

CHAPTER 3

EQUALITY AS A CONSTITUTIONAL VALUE: THE PRINCIPLE OF EQUALITY IN EU LAW



FRANE STANIČIĆ

Regnum regno non praescribit leges.

Viceroy count Ivan Erdődy as the head of
the Croatian parliamentary delegation at the
session of the joint Parliament in Požun
(today Bratislava) on 4 July 1790.

Abstract

The principle of equality should be considered as a fundamental legal principle in any system of law. It can be considered as a principle governing people's rights (everyone is equal before the law) and/or as a principle governing equality among states. This study explores the latter. First, it provides a theoretical definition of the principle of equality as considered by legal theorists. Thereafter, it discusses its implementation in international organisations and its possible limitations considering the membership in an international organisation. In the next part this principle will be analysed as a central principle of EU law, particularly its development in its use between EU Member States and the differentiation mechanisms used in the European Union's integration process. The aim of this study cannot be achieved without considering the insights from the case law of the CJEU, therefore, its overview will be provided in the next part. Special focus will be placed on the identity clause enshrined in Art. 4(2) of the TEU as this is crucial in the context of the correct implementation of the principle of equality of Member States. A special focus will be placed on the meaning of the identity clause in the context of the principle of supremacy of EU law

Frane Staničić (2026) 'Equality as a Constitutional Value: The Principle of Equality in EU Law'. In: David Sehnálek (ed.) *Unequal Equals? The Status of Member States in an Integrating European Union*, pp. 119–154. Miskolc–Budapest, Central European Academic Publishing.



https://doi.org/10.54237/profnct.2026.dsuesmsieu_3

as the absolute interpretation if this principle in the case law of the CJEU threatens to endanger the principle of equality with regard to Member States.

Keywords: principle of equality, sovereignty, member states, domestic legal order, international and supranational legal order

1. Introduction

The principle of equality should be considered as a fundamental legal principle in any system of law. It can be considered as a principle governing people's rights (everyone is equal before the law) and/or as a principle governing equality among states. This study explores the latter. Therefore, what is the meaning of principle of equality of states? It is a well-known principle that can also be called the non-discrimination principle. Its implementation is significant when discussing relations between states, particularly relations between states in international organisations and/or supranational legal orders.

The best example is the EU legal framework and the equality principle in EU. This principle was first introduced by the Constitutional Treaty, and thereafter, reaffirmed by the Lisbon Treaty (Art. 4(2) TEU). However, its interpretation and implementation in legal practice is crucial.

Therefore, this study first provides a theoretical definition of the principle of equality as considered by legal theorists. Thereafter, it discusses its implementation in international organisations and its possible limitations considering the membership in an international organisation. In the next part this principle will be analysed as a central principle of EU law, particularly its development in its use between EU Member States and the differentiation mechanisms used in the European Union's integration process. The aim of this study cannot be achieved without considering the insights from the case law of the CJEU, therefore, its overview will be provided in the next part. Special focus will be placed on the identity clause enshrined in Art. 4(2) of the TEU as this is crucial in the context of the correct implementation of the principle of equality of Member States. A special focus will be placed on the meaning of the identity clause in the context of the principle of supremacy of EU law as the absolute interpretation if this principle in the case law of the CJEU threatens to endanger the principle of equality with regard to Member States.

All Member States opted to accept the subordination of their legal orders to the new, independent legal order of the EU, however, is this acceptance absolute or with some safeguards. The principle of equality dictates that every sovereign state has a right to be considered equal to other states, and it recognises no superior authority, therefore, sending a statement of formal or legal equality before the law, with the

intention to protect the smaller and/or weaker states.¹ Thus, the supranationalisation of the EU legal order has only occurred within the framework of the principle of conferral and cannot be considered without it as it is an inherent part of supranationalisation.² Therefore, the EU is an association of states, constitutions, administrations and jurisdiction and its Member States have accepted a far-reaching relativisation of fundamental national legal decisions in the common European interest by opening up their own legal systems. Its legal order, which no doubtfully exists, has a very elaborate interconnected nature.³

Moreover, this is why the principle of equality is so important in the context of EU law and the relations between EU law and Member States and those among Member States. It must ensure the equality of all Member States forming this supranational organisation and a working and effective relation between the layers of its legal systems, constitutions, administration and jurisdictions. Particularly after the *ultra vires*-decision by the German Federal Constitutional Court in the *PSPP/Weiss* case, it has been argued that Art. 4(2) TEU would underpin the supremacy of EU law by requiring the equality of Member States ‘before the law’.⁴ Therefore, this study aims to explore the impact of the principle of equality on EU law and the relation of EU law and national legislative systems.

2. Principle of Equality as a Legal Principle in Legal Theory

As Guastini states, the concept of equality is an elementary (‘primitive’, ‘atomic’) concept, a concept that does not require further analysis, but can be used in the logical analysis of other complex (‘molecular’) concepts – political, social, legal equality, and the like.⁵ Apart from the evident conceptual differences between ‘equality’ and ‘obligation’ (e.g. ‘obligation’ is a property while ‘equality’ is a relation), equality in the realm of legal or political philosophy appears to have more or less the same logical status, as the concept of obligation in deontic language: in the sense that one can use ‘obligation’ to define ‘prohibition’ and ‘permission’, as one can use ‘equality’ to define inequality as well as sex-equality, wage-equality, and so on.⁶

Legal principles are ‘fundamental norms’ in two ways: first, they are fundamental because ‘they give foundation and/or axiological (ethical-political) justification to other norms’ and second, because they ‘do not have or do not require axiological basis, no ethical-political justification, because in a given legal culture they

1 Rossi, 2017, p. 5.

2 Riedl, 2024, p. 178.

3 Riedl, 2024, p. 181.

4 Klamert, 2022, p. 82.

5 Guastini, 2023a, p. 187.

6 Guastini, 2023a, p. 188.

are considered as evidently ‘just’ or ‘correct’ norms’.⁷ This fundamental character of legal principles is ‘axiological, and not factual’ and that ascribing fundamentality to a norm ‘depends on evaluation, namely on value-judgment about the relative importance of that norm within the legal system as a whole and/or within some particular part of the system’.⁸

According to Guastini, principles are also non-determined norms in the sense that their content is undetermined in at least one of the following forms: first, they can have an open factual state (open antecedent) which means that for all facts when manifesting themselves, not all legal consequence provided by the principle are listed. Second, principles can be defeasible or derogable. Derogable norms allow for implicit exceptions that are not specified by them or by any other norm in the legal order. Derogable norms cannot be applied by simple deductive reasoning.⁹ According to Guastini, a derogable norm (one that allows for unspecified implicit exceptions) does not apply to all the facts to which its antecedent refers, therefore, the occurrence of one of the facts covered by the antecedent is not a sufficient condition for the intended legal consequence.¹⁰ Principles are *prima facie* reasons and as such are subject to weighing against other principles with which they may come into normative conflict.¹¹ Third, principles can be general, that is, principles are norms that need to be made concrete to be suitable for solving specific cases. Making a principle concrete means formulating other norms by which the principles are ‘implemented’ or ‘executed’. Therefore, principles cannot (owing to their logical form, evasiveness and susceptibility to weighing) be directly applied to a specific case without prior concretisation.¹²

Therefore, defining the principle of equality in its legal meaning is important. Legal scholars claim that equality before the law has at least two fundamentally different meanings. On the one hand, it pertains to the rights and duties contained in positive law, that is, the content of the law, and mandates something like the absence of certain distinctions in the distribution of these. On the other hand, it pertains to the practices of the courts, police officers, ministries, etc., that is, the process of the law, and mandates something like the absence of certain distinctions in its application.¹³ Thus, the concept of equality before the law at stake is procedural. It pertains to how legal institutions treat persons, specifically to whether such institutions treat persons equally or differently. The concept of equality before the law is often summed up in what is sometimes referred to as an Aristotelian principle of justice that the court must ‘treat like cases alike’.¹⁴ However, when discussing the

7 Guastini, 2023b, p. 78.

8 Guastini, 2016, p. 242.

9 Guastini, 2023b, p. 80.

10 Ibid.

11 Guastini, 2016, pp. 242–243.

12 Guastini, 2016, p. 243. See Burazin and Keršić, 2024, pp. 493–495.

13 Thomsen, 2018, p. 105.

14 Ibid.

principle of equality in the context of equal treatment of Member States, particularly in the EU context, we must consider the fact that we have an interaction of two legal orders – the Member State legal order and the EU legal order. When discussing legal orders, two relations can exist between them – relation of mutual independence or the relation of superiorities-subordinations. Thus, the subordinated legal order is not in a real sense an independent legal order as it is a part of another legal order. The superior legal order is a ‘complete’ legal order which includes the subordinate legal order; for example, Kelsen advocated that state legal orders are subordinate to the international legal order.¹⁵ However, when discussing legal orders of Member States and that of the EU as a supranational entity, we cannot state that domestic legal orders are a part of the ‘higher’ legal ‘supranational’ order as the latter, according to the supremacy principle, excludes the former as domestic law does not apply when in conflict with EU law. This notwithstanding the fact that the domestic legal orders of Member States are, according to the CJEU case law, subordinate to the norms of EU law.

One must reflect that there are such views by which there is no such relation between EU and national law. Some authors state that they avoid using the monistic expression ‘primacy’ of EU law. ‘Primacy’ points to the existence of a hierarchy, as it refers to a position or condition of being first as in rank. At least implicitly it presupposes that in the national legal order EU law takes the supreme position because of its inherent superiority, supranational features, and constitutional nature. However, this is not what the precedence doctrine of the CJEU is about as the EU precedence rule is essentially a collision rule, although of a special nature. Similar to the priority rule in traffic legislation, what matters is the result, not the higher rank or origin of the rule as such.¹⁶

Therefore, multiple, independent, and incommensurable claims of constitutional autonomy in a non-hierarchical system of norms exist.¹⁷ As sovereignty in legal terms is no longer an exclusive characteristic of territorial entities, that is states, but belongs to the functional entities as well, it is possible to conceive the existence of multiple claims towards ultimate legal authority within a particular territory. It follows from its epistemic dimension that when conflicts occur between the competing national and supranational levels, there is no plausible perspective, no sure basis of historical knowledge, no Archimedean point, from which their claims could be reconciled as long as EU legal order and legal orders of the Member States are to be treated as different unities.¹⁸

This is why the principle of equality is strongly connected with sovereignty. Sovereignty is no longer located in nation-states but rather functionally differentiated into various competing and overlapping sites of authority. Furthermore, how this

15 Guastini, 2023b, pp. 267–268.

16 Barents, 2009, p. 423.

17 Walker, 2002, pp. 317, 320.

18 Walker, 2002, p. 338.

does not negate the relevance of sovereignty as a conceptual tool but rather requires for us to imagine a new constitutional vocabulary that is suitable for the post-Westphalian constitutional order.¹⁹ However, there is no ‘overlord’ or ‘the most sovereign’ to rule us all as Walker notes.²⁰ Thus, we should become more interested in the question of ‘how do we govern?’. From this perspective, constitutional discourses and identities become central. This calls for mutual accommodation and learning by the competing constitutional authorities. In practice judicial dialogues between courts and other relevant institutions is one way to materialise this, while the activities of legal scholars are another.²¹

