty and freedom of the country).[67]

6. In place of a conclusion: what is a possible solution? Constitutional dialogue, or lack thereof

Each chapter shows great variations in the means and reasoning used by constitutional courts when confronted with questions about EU law and powers. However, they are consistent in that intervention is rare and there is a strong emphasis on the pro-European approach. Two paths seem to emerge: In the case of Germany, Alexander Graser assumes a step backward, a weakening of the Constitutional Court's power[68], while Aleksander Stepkowsi's chapter paints a picture of a Constitutional Court that exercises its powers rigorously[69]. Additionally, in countries where the content of constitutional identity is not elaborated in detail, the need for this to happen is present, while the expansive development of EU law provides fewer opportunities for it. If we look at the cases presented in the chapters, it is apparent that problems arise, in some cases along very similar lines. We can therefore ask how, bearing in mind the common value of the pro-European approach, these problems can be effectively resolved. All courts and constitutional courts use the instrument of the interpretation of the law; however, there are limitations to this. The other available tool is dialogue between courts. However, this recognition by the CJEU was mostly a preliminary ruling procedure. Of the countries concerned, only the Czech

63 Decision U-I-3597/2010, Bacic, 2023, p. 111.
64 Toader and Safta, 2023, p. 322.
65 Decision 390/2021, Toader and Safta, 2023, p. 322.
66 Decision 32/2021 (XII. 20.).
67 Berkes and Varga, 2023, pp. 189, 200.
68 Graser, 2023, pp. 43–44.
69 Stepkowski, 2023, pp. 260–261.

Constitutional Court has attempted to engage in dialogue with the CJEU through other channels in a specific case, with dismal results, to say the least.[70] Simultaneously, while ordinary courts are active in initiating preliminary rulings to harmonise national law with EU law, this is more difficult for national constitutional courts.

The Italian Constitutional Court did not consider itself a 'court' in the sense of Article 267 TFEU (structurally, only one-third of its members are professional judges; two-thirds are appointed by political institutions, the President of the Republic, and the Parliament; functionally, its main competence is not to rule on disputes between individuals or between individuals and public authorities, but to verify the constitutionality of legislation), and it also treated the institution with reservations. When it first decided to refer to a question for a preliminary ruling in 2008[71], it limited its scope to inter-institutional disputes (between the state and regions, regions, and regions). The second case concerned the complex interaction between EU financial protection rules and domestic rules regarding the duration of criminal proceedings.[72] However, in this case, as Giacinto della Cananea pointed out, the question of the protection of national identity had already arisen (or could have arisen), but the Italian Constitutional Court chose dialogue rather than acting as the last defender of national identity. The third step was to interpret the right to silence in the context of the administrative procedure led by the financial market regulator CONSOB.[73] Although the German Constitutional Court ruled that in the case of ultra vires investigations, the Court of Justice of the EU must be given the opportunity to interpret the treaties in the context of a preliminary ruling procedure and to rule on the validity and interpretation of the acts in question, if it has not yet clarified the questions raised[74], reserving this finding for identity control, the author also presents a case in which it has refrained from doing so.[75] Similar to Germany, the French Conseil Constitutionelle also used a preliminary ruling procedure, but this is not common practice. The case, which was brought in 2013, concerned the validity of a European arrest warrant (like its German counterpart), the aim being to ensure that the law complied with the Constitution, and the result was the annulment of a provision of domestic law.[76] The Hungarian Constitutional Court has not yet used this instrument, although it has accepted the possibility in its recent practice.[77] The Croatian Constitutional Court, in its June 2020 decision[78], also stated that it considers itself to be a national court that can issue preliminary rulings within the limits of

70 Petr, 2023, pp. 153–155.
71 Order No 104/2008.
72 Taricco II case (C-42/17 – M.A.S. and M.B.).
73 della Cananea, 2023, pp. 89–90.
74 BVerfGE 126, 286.
75 Graser, 2023, p. 32.
76 Decision 2004-505 DC of 19 November 2004. The effect of the decision is not far-reaching, it does not change the legal status and primacy of the Constitution in the domestic legal order. Mathieu, 2023, p. 72.
77 Berkes and Varga, 2023, pp. 216–217.
78 U-III-970/2019 of 24 June 2020.

the powers conferred on it but has not yet made use of this possibility.[79] The chapter on Romania also shows that, although the Constitutional Court has made use of this instrument, other forms of dialogue (e.g., interjudicial dialogue, bilateral and multilateral meetings, international congresses, and conferences) are more widespread.[80] Therefore, we cannot conclude with confidence that this instrument is an effective solution. In principle, constitutional courts and the CJEU speak different languages and have different functions, preferences, and values regarding protection.

As indicated in the introduction to this chapter, the initial idea of the research was that the concept of constitutional identity emerged in the context of frictions between the EU and the member states in Eastern Europe, which were the focus of the research and thus have a close link with perceptions of sovereignty. The notion that the concept and role of constitutional identity can play a significant role in the practice of constitutional courts, even if it does not actually function as a 'weapon', guided this research. Previous research has provided concepts with a variety of nuances. First, it operates in the pro-European legal space. This pro-European approach does not manifest itself in the form of ordinary courts actively referring to EU law and CJEU judgements, but rather in the avoidance of conflict and interference and in the interpretation of law in accordance with EU law. Conversely, constitutional identity is in fact a manifestation of the same concept at different times under different names; the cited examples show that constitutional courts have all along been bastions around what they considered the defining core of their own constitutions—democracy, fundamental rights, rule of law, etc. It may be thought-provoking for the Court of Justice of the EU that while diverse interests have given rise to this kind of resistance, this does not mean that it is a particularistic issue; rather, it highlights the need to rethink the role of constitutional courts in the European space. Indeed, constitutional courts are not hurdles or deadweights of integration but rather a kind of sentinel that holds up a mirror to the institutions of the EU. In the diversity of the European space, which is seen as a value, these actors can be representatives of different perceptions with which it is possible and worthwhile to engage in dialogue, even within a more flexible framework.[81] Therefore, new forms of dialogue between these institutions could (and should) emerge with arrangements that are more flexible than the preliminary ruling process, allowing for genuine dialogue. This issue is linked to the future of the EU and the role and fate of national constitutional courts. It is in our best interests not to allow a constitutional court, an institution that is the basis of our statehood and nation.

79 Bacic, 2023 p. 128.
80 Toader and Safta, 2023 p. 345.
81 Trócsányi, 2023, pp. 261–262.

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