Walker believes that the questions on inter-systemic coherence as well as that of intra-systemic coherence, clearly cast doubt on the plausibility of a traditional Kelsenian or Hartian notion of a legal order as a hierarchical structure of norms organised around a point of legally self-validating sovereignty assumed or claimed to be grounded in social or political authority.²²

3. Principle of Equality and International Organisations

The doctrine of the equality of states is one of the most reaffirmed principles of the law of nations. So many assertions of state equality have been made since the principle’s inception in the 17th century that it can be said to be firmly established in international law. This doctrine of equality of states became a postulate of the law of nations through the pens of 17th and 18th century publicists influenced by the natural law writings of Thomas Hobbes.²³ This is very important for all international organisations, including the EU and its Member States. This principle is firmly linked with the principle of sovereignty of states. Hobbes believed that men in a state of nature had equal capacity to do one another harm; therefore, men in a state of nature had equal rights. This equality of rights of man was set forth as a law of nature, and, as publicists in the field of international law were ‘natural law’ men, it was simple to take Hobbes’ thesis and transfer the theory of such a right to the international person, the state. By analogising the state to the natural body, the state was said to be nothing more than an artificial man.²⁴

By principle, a sovereign state does not answer to any other state. If there are international organisations a state is a part of, or if there are international legal

19 Tuominen, 2021, p. 81.

20 Walker, 2005, p. 592.

21 Tuominen, 2021, p. 81.

22 Walker, 2005, p. 592.

23 Thomas and Thomas, 1951, p. 791.

24 Thomas and Thomas, 1951, p. 793.

sources, such affiliation and/or source can bond a state only if it chooses to do so. Therefore, according to the principle of equality, all activities in international or supranational legal order are consensual. Clearly, there are those who believe otherwise, and such views are called monistic in legal theory.²⁵

For example, Kelsen believed that state legal orders are subordinate to international legal order, and consequently, state legal orders are not independent with regard to other state legal orders but coordinated as they are all equally subordinated to the international legal order.²⁶ However, others advocate a opposite claim – called dualist – according to which state legal orders and international legal order are independent and ‘drive parallel routes’. Therefore, the notion of sovereignty is crucial for this issue.

Bodin considered sovereignty as ‘absolute and perpetual power’, other than before god. Similarly, Hobbes considers the ‘Leviathan’ or sovereign as the absolute wielder of power and the mechanism to avoid war between others who would fight for power.²⁷ As early as 1943, in the anticipation of the founding of the United Nations, the Governments of the United States of America, the United Kingdom, the Soviet Union, and China jointly declared that they recognised:

the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security.

The famous legal theorist Hans Kelsen wrote, in 1944, that the term ‘sovereign equality’ probably means sovereignty and equality, two generally recognised characteristics of the States as subjects of international law; for to speak of ‘sovereign equality’ is justified only insofar as both qualities are considered to be connected with each other.²⁸ Therefore, clearly, Kelsen connects equality with sovereignty as only sovereign states can be equal. However, sovereignty cannot mean real supreme authority as states are bound by norms of international law. Therefore, Kelsen concludes that state’s sovereignty under international law means its legal independence from other states.²⁹ However, the term ‘equality’ would appear to signify that all states have the same duties and rights. However, this is not correct as different states provide different rights and duties as Kelsen indicates by using the example of littoral and inland states who evidently do not have the same rights and duties under international law.³⁰

25 Guastini, 2023a, p. 268.

26 Kelsen, 2015, p. 366

27 Dobbs, 2014, p. 299.

28 Kelsen, 1944, p. 207.

29 Kelsen, 1944, p. 208.

30 Ibid.

Therefore, Kelsen concludes that equality means not the equality of duties and rights but equality of capacity for duties and rights – the principle of equality means that under the same conditions states have the same duties and same rights. However, he finds that the principle of equality so formulated is but a tautological expression of the principle of legality and represents an empty principle (he uses the example of significant powers who alone enjoy certain privileges).³¹ According to Kelsen, this is why scholars attempt to attribute more substantial import to the concept of equality, excluding the majority vote principle and establishing that no state has jurisdiction over another state. In this way, the principle of equality is the principle of autonomy of states as subjects of international law.³²

This doctrine was affirmed in the United Nations Charter providing the principle a character of universality which cannot too readily be contravened and ignored: The Organisation is based on the principle of the sovereign equality of all its Members.³³ The principle of sovereign equality among states was asserted once more by the UN General Assembly in its Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in 1970.³⁴ The principle of equality must be preserved as its negation would endanger a state's continued existence as such.³⁵ Equality is not a right in itself, nor an essential attribute of a state, but is simply a characteristic or basic rule of the system of international law.³⁶

This is why Kooijmans states that a correct understanding of the principle of equality can certainly contribute towards the view that international relations, too, are legal relations and that establishing a legal order, comprising the whole world, will bring peace and security to each individual and every nation, a peace and security in which all share equally.³⁷ In this context, sovereign equality functions as a weapon of weaker states that seek protection against imperial ambitions and the greed of greater powers. Irrespective of the differences in terms of culture, geography, military and economic power, the law demands that states be treated as equals.³⁸

Some jurists, and this is particularly true of those influenced by natural law reasoning, define equality as a natural right of states, or as an absolute, primordial or fundamental right. Others regard equality not as a right in itself but as an essential attribute of a state owing to its international personality. It is irrelevant whether equality is classified as a right or as an essential attribute. In both instances the idea

31 Kelsen, 1944, p. 209.

32 Ibid.

33 Art. 2, para. 1 of the UN Charter. See also in Rossi, 2017, p. 6.

34 Rossi, 2017, p. 6.

35 Thomas and Thomas, 1951, p. 796.

36 Ibid.

37 Kooijmans, 1964, p. 247.

38 Nijman and Werner, 2013, p. 13.

is present that the negation of equality would endanger a state's continued existence as such, thus, the compelling force underlying both viewpoints is the same.³⁹

The principle of sovereign equality has been connected to the right of states to assess for themselves what justice, morality and law demand in concrete situations. Sovereign equality then rests on the idea that no state has the right to arrogate the power to determine for one of its peers what certain legal and moral obligations entail.⁴⁰ However, this principle creates tensions in the context of international organisations. Often the authority of international organisations are challenged in the name of sovereign equality.⁴¹ This is also valid for the EU and its Member States. The nature of the EU and its relationship with its Member States makes any question over sovereignty and the balance of power a complex and contentious issue, that revolves around overlapping questions such as *Kompetenz-Kompetenz*, subsidiarity, direct effect, and primacy (or supremacy).⁴² It is self-evident that member states of any international organisation voluntarily agree to give up some of their own sovereignty so as to confer powers on the organisation itself.⁴³ There are two criteria – quantitative representation and the weight carried by different states and voting majorities.⁴⁴ Evident examples being the UN Security Council which in effect negates the principle of equality of Member States of the UN with regard to the 'one state one vote' principle. Regarding majority voting, the principle should be that no majority of states can impose anything on any single state contrary to its will, which it would translate into the principle of unanimous voting. Therefore, every state should have a veto power irrespective of its size and/or strength.⁴⁵ Certainly, this principle can lead to the impossibility to make (any) decision(s).

Therefore, the question on principle of equality in international law or in supranational organisations revolves about the concept of sovereignty and the equality of states which enter into international organisations and/or are a member of a supranational organisation. However, as Dobbs points out, the nature of the EU and its relationship with its Member States makes any question over sovereignty and the balance of power a complex and contentious issue, that revolves around overlapping questions such as *Kompetenz-Kompetenz*, subsidiarity, direct effect, and primacy (or supremacy).⁴⁶

39 Thomas and Thomas, 1951, p. 796.

40 Ibid.

41 The tension between equality between states and forms of international organisation has structured many debates throughout the history of international law, as the examples of the Concert of Europe, the League of Nations, the United Nations or the coalition against Libya attest. In the 1960's, debates regarding this tension primarily focused on two issues: the power of the Security Council and voting rules of international conferences and organisations. Nijman and Warner, 2013, p. 16.

42 Dobbs, 2014, p. 300.

43 Rossi, 2017, p. 7.

44 Ibid.

45 Rossi, 2017, p. 9.

46 Dobbs, 2014, p. 300.

4. Principle of Equality as a Central Principle of EU Law

4.1. Development of Principle of Equality Between EU Member States

When discussing the principle of equality, we must consider that EU law constitutes a separate legal order. This legal order was established by the framework of treaties which represents a ‘constitutional charter formerly of the European Community, and now of the European Union’.⁴⁷ This view was formulated by the CJEU who additionally took for granted that these treaties (or this constitutional charter) naturally awarded themselves the final authority in their interpretation. Therefore, treaties and set of legal rules brought according to them (regulations, directives etc.) represent a new legal order with direct effect for the Member State’s themselves.⁴⁸ This new legal order differentiates itself with regard to international and state legal orders, and therefore constitutes an independent legal order.⁴⁹

The principle of equality or non-discrimination constitutes one of the cornerstones of the process of European integration. The pursuit of equality among the people and states is a primary objective. This has long been perceived as a precondition to progressing towards ‘an ever closer union among the peoples of Europe’ – to the extent that the Union is actually ‘founded’ on the value of equality.⁵⁰ Compliance with the principle of equal treatment requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way unless such treatment is objectively justified.⁵¹

Rossi provides a clear and precise overview of the development of this principle from the early beginning of the development of what we call today the EU. As is known, the first step was the establishment of the European Coal and Steel Community (ECSC) which comprised six states. In the High Authority there were more members than Member States (nine, eight appointed by Member States by agreement or by five-sixths majority and the ninth was elected by the eight designated), its Court had seven judges and decisions of the Special Council were made by absolute majority (this majority had to include a state producing at least 20% of steel and coal production of the ECSC). Therefore, the ECSC system was framed by rules of formal parity, also considering the weight each Member State carried depending on its output and population.⁵²

The system of the European Economic Community (EEC) was different, although in part based on the ECSC system. The voting system within the Council was mostly based on unanimity, except for rare occasions on which decisions were made by

47 MacCormick, 2014, p. 77.

48 Ibid.

49 Ibid.

50 Muir, 2019, p. 817.

51 Muir, 2019, p. 818.

52 Rossi, 2017, p. 11.

simple majority or by qualified majority. Regarding qualified majority voting, larger states were allotted more votes, but with a corrective skewed in favour of the smaller states. Therefore, as a whole, the Community system was designed to pursue a 'substantive' equality, tweaking the system in favour of the smaller states.⁵³

Changes began to occur since the Single European Act when more policy areas went from unanimity to qualified-majority voting, with a consequent elimination of veto power. Simultaneously, the grooving lawmaking role assigned to the European Parliament contributed to increasing the weight of larger states. The Treaty of Nice readjusted the weighting of votes by increasing the gap between larger and smaller states and it introduced a new method for calculating what counts as a qualified majority in the Council by taking a triple threshold: the number of votes, the number of Member States (a simple majority if the proposal comes from the Commission, or a two-thirds majority in all other cases) and EU population (at least 62%).⁵⁴

The Lisbon Treaty provided a reform of the system from November 2014. Qualified-majority voting has since been based on double-majority voting. It now requires 55% of Member States voting in favour (at least 15 states) representing at least 65% of population (the 55% threshold increases to 72% when deliberating on a proposal not originating from the Commission). A blocking minority must comprise at least four Member States or the act will be deemed to have been adopted.⁵⁵

It is evident that the EU as a supranational organisation/entity requires far more relinquishing of sovereignty than would be entailed by membership in an international organisation. This is why it is extremely important that the EU 'delivers' what is expected or, as Rossi states, that it can look after the common interest of all Member States.⁵⁶ Therefore, it is important to see whether EU institutions provide a framework which respects the principle of equality which Rossi defines as equality before the law.⁵⁷ He finds that if equal protection under the law is to be insured and loss of sovereignty justified, it will be necessary to rebalance the system by reinforcing the Commission and preserving the strength and independence of other EU institution charged with ensuring the equality among the Member States before the law – the CJEU. Moreover, he finds that the power of the European Council is excessive as it primarily deals with political coalitions.⁵⁸ Other authors also find that the case law of the CJEU exceeds its judicial authority, thereby disrupting the balance of power and the intended division of responsibilities among the EU institutions laid down in the Treaties.⁵⁹ They believe that, as the *van Gend & Loos* and *Costa v. ENEL* judgments turned an international law alliance into a supranational

53 Rossi, 2017, pp. 11–12.

54 Ibid., pp. 12–13.

55 Ibid., p. 13.

56 Ibid., p. 15.

57 Ibid., p. 16.

58 Ibid., p. 18.

59 Riedl, 2024, p. 182. The reference point being the *Juizes Portugueses* judgment (C-64/16 from 27 February 2018).

organisation, the *Juízes Portugueses* judgment and subsequent case law may represent the beginning of the transformation of the European constitutional system into a federal constitutional state.⁶⁰

4.2. Principle of Equality Among Member States and the Differentiation Mechanisms Used in the European Union's Integration Process

Can the principle of equality even be reconciled with the very idea of differentiated integration? Are these concepts in any legal relation? Or rather, does the principle of legality limit the possibilities for differentiation at the level of primary EU law? One must stress that the prohibition of discrimination is banned by Art. 18 TFEU and there are numerous other provisions clarifying that equality is one of the 'most fundamental' legal principles of EU law. As Muir states, the principle of equality or non-discrimination constitutes one of the cornerstones of the process of European integration. The pursuit of equality among the people and states is a primary objective.⁶¹ Compliance with the principle of equal treatment requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way unless such treatment is objectively justified.⁶²

As early as 2005, Walker asked: Did the idea of 'differentiated integration' not pose an oxymoronic challenge to the very idea of unitary legal order?⁶³

Wouters and Schmitt find, using the practice of CJEU in free movement cases, that the principle of equality acts as a limitation on the scope of the Treaties' freedoms and as a limit to the intrusion of EU law into national law.⁶⁴ Moreover, equality between the Member States serves as a constitutional principle of EU law, which is of crucial importance for ongoing differentiation mechanisms within the EU institutional context.⁶⁵ The reason for such thesis is evidently – as was reiterated in this chapter many times – the principle of sovereignty of states, notwithstanding the fact that they are a part of a supranational organisation. As is highlighted in literature, this principle is reflected in the institutional rules of the EU in various ways – most prominent is the principle in the representation of each Member State in the Council of the EU and in the rotating office of the President of the Council. This is followed by the rule of equal voting rights when the Council decides by a majority, equal availability of the veto right when unanimous action is required, the composition of the Commission by one member from each Member State and the equal rights of standing of all Member States before the EU courts.⁶⁶

60 Riedl, 2024, p. 183.

61 Muir, 2019, p. 817.

62 Muir, 2019, p. 818.

63 Walker, 2005, p. 591.

64 Wouters and Schmitt, 2017, p. 48.

65 Ibid., p. 50.

66 Ibid., p. 51.

How does differentiated integration fit into the principle of equality of Member States? Differentiation mechanisms are often devised by the ‘High Contracting Parties’ at the level of primary EU law, and are used since the beginning of the European integration process.⁶⁷ For example, the Maastricht Treaty provided the rules on the Economic and Monetary Union (EMU), the Amsterdam Treaty enabled certain Member States not to participate in rules concerning civil cooperation, immigration and asylum etc. There are different treaties between EU Member States in fields closely connected to EMU,⁶⁸ the decisions regarding the ‘special’ status of the UK in the EU etc. However, are not all Member States equal and does the principle of equality limit the possibilities for differentiation at the level of primary EU law is a question that deserves answering. The CJEU case law indicates that there are certain areas in which the principles of EU law such as independence of EU judiciary system and the binding nature of its decisions and the unity in interpretation of application of EU law are ‘untouchable’.⁶⁹

The CJEU defends ‘autonomy of the Community legal system’ as its exclusive jurisdiction forms ‘part of the very foundations of the Community’.⁷⁰ It reaffirmed the importance of autonomy of EU legal order in its Opinion 2/13 with regard to the EU accession to the ECHR.⁷¹ Thus, it can be construed that, as the principle of equality is a fundamental principle of EU legal order, it cannot be touched by the EU constitutional legislature.⁷² This would mean that EU law also includes a component that is unchangeable – even for the Member States. Therefore, EU law would also include perpetuity clauses, as does the constitutional law of Member States.

However, the practice indicates differently as Member States did not refrain from attaining special and/or different status to certain Member States (British and Danish opt-out from stage three of EMU, non-inclusion of the UK in the Protocol and Agreement on Social Policy (Maastricht), special position of UK; Ireland and Denmark with regard to the provisions on Schengen in the Amsterdam Treaty). Notably, there are certain restrictions regarding the possibility of differentiated integration flowing from international law,⁷³ and the restrictions flowing from national constitutions.

67 Wouters and Schmitt, 2017, p. 56.

68 Treaty on the European Stabilisation Mechanism, Fiscal Compact Treaty, Agreement in the Single Resolution Mechanism.

69 Wouters and Schmitt, 2017, p. 58.

70 Kadi judgment, Case ECLI:EU:C:2008:461, para. 4.

71 Wouters and Schmitt, 2017, p. 59.

72 Wouters and Schmitt, 2017, p. 60.

73 See, in more detail, Wouters and Schmitt, 2017, pp. 63–66.

5. The Practice of CJEU and the Principle of Equality

CJEU case law on the principle of equality revolves mostly on the application of Art. 4(2) TEU and ensuring that variety of national prerogatives is upheld. This section provides an overview of the CJEU case law on the matter to elucidate how the CJEU considers Art. 4(2) TEU. The CJEU dealt with notions linked to the form of government, use of official languages, fundamental rights and other issues.

In *Sayn-Wittgenstein*,⁷⁴ national characteristics have prevailed over individual rights and free movement. In this case, Mrs Sayn-Wittgenstein, an Austrian national resident in Germany, challenged the decision of an Austrian authority to correct the entry of the register of civil status and change her surname from '*Fürstin von Sayn-Wittgenstein*' to '*Sayn-Wittgenstein*'. In its judgment, the Court began by pointing out, as in *Runevič-Vardyn*, that a person's name was a constituent element of his or her identity and of his or her private life, and that an amendment of the surname '*Fürstin von Sayn-Wittgenstein*', which she had used continuously for fifteen years following her adoption by a German prince (Fürst), constituted interference with the right to respect for family life. However, the CJEU eventually upheld the Austrian government's claim under which the Law on the abolition of the nobility, which prohibits Austrian citizens from bearing titles of nobility, including those of foreign origin, was an element of national identity.⁷⁵

In *Runevič-Vardyn*,⁷⁶ the CJEU was seized in the context of rules in Lithuania that provide that a person's surnames and forenames may be entered on the certificates of civil status of that State only in a form which complies with the rules governing the spelling of the official national language. The Court began by insisting on the fact that a person's forename and surname are a constituent element of his identity and of his private life. However, it left it for the referring court to decide whether the refusal by the Lithuanian authorities to amend the joined surname of the applicants (who wanted their names to be written on certificates of civil status in Lithuania in a form which complies with the rules governing Polish spelling) was liable to cause serious inconvenience to those concerned. To that effect, the referring court would have to examine whether such refusal reflects a fair balance between fundamental rights and national identity, that is between the applicants' right to respect for their private life and the legitimate protection by the Member State concerned about its official national language and its traditions.⁷⁷

In *Las*,⁷⁸ the CJEU found that, according to the fourth subparagraph of Art. 3(3) TEU and Art. 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. In accordance with Art.

⁷⁴ Case C-208/09, EU:C:2010:806.

⁷⁵ Millet, 2021, p. 580.

⁷⁶ Case C-391/09, EU:C:2011:291.

⁷⁷ Millet, 2021, p. 579.

⁷⁸ Case C-202/11, ECLI:EU:C:2013:239.

4(2) TEU, the Union must also respect the national identity of its Member States, which includes protection of the official language or languages of those States. Accordingly, the objective of promoting and encouraging the use of Dutch, which is one of the official languages of the Kingdom of Belgium, constitutes a legitimate interest which, in principle, justifies a restriction on the obligations imposed by Art. 45 TFEU.

In *Commission v. Spain*⁷⁹ the CJEU found that the defendant Member State had failed to adopt all the measures necessary to transpose the EU Water Framework Directive. In particular, while the provisions on intracommunal basins had been transposed into the Spanish legal order, there had been no implementation of the rules on intercommunal basins, the latter being a competence reserved to the single Autonomous Communities. Insisting on the supplementing clause foreseen in Art. 149(3) CE – whose effectiveness could be doubted in that instance – the Spanish government argued that by activating Art. 258 TFEU ‘the Commission, disregarding Art. 4(2) TEU and the third paragraph of Art. 288 TFEU, sought to stipulate the manner in which the transposition was to be achieved in that Member State’.⁸⁰ However, according to the CJEU, such constitutional specificities were irrelevant as the argument rests on a ‘misreading’ of the Commission’s allegations. In fact, the Commission never tried to ‘impose, in breach of Art. 4(2) TEU and the third paragraph of Art. 288 TFEU, the manner in which the transposition of the provisions at issue was to be achieved’.⁸¹

In *Digibet and Albers*⁸² the Third Chamber of the CJEU accepted that: ‘the division of competences between the Länder cannot be called into question, since it benefits from the protection conferred by Art. 4(2) TEU’ and found that Art. 56 TFEU did not preclude the majority of the Länder from prohibiting the organisation of games of chance online where a Land has concomitantly opted for a more liberal legislation, provided the measures were proportionate – a determination that was left to the national judge.

Building upon *Digibet and Albers*, in *Remondis*⁸³ the CJEU clarified that Art. 4(2) TEU also covers the ‘internal reorganisations of powers within a Member State’ and accepted that the transfer by the Region of Hannover of waste treatment tasks that were its responsibility to a public body (a special-purpose association) created within the Region Hannover did constitute a ‘public contract’ within the meaning of the otherwise applicable Public Procurement Directive.⁸⁴

In *Torresi*,⁸⁵ the CJEU scrutinised Italian rules on access to legal profession. It was reserved for holders of a five-year university diploma in law and who participated in

79 Case C-151/12, ECLI:EU:C:2013:690.

80 Para. 23 of the *Commission v. Spain* judgment.

81 Para. 37 of the *Commission v. Spain* judgment; Di Federico, 2019, p. 360.

82 Case C-156/13, ECLI:EU:C:2014:1756.

83 Case C-51/15, ECLI:EU:C:2016:985.

84 Di Federico, 2019, p. 361.

85 Joined Cases C-58/13 and C-59/13 ECLI:EU:C:2014:208.

an apprenticeship of at least 18 months and passed a state examination. On average, over 61% of applicants do not succeed in passing this examination.⁸⁶ This prompted significant number of Italian law graduates to seek recognition of their university degree in other Member States, obtain a lawyer's position and return to Italy to practice law. Consiglio Nazionale Forense considered that the effect of Art. 3 of Directive 98/5,⁸⁷ in so far as it enables Italian nationals who obtain their professional legal qualification in a Member State other than the Italian Republic to practise their profession in the Italian Republic, is to circumvent Art. 33(5) of the Italian Constitution, under which access to the profession of lawyer is dependent on having successfully passed a State examination. Consequently, that provision of European Union secondary law, since it permits the circumvention of rules which form part of the Italian national identity, is contrary to Art. 4(2) TEU and should therefore, be held to be invalid. CJEU interpreted Art. 3 of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the legal profession permanently in a Member State other than that in which the qualification was obtained must be interpreted as meaning that no abuse can be identified in the fact that a national of a Member State who after successfully obtaining a university degree travels to another Member State to acquire there the professional qualification of lawyer and returns to the Member State of which he is a national to practice there the profession of lawyer under the professional title obtained in the Member State where that professional qualification was acquired. The CJEU found that such deliberation cannot, in any way, affect either the fundamental political and constitutional structures or the essential functions of the host Member State within the meaning of Art. 4(2) TEU.⁸⁸

In *Bogendorff von Wolffersdorff*⁸⁹ the competent state body in Germany refused to register the daughter of the applicant under her British name as it contained 'nobility addendum' (she had dual nationality – German and British, and this addendum was in her British name). The court referred to the CJEU for a preliminary ruling with the following question – Are Arts. 18 TFEU and 21 TFEU to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of a national of that State if he is simultaneously a national of another Member State and has acquired in that Member State, during habitual residence, by means of a change of name not associated with a change of family law status, a freely chosen name including several tokens of nobility, where it is possible that a future substantial link with that State does not exist and in the first Member State the nobility has been abolished by constitutional law but the titles of nobility used at the time of abolition may continue to be used as part of a name? One of the chief

⁸⁶ Mastroianni and Arena, 2015, p. 373.

⁸⁷ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998, pp. 36–43.

⁸⁸ Para. 58 of the *Torresi* judgment.

⁸⁹ Case C-438/14, ECLI:EU:C:2016:401.

facts was that it was argued that the abolition of privileges (and nobility being one of them) was one of the chief identity clauses in the constitution and thereby justifying a restriction on the right to freedom of movement considering Art. 4 (2) TEU. The CJEU upheld its earlier judgment in *Sayn-Wittgenstein* stating that notably, in accordance with Art. 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.

In *Coman*,⁹⁰ the Court has given precedence to fundamental rights (and, together with them, to unfettered freedom of movement across the EU) over national features.⁹¹ The Court was to decide whether a third country national of the same sex of a Union citizen, who lawfully concluded a marriage in another Member State with that citizen, had a right of residence in the EU as a spouse. In its judgment, the Court acknowledged, although only implicitly, that the traditional institution of marriage (between a man and a woman) was an element of Romanian national identity. Nevertheless, it made a clear choice in favour of EU citizens' right to lead a normal family life and insisted on the fact that a national measure that is liable to obstruct the exercise of the freedom of movement for persons was justified only where such a measure was consistent with the fundamental rights guaranteed by the Charter. In doing so, the Court astutely distinguished between marriage itself and the legal consequences of marriage. It held:

the obligation for a Member State to recognize a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State. Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex.⁹²

In *Izsák and Dabis v. Commission*⁹³ the CJEU was resolving an issue with citizen's initiative filed according to Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative.⁹⁴ The appellants, together with five other persons, sent the Commission a proposed European citizens' initiative (ECI) titled 'Cohesion policy for the equality of the regions and sustainability of the regional cultures' ('the proposed ECI at issue'). By the decision at issue, the Commission refused to register the proposed ECI at issue, on the ground that it was apparent from an in-depth examination of the provisions of the Treaties cited in the proposal, and of all the other possible legal bases, that the proposed ECI fell manifestly outside the framework of its powers to submit a proposal for a legal

⁹⁰ Case C-673/16, EU:C:2018:385.

⁹¹ Millet, 2021, p. 580.

⁹² Para. 45 of the *Coman* judgment.

⁹³ Case C-420/16 P, ECLI:EU:C:2019:177.

⁹⁴ OJ 2011 L 65, p. 1.

act of the Union for implementing the Treaties. Among other reasons, they specified infringement of Arts. 4(2) and 174 TFEU. However, CJEU found that the general Court, by excluding, in Paras. 85 to 89 of the judgment under appeal, the possibility that a national minority region may because of its specific ethnic, cultural, religious or linguistic characteristics systematically form part of the ‘regions which suffer from severe and permanent natural or demographic handicaps’ within the meaning of the third paragraph of Art. 174 TFEU, the General Court correctly interpreted the concept of ‘regions concerned’ in that provision, and did not therefore err in law on this point. Interestingly, the General Court, in dismissing the action, claimed that independently of the absence of an adequate legal basis in the treaties (nor in the Charter) the EU legislator could not adopt a measure within the framework of EU cohesion policy defining national minority regions without infringing Art. 4(2) TEU. The adoption of such act would unduly impinge on the internal structure of a Member State and thus be invalid.⁹⁵

In *M.A.S. and M.B.* in response to the request for a preliminary ruling on behalf of the Italian Constitutional Court, the CJEU delivered a conciliatory decision in which it accepted that, aiming to ensure respect to the principle of legality as understood by the Italian Constitutional Court, the national judges could apply the Italian provisions concerning the statute of limitations even if this would result in a violation of the Member States’ duty to protect the financial interests of the Union (the *Tarrico II* case⁹⁶). However, in *Tarrico II* decision the CJEU continued to uphold the doctrine of EU law’s supremacy but provided Member States discretion regarding ongoing criminal cases in a procedural field of law, that is limitation periods, provided that the matter had not yet been harmonised by EU law. Thus, the CJEU in *Tarrico II* did not accept an attenuation of nor an exception to the primacy of EU law, but showed itself conciliatory. Simultaneously, the Court avoided a direct confrontation over whether and how to resolve a discrepancy between EU law and national constitutional law principles.⁹⁷ The response of the Italian Constitutional Court came⁹⁸ shortly after and the Court affirmed that, while the Court of Justice had the sole authority to interpret EU law uniformly and determine whether it has direct effect, it was also undeniable that, as recognised by the *M.A.S. and M.B.* judgment, the Italian legal system could not accept an interpretive result that violated the principle of legal certainty in criminal matters.⁹⁹

However, maybe the strongest way in which Art. 4(2) is invoked by national constitutional courts is to deny applicability of EU law. This use of Art. 4(2) TEU ‘has been firmly rejected by the Court of Justice’.¹⁰⁰

95 Di Federico, 2019, p. 357.

96 Case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.

97 Capelli, 2023, p. 101.

98 Judgment No. 115/2018.

99 Capelli, 2023, p. 102.

100 Di Federico, 2019, p. 362.

For example, in *Affatato*,¹⁰¹ the referring judge had doubts as to the very applicability, in accordance with Art. 4(2) TEU of Clause No. 5 of the Framework Agreement on fixed-term work to the Italian Republic, at least insofar as it prescribed the conversion, also in the public sector, of such contracts into contracts of indefinite duration. According to the Italian Constitutional Court Art. 97 Cost. demands that public employees be recruited through public competitions to guarantee impartiality and the right to sound administration. The CJEU underlined that Member States continue to enjoy a certain margin of discretion in determining when and under what conditions fixed term employment contracts are to be deemed to be contracts of indefinite duration and consequently found that Clause No. 5 of the Framework Agreement, in itself, is not capable of hampering the fundamental structures, political and constitutional, nor the essential functions of the Italian Republic within the meaning of Art. 4(2) TEU.¹⁰²

Moreover, in *O'Brien*,¹⁰³ the UK Supreme Court evoked the independence of the judiciary to know whether judges could be included in the scope of application of the Framework Agreement on part-time work and Directive 97/81.¹⁰⁴ In its observations the Latvian Government contended that the application of EU law to the judiciary violated Art. 4(2) TEU. The Second Chamber firmly dismissed the argument. Although the definition of ‘workers’ is left to the national judge, an exclusion from the protection afforded under the Directive is allowed only insofar as the distinctive features of the relationship between judges and the Ministry of Justice are established. Otherwise, the application of Directive 97/81 and the Framework Agreement on part-time work cannot affect national identity.¹⁰⁵

In *ZZ*,¹⁰⁶ the CJEU rejected Italian Government claims on inadmissibility of the case. The Italian Government claimed:

it is clear from Art. 4(2) TEU and Art. 346(1)(a) TFEU that State security remains the responsibility of solely the Member States. The question referred thus relates to an area governed by national law and, for that reason, does not fall within European Union competence.¹⁰⁷

However, the CJEU stated that although it is for Member States to take the appropriate measures to ensure their internal and external security, the mere fact

101 Case C-3/10, ECLI:EU:C: 2010:574.

102 Di Federico, 2019, p. 362.

103 Case C-393/10, ECLI:EU:C: 2012:110.

104 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work, OJ L 14, 20.1.1998, pp. 9–14.

105 Ibid.

106 Case C-300/11, ECLI:EU:C:2013:363.

107 Case C-300/11, ECLI:EU:C:2013:363, para. 35.

that a decision concerns State security cannot result in European Union law being inapplicable.¹⁰⁸

From the case law, it appears that the notion of Member States on what comprises ‘national (constitutional) identity’ is very broad. The list would include: sound administration of justice (*Torresi*); Republican form of government (*Sayn-Wittgenstein and Bogendorff von Wolffersdorff*); protection of national languages (*Runevic-Vardyn and Las*); allocation of competences within the Member States, at the central and regional and local level (*Commission v. Spain, Digibet and Albers, Remondis and Izsák and Dabis v. Commission*); principle of impartiality of the public administration (*Affattato*); independence of the judiciary (*O’Brien*); ZZ and public policy and morality (*Coman*).¹⁰⁹ It is worth noticing that, in *M.A.S. and M.B.* the CJEU did not address the Italian’s argument that configured the principle of legality as a component of national identity.¹¹⁰

However, the case law of the CJEU indicates that national (constitutional) identity does not appear to have developed its potential, or better, the CJEU appears to narrow down the scope of Art. 4 (2) so that it cannot be used to curtail the implementation of EU law and ‘further integration’. The case-law of the CJEU has clarified that, against the expectations and the claims of some Member States, Art. 4(2) TEU cannot act as a ‘competence clause’ nor as an exception to the principle of the primacy of EU law. Conversely, the CJEU has often admitted that the respect for national identity could justify a derogation from free movement provisions, provided that, in line with its traditional approach, the national measures at stake complied with the principle of proportionality and did not result in a disproportionate contraction of fundamental rights.¹¹¹ However, there are some who advocate even narrower interpretation of Art. 4(2) TEU – even, for example to omit the status of a country’s official language from its scope.¹¹²

Moreover, the CJEU, chose, on its own initiative, to use the clause as an aid to interpreting other norms of EU law – respectively, the free movement of services and a public procurement directive. This, as De Witte argues, was an appropriate judicial use of Art. 4(2) TEU.¹¹³

The CJEU clearly indicated its conviction that the CJEU is in charge of defining what belongs to the idea of national identity or constitutional structure of Member States, national Constitutional Courts or the CJEU. Moreover, some believe that Art. 4(2) TEU should only be used as a ‘supportive’ norm to interpret other norms of EU law.

108 Case C-300/11, ECLI:EU:C:2013:363, para. 38.

109 Di Federico, 2019, p. 364.

110 Capelli, 2023, p. 109.

111 Capelli, 2023, p. 110.

112 De Witte, 2021, p. 567. De Witte justifies this by stating that respect for the Member States’ linguistic policies is protected elsewhere in primary law, in the Arts. 3(3) TEU and 22 of the Charter. Ibid.

113 De Witte, 2021, p. 565.

6. Identity Clause in Art. 4 TEU and the Principle of Equality

6.1. *Identity Clause in the Context of National Identity*

Art. 4(2) TEU provides:

[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structure, 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.¹¹⁴

The formulation and constitutional positioning¹¹⁵ of Art. 4(2) TEU suggest that the provision is autonomous, to be distinguished from other provisions concerning the cultural, linguistic and religious specificities of the Member States, as well as from those relating to the protection of fundamental rights, and should be read jointly with the principles of conferral, sincere cooperation, subsidiarity and proportionality.¹¹⁶

The respect for the national identities of the Member States, whose systems of government are founded on the principles of democracy, can be found in primary law since the Maastricht Treaty, when it was mentioned in Art. F, which also affirmed the duty to respect fundamental rights, as they result from the constitutional traditions common to the Member States.¹¹⁷

The development of identity clause, particularly its iteration in the Lisbon Treaty, made this clause fully justiciable. Art. 4(2) TEU is meant to operate as a parameter of validity (in the context of actions for annulment and preliminary rulings) or as hermeneutical criterion (in the context of infringements procedures and preliminary rulings) to scrutinise the acts adopted by the EU institutions, bodies, offices and agencies vis à vis exceptions invoked by the Member States to resist the full application of EU primary and secondary law.¹¹⁸ However, to date the Court of Justice has failed to assign to Art. 4(2) TEU an autonomous function in managing constitutional conflicts. In particular, it has not clarified the reasons for recurring to the identity clause, nor has it insisted on the dichotomy fundamental structure/essential functions resulting therefrom.¹¹⁹

¹¹⁴ Dobbs, 2014, p. 300.

¹¹⁵ The importance of the national identity clause is emphasised by the fact that it is reproduced verbatim in the Preamble to the CFREU. Kaczorowska-Ireland, 2019, p. 57.

¹¹⁶ Di Federico, 2019, p. 348.

¹¹⁷ Ibid., p. 353.

¹¹⁸ Ibid., p. 355.

¹¹⁹ Ibid., p. 378.

Therefore, Art. 4(2) TEU has been the subject of intensive debate amongst scholars. In particular the debate focuses on two issues, first, how to identify matters which should be regarded as falling within the national identity clause, or how to define what constitutes the national identity of any particular Member State within the meaning of Art. 4(2) TEU, and second, what body should have the final authority on the interpretation and application of Art. 4(2) TEU.¹²⁰

Rodin wrote, as early as 2011, that in the context of Art. 4(2) TEU, this can mean that Member States are at liberty to define the core of national constitutional identity, while the CJEU retains the power to interpret the broader normative framework within which national identity operates in the EU. Too extensive an interpretation of the national identity clause has the potential to block or even reverse the course of European integration. However, too narrow an interpretation would render Art. 4(2) devoid of its useful effect.¹²¹

Moreover, in 2011, von Bogdandy and Schill described Art. 4(2) TEU as one of the most important novelties of the Lisbon Treaty, reading this provision as an exception to primacy provided for under EU law itself, and that it could guide the way to a more nuanced understanding beyond the categorical positions of the CJEU on the one side and that of most domestic constitutional courts.¹²²

Respect for national identity under the Lisbon Treaty should be interpreted as a way to ‘overcoming absolute primacy’ and ‘can be understood as permitting domestic Constitutional Courts to invoke under certain limited circumstances constitutional limits to the primacy of EU law’. In these readings, the concept of ‘national identity’ is identified with the concept of ‘constitutional identity’ and framed within the discourse of CJEU and national constitutional Court’s different claims to sovereign authority.¹²³ The German Constitutional court said it plainly in its *Lisbon*¹²⁴ judgment: ‘the duty, under European law, to respect identity... (is) the expression of the foundation of Union authority in the constitutional law of the Member States’.

However, it is, in legal theory, but also in CJEU case law, clear that ‘constitutional identity’ is stated to be different from the ‘national identity’ referred to in the broadly drafted provision of Art. 4(2) TEU, and it is also a fact that CJEU’s interpretation of Art. 4(2) TEU appears to be undermining constitutional identity.¹²⁵ CJEU has established that national identity as protected by Art. 4(2) TEU is a rather limited concept. It neither constitutes a catch-all tool to limit the transfer of sovereign powers to the EU nor is it an exception to the principle of EU law supremacy.¹²⁶

120 Kaczorowska-Ireland, 2019, p. 58.

121 Rodin, 2011, p. 41.

122 Von Bogdandy and Schill, 2011, pp. 1417–1418.

123 Guastafarro, 2012, p. 7.

124 30 June 2009 – 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, para. 234.

125 Konstadinides, 2015, p. 130.

126 Konstadinides, 2015, p. 131.

Sensitive questions, concerning areas where legislative competences have not been conferred to the EU, continue to arrive in Luxembourg, perhaps even more often than ever. In some of these cases, Member States attempt to protect themselves from the interference of EU law by relying, in different fashions, on the national identity clause of Art. 4(2) TEU.¹²⁷ This is the reason constitutional courts of Member States use Art. 4(2) as a weapon to battle the, as they see it, interference from the side of EU law and EU institutions in domestic affairs.

Both German and Polish constitutional courts argued that constitutional identity is a question of EU law. For instance, the German Constitutional Court claimed in its *Lisbon* judgment that the institution of identity review was the only way to ensure compliance of EU institutions with Art. 4(2) of the TEU. Similarly, the Polish Constitutional Tribunal argued that constitutional identity was the equivalent to the concept of national identity in Art. 4(2) of the TEU.¹²⁸ This indicates that national constitutional courts attempt to place a sign of equation between national and constitutional identity, therefore successfully advocating the use of Art. 4(2).

More recently, in its reference triggering the *Gauweiler* case,¹²⁹ the German Constitutional Court *expressis verbis* said that ‘the identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art. 4 TEU section 2 sentence 1 by the Court of Justice of the European Union’. On that occasion, the German Constitutional Court admitted its ‘discomfort’ with Art. 4(2) TEU and all those EU law provisions referring to national law, opening the door to different readings of the same concept, a concept introduced in the Treaties to contain constitutional conflicts.¹³⁰

Some authors argue that this identity review violates the principle of sincere cooperation (Art. 4(3) TEU). However, the German Court answered, in its decision on the European Arrest Warrant:

127 Bonello, 2021, p. 553.

128 Scholtes, 2021, pp. 539–540.

129 In this case, the CJEU answered the first preliminary ruling ever raised by the *Bundesverfassungsgericht* (BVerfG), concerning the legality of the Outright Monetary Transaction (OMT) programme designed by the European Central Bank (ECB) at the height of the Euro-crisis. The OMT programme – which followed on ECB President Mario Draghi’s pledge to do ‘whatever it takes’ to save the euro – allowed the ECB to purchase government bonds on the secondary market when necessary to restore the normal transmission of monetary policy stimulus, on the condition that the Member State(s) concerned entered a programme of economic adjustment. In its preliminary reference, the BVerfG had been explicit in describing the OMT programme as in violation of EU law and asking the CJEU to strike down the challenged measure as *ultra vires*. Moreover, the BVerfG had reserved to itself a right to invalidate the OMT programme in Germany if the CJEU had not followed its interpretation. However, in *Gauweiler*, the CJEU soundly rejected the view that the OMT programme exceeded the powers conferred to the ECB by the EU Treaties and that violated the prohibition of monetary financing, fully backing the action of the ECB. Fabbri, 2015, p. 1004.

130 Martinico, 2021, p. 449.

the identity review does not violate the principle of sincere cooperation within the meaning of Art. 4 section 3 TEU. It is rather inherent in the concept of Art. 4 section 2 sentence 1 TEU [...] and corresponds to the special nature of the European Union.

Furthermore, it stated:

As ‘masters of the treaties’ (*Herren der Verträge*), Member States decide through national legal arrangements if and to what extent Union law is applicable and is accorded precedence in the respective national legal order.¹³¹

However, the claims that the identity clause excludes certain matters from the purview of CJEU have so far constantly failed. Although national identity may influence the concrete application of EU law to a specific case, it does not, by itself, exclude some areas, even if sensitive and close to the core areas of state activities, from the reach of EU law. Thus, and even if that may have been the expectations of (some) Member States when drafting the Rome and Lisbon Treaties, Art. 4(2) TEU is unable to provoke a return to ‘limited integration’.¹³² Therefore, some believe that there are many reasons to not conflate the constitutional identity advanced by the Member States with the national identity of Art. 4(2).¹³³ Scholtes argues that this provision’s practical significance of the Art. has been reduced to little more than a generalised public policy clause.¹³⁴ As he sees it, rather than categorical limits to the primacy of EU law, identity concerns under Art. 4(2) TEU are merely another aspect to be weighed as part of a proportionality test.

Millet finds that CJEU does not operate any explicit distinction among the different Art. 4(2) TEU-based claims between ‘elements of national identity’ and genuine elements of national constitutional identity despite the abundant doctrinal discussion.¹³⁵ However, he also claims that there are elements that make national constitutional identity an item CJEU must accept and adhere by. In order for a national constitutional identity claim to be ‘admissible’ for the CJEU it must be circumscribed to core constitutional commitments that are not only unique, but also crucial for the ethos and psyche of the national political community, as notably interpreted by constitutional courts.¹³⁶ To fulfil this criteria, a national constitutional claim should be distinctive (specifically national), should relate to substantive elements of the national identity (this is a negation of the German Constitutional Court *ultra vires*

131 2 BvR 2735/14, para. 44.

132 Bonello, 2021, p. 554.

133 Scholtes, 2021, p. 540.

134 Ibid.

135 Millet, 2021, p. 586.

136 Ibid.

claim) and bound to relate to an axiologically crucial feature for the national ethos (a fundamental value).¹³⁷

6.2. Identity Clause in the Context of the Principle of Supremacy of EU Law

...the European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States.¹³⁸

Although Art. 4(2) TEU provides:

[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structure, 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,

the CJEU created the principle of supremacy through its practice. The Lisbon Treaty added to this conundrum over primacy and national sovereignty, 15 as reflected in its inclusion of Declaration 17 expressly recognising the principle of primacy as developed within the case law, while simultaneously strengthening the status and developing the content of Art. 4(2) TEU.¹³⁹

The principle of the supremacy (also referred to as ‘precedence’ or ‘primacy’) of EU law is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU Member State (national law), EU law will prevail. If this were not the case, Member States could simply allow their national laws to take precedence over primary or secondary EU legislation, and the pursuit of EU policies would become unworkable.

The principle of supremacy of EU law has developed over time by means of the case law (jurisprudence) of the CJEU. It is not enshrined in the EU treaties, although there is a brief declaration annexed to the Lisbon Treaty in regard to it. As the CJEU stated in its famous judgment *van Gend & Loos*, the EU constitutes a new legal order of international law for the benefit of which the Member States have limited their

¹³⁷ Millet, 2021, pp. 586–587. For example, traditional marriage between a man and a woman is certainly still part of the social contract in some Member States, in particular those where religion remains highly influential within society, while laïcité stands high as a national value in a country such as France. Millet, 2021, p. 588.

¹³⁸ Advocate General Poiares Maduro in Case C-160/03 *Spain v. Eurojust* ECLI:EU:C:2005:168, para. 31.

¹³⁹ Scholtes, 2021, p. 540.

sovereign rights, although within limited fields, and the subjects of which comprise not only Member States but also their nationals.¹⁴⁰

In *van Gend & Loos v. Nederlandse Administratie der Belastingen*,¹⁴¹ CJEU declared that the laws adopted by EU institutions were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Member States. Therefore, EU law has direct effect. According to the principle of supremacy of EU law, in case of a conflict between EU law and the law of the Member States, EU law prevails. However, this principle does not signify that the CJEU can invalidate the national law, which conflicts with EU law. It rather means that in case of a conflict between national law and directly effective EU law, which cannot be solved by consistent interpretation of national law, national courts of the Member States must apply EU law instead of the national law.¹⁴²

In *Costa v. ENEL*,¹⁴³ the Court further built on the principle of direct effect and captured the idea that the aims of the treaties would be undermined if EU law could be made subordinate to national law. As the Member States transferred certain powers to the EU, they limited their sovereign rights, and thus for EU norms to be effective they must take precedence over any provision of national law, including constitutions. This view of absolute primacy of EU law is echoed through the CJEU's case law ever since.¹⁴⁴ In the narrative of the CJEU, the doctrine of supremacy was laid down in *Costa v. ENEL* in 1964, but was part of EU law from the outset.¹⁴⁵ However,

140 Trstenjak, 2013, p. 71.

141 Case 26/62 ECLI:EU:C:1963:1.

142 Trstenjak, 2013, p. 72.

143 Case 6/64 ECLI:EU:C:1964:66.

144 Bruggeman and Larin cite Case C-119/05 *Lucchini*, ECLI:EU:C:2007:434, para. 61; C-213/89 *Factor-tame*, ECLI:EU:C:1990:257, paras. 17–18; Case C-409/06 *Winner Wetten*, ECLI:EU:C:2010:503, para. 61, see Bruggeman and Larin, 2020, p. 22. The only two possible exceptions, that is, where a relative interpretation of the primacy of EU law is used, could be seen in *Omega* and *Sayn Wittgenstein*. In these, the CJEU appeared to depart from the strict, unconditional hierarchy it maintained in its case law discussed above, and which was taken up again later. In *Omega*, the German Federal Administrative Court (*Bundesverwaltungsgericht*) asked the CJEU whether it could prohibit a laser gaming facility from providing services deemed to infringe the principle of human dignity as enshrined in the German constitution, even if it were to restrict the free movement of goods and services in EU law. The Court found this prohibition to be justified based on public policy exceptions provided for in the EU Treaties. In *Sayn Wittgenstein*, the question arose whether a law abolishing nobility as an expression of the constitutional principle of equality in Austria posed a legitimate restriction to the free movement of persons in EU law. The CJEU explicitly relied on Art. 4(2) TEU in justifying the derogation based on public policy grounds. In both cases the Court allowed for limitations to the EU's fundamental freedoms, but not stemming (only) from domestic constitutional principles, but based on policy objectives it deemed legitimate in EU law. Bruggeman and Larin, 2020, p. 22.

145 Nagy, 2024, p. 72. Some authors believe that although it is usually argued that this doctrine emerged in the well-known judgment *Costa v. Enel* this is not the case. As they say, it is true that in this judgment the CJEU postulated the autonomous precedence of EU law over conflicting national law in explicit terms. However, its foundations were already laid down in previous judgments, including the case-law on the ECSC Treaty. This background is important as it demonstrates that the precedence doctrine does not constitute a political invention of an activist CJEU, but rather that it results from the legal nature of the Communities. Barents, 2009, p. 423.

supremacy in fact became a reality when it was accepted by national courts, and different national courts accepted it at different times, with uniform acceptance not being achieved until the early 1990s.¹⁴⁶

Further examples of cases in which the CJEU affirmed the supremacy of EU law include *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*,¹⁴⁷ *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*,¹⁴⁸ *Marleasing SA v. La Comercial Internacional de Alimentacion SA*.¹⁴⁹

Most recently the CJEU stated, in *Pelham and Others*:

by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law in the territory of that State.¹⁵⁰

Therefore, the CJEU stands firm in its traditional stance on supremacy of EU law.

In these cases, CJEU clarified that the primacy of EU law must be applied to all national acts, whether they were adopted before or after the EU act in question. Where EU law takes precedence over conflicting national law, the national provisions are not automatically annulled or invalidated. However, national authorities and courts must refuse to apply those provisions as long as the overriding EU norms are in force. Therefore, the principle of supremacy seeks to ensure that people are uniformly protected by an EU law across all EU territories.

Notably, the supremacy of EU law only applies where Member States have ceded sovereignty to the EU – in fields such as the single market, environment, transport, etc. However, it does not apply in areas such as education, culture or tourism.

It is well argued that the duty set out in Art. 4(2) TEU has been construed to uphold various national prerogatives capable, in principle, of justifying an exception to the full application of EU (primary and secondary) law; most notably: the form of government of the Member States; national choices related to the use of the official language(s); domestic understanding of fundamental rights; internal allocation of competences at the regional or local level. More recently, public policy concerns have also been linked to Art. 4(2) TEU.¹⁵¹

Some scholars argue that the notion of ‘constitutional identity’ is used by various constitutional courts (out of whom some are less and less politically independent) to carve out ever-larger areas of ‘constitutional identity’ by themselves and thus undermine the supremacy of EU law. National constitutional and supreme courts as well as other Member State institutions play a crucial part in both cooperating

146 Ibid.

147 Case 11-70 ECLI:EU:C:1970:114.

148 Case 106/77 ECLI:EU:C:1978:49.

149 Case C-106/89 ECLI:EU:C:1990:395.

150 Case C-476/17, EU:C:2019:624, para. 78.

151 Di Federico, 2019, p. 358.

with and in counterbalancing the CJEU.¹⁵² However, the CJEU further expanded its powers after the Charter of Fundamental Rights came into force because this enabled the CJEU to act as a constitutional court. Its slow broadening of powers with special reference to *Fransson*¹⁵³ erodes the functioning of national courts even in situations which are only ‘in the reach’ of EU law.¹⁵⁴

Notably, some authors set the thesis that supremacy of EU law ensures the principle of equality – preventing each country of the EU from cherry-picking which provisions of EU it likes or not. They argue that the supremacy of EU law is not an arbitrary imposition of supranational authority over the will of a Member State. Rather, it is the guarantee that Member States will remain equal under the EU Treaties. As Member States have accepted to become members of the EU, limiting their sovereignty on a reciprocal basis, if a Member State (its highest court) could unilaterally decide to redefine the terms of its participation to the EU, this would undermine the equal position of all the Member State *vis-à-vis* EU law. Some states would be more equal than others.¹⁵⁵

The activation of Art. 4(2) TEU is potentially disruptive inasmuch as it can – if taken seriously – lead to the differentiated application of EU law throughout the Union. Most notably, when it is relied upon to challenge the validity of a provision of secondary law under Art. 263 TFEU the CJEU will have to determine whether the legislator has overstepped the boundaries of its wide discretionary power unduly impinging on the fundamental structure or the essential functions of a given Member State. The violation of the duty set forth in the provision would entail the annulment (total or partial) of the relevant measure with *erga omnes*, and – at least in principle – *ex tunc* effects.¹⁵⁶ Moreover, the argument based on the ‘effectiveness’ of EU law may be tempting but arguably is not compelling. Effectiveness has emerged from loyalty as a means to ensure that EU law takes full effect in national law.¹⁵⁷

However, constitutional identities represent the third frontier of limitation to supremacy, after the ‘fundamental rights’ reservation inaugurated with *Solange*, and the ‘competence’ reservation inaugurated with the *Maastricht* judgment. The identity review would be based upon Art. 4(2) TEU, which, while protecting national constitutional identities, prevents some of the norms of the Treaty to claim primacy upon them.¹⁵⁸ However, notably, the CJEU is not always reluctant to accept various ‘elements of national identity’, as it calls them. Millet lists the abolition of nobility titles in Austria (as a result of the latter’s status as a Republic) and in Germany (as a result of the latter’s constitutional choice); the protection of the State’s official national language in Lithuania and Belgium; or the protection of the domestic division

¹⁵² Bruggeman and Larik, 2020, p. 21.

¹⁵³ C-617/10 *Åklagaren v. Hans Åkerberg Fransson*. ECLI:EU:C:2013:105.

¹⁵⁴ Horvat Vuković, 2019, p. 254.

¹⁵⁵ Fabbrini, 2015, pp. 1022–1023.

¹⁵⁶ Di Federico, 2019, p. 355.

¹⁵⁷ Klamert, 2022, p. 85.

¹⁵⁸ Guastaferrero, 2012, p. 10.

of competences in Germany, be it between Länder or merely regarding the internal reorganisation of powers between local public bodies.¹⁵⁹

The first remote hints at today's notion of constitutional identity trace back to the German and Italian Constitutional Courts' reactions to the CJEU doctrine of supremacy of EU law. The Italian Constitutional Court, in its 1973 *Frontini* judgment, began developing its *controlimiti* doctrine, a version of which remains current to this day.¹⁶⁰ The German Constitutional Court's *Solange* case law provides another early trace of constitutional identity, extended by its *Maastricht* judgment, which framed national limitations to the reach of EU law as a matter of sovereignty as *Kompetenz-Kompetenz*, or the capacity to decide who is competent.¹⁶¹ In *Mr R*¹⁶² case the German Constitutional Court ruled that German courts now always have to guarantee compliance with the German constitutional principle of human dignity, thus expanding its powers towards the scrutiny of EU law as it abandoned the exceptional conditionality element from its *Solange* cases.¹⁶³

Both the Spanish and French Constitutional Courts read this clause as 'containing an implicit limit to the primacy of European law whenever that law would affect national constitutions, or at least their fundamental structures'.¹⁶⁴ The Czech Constitutional Court went down a similar route, using the eternity clause in Art. 9 of the Czech Constitution as the beginning point for staking out a 'material core' of

159 Millet, 2021, pp. 573–574. In contrast, the Court did not recognise the employee participation system in social negotiations as an element of (German) national identity. By the same token, although the Court implicitly acknowledged the institution of marriage between a man and woman as an element of national identity in Romania, it considered that same-sex marriages celebrated abroad were to be recognised in that Member State. Millet, 2021, p. 574.

160 Scholtes, 2021, p. 536. The Italian Constitutional Court developed similar objections to absolute primacy in what is termed the *controlimiti* doctrine as developed in *Frontini*, *Granital*, and *Fragd*. When activated, the Italian Constitutional Court can declare the legislation incorporating EU law unconstitutional. See Bruggeman and Larik, 2020, p. 23.

161 Scholtes, 2021, p. 537.

162 2 BvR 2735/14, 15 December 2015.

163 Bruggeman and Larik, 2020, p. 23.

164 Scholtes, 2021, p. 537.

The German Constitutional Court was the most direct in its judgment, instituting an identity review (Identitätskontrolle) against EU law. In the judgment, the Court declared itself competent to review European Union legislation, including any new treaties, for compliance with German constitutional identity. An anchor for the Court's conception of constitutional identity was the 'eternity clause' in Art. 79(3) of the German Constitution. The clause precludes the constitutional legislator from changing certain essential provisions of the constitution, Art. 127 – which enshrines the inviolability of human dignity and mandating respect for human rights – and Art. 2028 – which, among other things, establishes the federal, democratic, and social nature of the German state, as well as the principles of popular sovereignty and the rule of law. Thus, the German Constitution binds even the constitution-amending power to the constitution's fundamental principles. By extension, the inviolable core content of the constitution, protected by the eternity clause, must be equally protected against encroachment through European Union law. The identity of the *Grundgesetz* is thus 'integration-proof'. Any change of constitutional identity through European integration must be legitimated through an act of the constituent power, that is, through the enactment of a new constitution in a referendum. Scholtes, 2021, p. 538.

the Constitution. In the case of a conflict between EU Law and the Czech Constitution, the Court upheld that ‘the constitutional order of the Czech Republic, in particular its material core, must take precedence’.¹⁶⁵ The Polish Constitutional Court, in its judgment, referred extensively to the German Constitutional Court’s precedent and similarly invoked Art. 4(2) of the TEU. In developing its conception of constitutional identity, it argues that the latter is the ‘normative manifestation’ of Polish sovereignty, and as such, it expresses the ‘matters which constitute ‘the heart of the matter’ i.e. are fundamental to the basis of the political system of a given state’. In addition to Poland and the Czech Republic, other countries such as Hungary and Belgium have all adopted their own forms of constitutional identity discourse to protect from European encroachment.¹⁶⁶

Therefore, it is safe to say that constitutional identity has become a ‘weapon’ in the hands of national constitutional courts which they use to suppress the CJEU doctrine of absolute supremacy of EU law. As we can see, the ‘line of defense’ is, again, national sovereignty and the existence of a national constitutional essence which cannot be overcome by the doctrine of supremacy of EU law and the fact that there are some exclusive reservoirs of sovereignty that cannot be ceded to the EU.

However, as for now, the CJEU appears ‘reluctant to explicitly refer to Art. 4(2) TEU’ and use the case law of the Member States constitutional courts to ‘delimit the outer limits of constitutional identity’.¹⁶⁷ This situation, as Di Federico states, serves three distinct but highly interrelated purposes. First, it indicates that the issues at stake are particularly sensitive. Second, it supports the conclusion that the full application of EU law will depend on the interpretation offered by the CJEU and its compliance with the national constitutional order. Third, it offers the Luxembourg judges a legal ground for accepting the relevant national specificities.¹⁶⁸ Therefore, some scholars invite the CJEU to ‘confine the EU law concept of national identity to the precise scope given to it by the drafters of the Lisbon Treaty’ as ‘many other norms and principles of EU law are available to protect the variety of legitimate public interests of the Member States’.¹⁶⁹

6.3. The Relation of Art. 4(2) and Art. 4(3)

When discussing the implementation of Art. 4(2), one could argue that it conflicts, as described above, with the principle of sincere cooperation enshrined in Art. 4(3) TEU. However, the German Constitutional Court argued that the need to uphold the constitutional identity of the Member States upon which the Union is founded – and to disapply EU law conflicting with the German constitutional identity – does

¹⁶⁵ Ibid.

¹⁶⁶ Scholtes, 2021, p. 539.

¹⁶⁷ Bruggeman and Larik, 2020, p. 25.

¹⁶⁸ Di Federico, 2019, p. 350.

¹⁶⁹ De Witte, 2021, p. 570.

not infringe the principle of sincere cooperation laid down on Art. 4(3) TEU precisely because of the duty set out in Art. 4(2) TEU.¹⁷⁰

7. Conclusion

Years after the introduction of the national identity clause, it can be concluded that Art. 4(2) has not fundamentally transformed the relationship between European and domestic legal orders.¹⁷¹ This is why some authors believe that it was never intended as such.¹⁷² The CJEU's case law does provide reason to believe such a thesis as it never in reality accepted such meaning of this provision. It is also true that it never dismissed it either. Thus, what is the function of Art. 4(2) TEU? Is it in reality only a 'policy statement' as some would have us believe? Or does it have a more fundamental meaning and purpose? Who is to interpret it with a firm and without doubt voice – the CJEU or the ones whose interests it (should) defends – the constitutional courts? Rodin's answer in 2011 was that the role of Art. 4(2) TEU is twofold. As a competence rule, it imposes limits on EU regulation, even in cases where such regulation would otherwise be permissible. As an interpretative rule, it provides guidance for the CJEU and national courts on how to interpret the relationship between EU and national law.¹⁷³ Further, he stated that Member States are under an obligation under Art. 2 TEU not to construe national identity in a way that is in confrontation with the fundamental rules, principles and values of the EU. However, the CJEU, within the limits of its jurisdiction, determines to what extent the Treaties are to be interpreted as allowing a margin of discretion in national identity claims, or as treating such claims as an ordinary public policy justification. Certainly, national constitutional courts retain the right to rule on the application of national constitutional law even after the CJEU has spoken, and this can lead to a collision between national constitutional and EU law.¹⁷⁴ In contrast with the innovative interpretation of the provision Member States put forth, the CJEU has interpreted the identity clause in a very conservative way: the only successful claims grounded on Art. 4(2) TEU were the ones that could be framed according to the CJEU's consolidated jurisprudence on derogations to free movement rights.¹⁷⁵

Rodin was evidently right as subsequent development clearly indicated that the Member States constitutional courts came into conflict with CJEU regarding the application of EU law regarding their constitutional provisions and the concept of

170 Di Federico, 2019, p. 351.

171 Capelli, 2023, p. 112.

172 Bonello, 2021, p. 538.

173 Rodin, 2011, p. 41.

174 Ibid.

175 Capelli, 2023, p. 112.

supremacy of EU law. This concept, although strongly confirmed by CJEU is not accepted regarding, particularly, the questions of national constitutional identity. Therefore, the question we should ask ourselves is – did the creators of the TEU (the Member States) intend for Art. 4(2) to be a mere ‘policy statement’ or a tool for Member States, if they believe that CJEU and EU integration has become more than they bargained for?

The role of national constitutions as the utmost expression of sovereignty has been an overlying theme of European integration with respect to setting the conditions for the interaction between the national and European legal orders. After all, every Member State joined based on its national constitution, either on the grounds of general provisions regarding membership in international obligations, or on the grounds of specific provisions specifically enacted to prepare the national legal order for EU accession.¹⁷⁶ Considering this, one can only agree with the thesis that the Treaty’s identity clause appears to be providing a means of protecting the fundamental interests which defending Member States may resort to against the otherwise tidal force of EU law. The purpose underlying it is to safeguard diversity and preserve certain national competences that remain dear to the Member States.¹⁷⁷

As Walker states, the EU and EU law are works in progress.¹⁷⁸ That was true in 2005 and is true in 2024. There is no way of knowing whether the course set is the correct one and this is why it is absolutely necessary to establish a real dialogue of courts on the matters of principle of equality and its meaning in EU law. There cannot be, as was already stated in this chapter, an overlord with regard to the concept of sovereignty. We constantly question law’s role in mobilising and co-ordinating collective action without the luxury of knowing that it has already answered these questions elsewhere, thereby underscoring our uncertainty as to whether it can answer these questions.¹⁷⁹ National courts will continue to contest EU law primacy, and in doing so, they will most likely retain the vocabulary of constitutional identity. For better or worse, the European legal space is best conceived of in pluralistic terms as a space where authority is heterarchically negotiated rather than hierarchically settled. The language of constitutional identity is key to this negotiation.¹⁸⁰

However, as ‘masters of the treaties’ (*Herren der Verträge*), Member States decide through national legal arrangements if and to what extent EU law is applicable and is accorded precedence in the respective national legal order’, as was firmly said by the German Constitutional Court.

176 Konstadinides, 2015, pp. 127–128.

177 Konstadinides, 2015, p. 130.

178 Walker, 2005, p. 590.

179 Walker, 2005, p. 591.

180 Sholtes, 2021, p. 548.

References

Bibliography

- Avbelj, M. (2008) 'Questioning EU Constitutionalisms', *German Law Journal*, 9(1), pp. 1–26 [Online]. Available at: <https://doi.org/10.1017/S2071832200006283> (Accessed: 17 December 2024).
- Barents, R. (2009) 'The precedence of EU law from the perspective of constitutional pluralism', *E.C.L. Review*, 5(3), pp. 421–446 [Online]. Available at: <https://doi.org/10.1017/S1574019609004210> (Accessed: 17 December 2024).
- Bonelli, M. (2021) 'National Identity and European Integration Beyond 'Limited Fields'', *European Public Law*, 27(3), pp. 537–558 [Online]. Available at: <https://doi.org/10.54648/EURO2021025> (Accessed: 17 December 2024).
- Bruggeman, R., Larik, J. (2020) 'The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity', *Utrecht Journal of International and European Law*, 35(1) pp. 20–34 [Online]. Available at: <https://doi.org/10.5334/ujel.489> (Accessed: 17 December 2024).
- Burazin, L., Keršić, M. (2024) 'Kritička analiza Guastinijeva shvaćanja sukoba između ustavnih prava i tehnike odvagivanja', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 45(3), pp. 491–517 [Online]. Available at: <https://doi.org/10.30925/zpfsr.45.3.1> (Accessed: 17 December 2024).
- Capelli, T. (2023) 'Art. 4(2) TEU: The respect for national identity in the context of European integration', *Astrid Rassegna*, 2023/16, pp. 1–131.
- De Witte, B. (2021) 'Art. 4(2) TEU as a Protection of the Institutional Diversity of the Member States', *European Public Law*, 27(3), pp. 559–570 [Online]. Available at: <https://doi.org/10.54648/EURO2021026> (Accessed: 17 December 2024).
- Di Federico, G. (2019) 'The Potential of Art. 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards', *European Public Law*, 25(3), pp. 347–380 [Online]. Available at: <https://doi.org/10.54648/EURO2019021> (Accessed: 17 December 2024).
- Di Federico, G., Martinico, G. (2023) 'Official Languages, National Identities and the Protection of Minorities: A Complex Legal Puzzle', *European Constitutional Law Review*, 19(2), pp. 346–370 [Online]. Available at: <https://doi.org/10.1017/S157401962300010X> (Accessed: 17 December 2024).
- Dobbs (2014) 'Sovereignty, Art. 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?', *Yearbook of European Law*, 33(1), pp. 298–334 [Online]. Available at: <https://doi.org/10.2139/ssrn.2267540> (Accessed: 17 December 2024).
- European Union (no date) 'Primacy of EU law (precedence, supremacy)' [Online]. Available at: <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html> (Accessed: 17 December 2024).
- Fabbrini, F. (2015) 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States', *German Law Journal*, 16(4), pp. 1003–1023 [Online]. Available at: <https://doi.org/10.2139/ssrn.2641800> (Accessed: 17 December 2024).
- Guastaferrero, B. (2012) *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*. Jean Monnet Working Paper 01/12. New York: New York University School of Law.
- Guastini, R. (2016) 'Applying Constitutional Principles', *Analisi e Diritto*, 2016/9, pp. 241–249.

- Guastini, R. (2023a) 'A Short Lesson on Equality under the Italian Constitution', *Analisi e Diritto*, 2023/2, pp. 187–195 [Online]. Available at: <https://doi.org/10.4454/analysiediritto.v23i2.882> (Accessed: 17 December 2024).
- Guastini, R. (2023b) *Sintaksa prava*. Zagreb: Naklada Breza.
- Horvat Vuković, A. (2019) 'Ustavni sud Republike Hrvatske kao 'europski' sud i očuvanje nacionalnih standarda zaštite temeljnih ljudskih prava i sloboda', *Zbornik Pravnog fakulteta u Zagrebu*, 69(2), pp. 249–276 [Online]. Available at: <https://doi.org/10.3935/zpfz.69.2.04> (Accessed: 17 December 2024).
- Kaczorowska-Ireland, A. (2019) 'What Is the European Union required to Respect under Art. 4(2) TEU?: The Uniqueness Approach', *European Public Law*, 25(1), pp. 57–82 [Online]. Available at: <https://doi.org/10.54648/EURO2019005> (Accessed: 17 December 2024).
- Kelsen, H. (1944) 'The principle of sovereign equality of states as a basis for international organization', *The Yale Law Journal*, 53(2), pp. 207–220 [Online]. Available at: <https://doi.org/10.2307/792798> (Accessed: 17 December 2024).
- Kelsen, H. (2015) *Opća teorija normi*. Zagreb: Naklada Breza.
- Klamert, M. (2022) 'Supremacy, the Uniformity of EU Law, and the Principle of Equality', *Austrian Law Journal*, 2022/1, pp. 82–92 [Online]. Available at: <https://doi.org/10.2139/ssrn.3958290> (Accessed: 17 December 2024).
- Kooijmans, P.H. (1964) *The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law*. Michigan: A.W. Sythoff.
- Konstadinides, T. (2015) 'Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse', *Yearbook of European Law*, 34(1), pp. 127–169 [Online]. Available at: <https://doi.org/10.1093/yel/yev012> (Accessed: 17 December 2024).
- MacCormick, N. (2014) *Institucije prava*. Zagreb: Naklada Breza.
- Martinico, G. (2021) 'Taming National Identity: A Systematic Understanding of Art. 4.2 TEU', *European Public Law*, 27(3), pp. 447–464 [Online]. Available at: <https://doi.org/10.54648/EURO2021021> (Accessed: 17 December 2024).
- Mastroianni, R., Arena, A. (2015) 'Free movement of lawyers and the Torresi judgement: a bridge too far? European Court of Justice, Grand Chamber Judgement of 17 July 2014, Joined Cases C-58/13 and C-59/13 Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata', *European Constitutional Law Review*, 2015/11, pp. 373–388 [Online]. Available at: <https://doi.org/10.1017/S1574019615000152> (Accessed: 17 December 2024).
- Millet, F-H. (2021) 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way', *European Public Law*, 27(3), pp. 571–596 [Online]. Available at: <https://doi.org/10.54648/EURO2021027> (Accessed: 17 December 2024).
- Muir, E. (2019) 'The Essence of the Fundamental Right to Equal Treatment: Back to the Origins', *German Law Journal*, 2019/20, pp. 817–839 [Online]. Available at: <https://doi.org/10.1017/glj.2019.64> (Accessed: 17 December 2024).
- Nagy, C.I. (2024) 'The rebellion of constitutional courts and the normative character of European Union law', *International and Comparative Law Quarterly*, 73(1), pp. 65–101 [Online]. Available at: <https://doi.org/10.1017/S0020589323000519> (Accessed: 17 December 2024).
- Nijman, J.E., Werner, W.G. (2013) 'Legal Equality and the International Rule of Law', *Netherlands Yearbook of International Law*, 2013/43, pp. 3–24 [Online]. Available at: https://doi.org/10.1007/978-90-6704-915-3_1 (Accessed: 17 December 2024).

- Riedl, B. (2024) 'ECJ Encroachment on Domestic Judicial Autonomy?', *European Public Law*, 30(2), pp. 157–186 [Online]. Available at: <https://doi.org/10.54648/EURO2024009> (Accessed: 17 December 2024).
- Rodin, S. (2011) 'National Identity and Market Freedoms After the Treaty of Lisbon', *Croatian Yearbook of European Law & Policy*, 2011/7, pp. 11–41 [Online]. Available at: <https://doi.org/10.2139/ssrn.2005691> (Accessed: 17 December 2024).
- Rossi, L.S., Calsolari, F. (2017) *The principle of Equality in EU law*. New York: Springer; <https://doi.org/10.1007/978-3-319-66137-7>.
- Scholtes, J. (2021) 'Abusing Constitutional Identity', *German Law Journal*, 2021/22, pp. 534–556 [Online]. Available at: <https://doi.org/10.1017/glj.2021.21> (Accessed: 17 December 2024).
- Thomsen, F.K. (2018) 'Concept, Principle, and Norm-Equality before the Law Reconsidered', *Legal Theory*, 2018/24, pp. 103–134 [Online]. Available at: <https://doi.org/10.1017/S1352325218000071> (Accessed: 17 December 2024).
- Trstenjak, V. (2013) 'National Sovereignty and the Principle of Primacy in EU Law and Their Importance for the Member States', *Beijing Law Review*, 4(2), pp. 71–76 [Online]. Available at: <https://doi.org/10.4236/blr.2013.42009> (Accessed: 17 December 2024).
- Tuominen, T. (2021) 'From Constitutional Pluralism to Global Law: Reading Neil Walker's Postmodern Constitutionalism', *Athena*, 1(1), pp. 58–85.
- Van Wynen, T.A., Thomas, A.J. (1951) 'Equality of States in International Law. Fact or Fiction?', *Virginia Law Review*, 37(6), pp. 791–823 [Online]. Available at: <https://doi.org/10.2307/1069322> (Accessed: 17 December 2024).
- Von Bogdandy, A., Schill, S. (2011) 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty', *Common Market Law Review*, 48(5), pp. 1417–1453 [Online]. Available at: <https://doi.org/10.54648/COLA2011057> (Accessed: 17 December 2024).
- Walker, N. (2002) 'The Idea of Constitutional Pluralism', *The Modern Law Review*, 2002/65, pp. 317–359 [Online]. Available at: <https://doi.org/10.1111/1468-2230.00383> (Accessed: 17 December 2024).
- Walker, N. (2005) 'Legal Theory and the European Union: A 25th Anniversary Essay', *Oxford Journal of Legal Studies*, 25(4), pp. 581–601 [Online]. Available at: <https://doi.org/10.2139/ssrn.891032> (Accessed: 17 December 2024).

Legal sources

- Case 26/62 *Van Gend & Loos* EU:C:1963:1.
- Case 6/64 *Costa* EU:C:1964:66.
- Case 119/05 *Lucchini*, EU:C:2007:434.
- Case 213/89 *Factortame*, EU:C:1990:257.
- Case 409/06 *Winner Wetten* EU:C:2010:503.
- Case 11/70 *Internationale Handelsgesellschaft mbH* EU:C:1970:114.
- Case 106/77 *Simmenthal SpA* EU:C:1978:49.
- Case 106/89 *Marleasing SA* EU:C:1990:395.
- Case 4/73 *Nold, Kohlen- und Baustoffgroßhandlung* EU:C:1974:51.
- Case 617/10 *Åklagaren v. Hans Åkerberg Fransson* EU:C:2013:105.
- Case 493/17 *Weiss* EU:C:2018:1000.
- Case 105/14, *Tarrico and Others* EU:C:2015:555.
- Case 42/17 *M.A.S. and M.B.* EU:C:2017:936.
- Case 476/17 *Pelham and Others* EU:C:2019:624.

Case 617/10 *Åklagaren v. Hans Åkerberg Fransson*. ECLI:EU:C:2013:105.
Case 208/09 *Sayn-Wittgenstein* EU:C:2010:806.
Case 391/09 *Runevič-Vardyn* EU:C:2011:291.
Case 202/11 *Las* EU:C:2013:239.
Case 151/12 *Commission v. Spain* EU:C:2013:690.
Case 156/13 *Digibet and Albers* EU:C:2014:1756.
Case 51/15 *Remondis* EU:C:2016:985.
Case 438/14 *Bogendorff von Wolffersdorff* EU:C:2016:401.
Case 673/16 *Coman* EU:C:2018:385.
Case 420/16 P *Izsák and Dabis v. Commission* EU:C:2019:177.
Case 3/10 *Affatato* EU:C: 2010:574.
Case 393/10 *O'Brien* EU:C: 2012:110.
Case 300/11 *ZZ*:C:2013:363.
Case 42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.
Joined Cases 58/13 and C-59/13 *Torresi* EU:C:2014:208.
Lisbon 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, 30 June 2009.
Mr R 2 BvR 2735/14, 15 December 2015.