THE CONCEPT OF CONSTITUTIONAL IDENTITY WITHIN THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract

This thesis examines the evolving concept of constitutional identity within the framework of the European Convention on Human Rights (ECHR), after it has migrated from the framework of the European Union (EU).

In the EU context, national constitutional courts have essentially developed the concept to demand identical fundamental rights protection at the EU level. This development arose as a reaction to the Court of Justice of the European Union's (CJEU) limited application of the national identity clause of Article 4.2 TEU and its insistence on the primacy, uniformity, and effectiveness of EU law over fundamental rights catalogues in national constitutions. While some applications of constitutional identity by national courts have been legitimate, others have led to questionable clashes with the CJEU, particularly in instances where courts lacking independence were undermining the rule of law. To mitigate such conflicts, the CJEU should foster judicial dialogue by allowing domestic courts to apply their fundamental rights catalogues and by giving more weight to the national identity clause.

In contrast, the ECHR's objective of safeguarding human rights places the European Court of Human Rights (ECtHR) in a comparatively weaker position to enforce its judgments within the legal orders of the High Contracting Parties. Despite a generally more deferential stance, national constitutional courts have implicitly invoked constitutional identity arguments, prompting the ECtHR to shift from an indifferent to a more sensitive attitude towards national constitutional law, emphasising judicial dialogue. However, in Savickis and Others v. Latvia and subsequent cases, the ECtHR's oversensitivity has led to the recognition of constitutional identity as a legitimate aim within the ECHR without an adequate proportionality assessment, which is problematic in the light of the rule of law. Future research should focus on how the ECtHR's jurisprudence evolves, particularly concerning the proportionality test in assessing constitutional identity claims and the width of the margin of appreciation.

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Introduction

1. Constitutional identity has always been an extremely controversial concept in the context of the law of the European Union (EU), where it is used as an autonomous concept by constitutional courts vis-à-vis the national identity clause of Article 4.2 TEU, as interpreted by the Court of Justice of the European Union (CJEU). For example, Federico Fabbrini and András Sajó describe it as a doctrine that is 'drenched with neo-sovereigntist features and that is contrary to the rule of law' and that 'inevitably results in arbitrariness in its use'.[1] More broadly, Michel Rosenfeld describes the concept of constitutional identity as 'an essentially contested concept as there is no agreement over what it means or refers to'.[2] After the European Court of Human Rights (ECtHR) had recognised this concept as a legitimate aim within the system of the European Convention of Human Rights (ECHR) in the recent case of Savickis and Others v. Latvia of 9 June 2022[3], judges O'Leary, Grozev and Lemmens furthermore called it a 'dangerous and slippery slope'.[4]

2. This thesis seeks to examine whether this criticism is justified or whether, on the other hand, the recognition of the concept of constitutional identity by the ECtHR has the potential of contributing to fruitful judicial dialogue with domestic courts. To that end, it will firstly proceed with a more detailed research plan. Subsequently, the actual thesis will be divided in two main chapters. In the first chapter, the role that the concept of constitutional identity has played within the legal order of the EU will be elaborated upon. In the second chapter, it will be examined whether its migration towards the system of the ECHR is normatively desirable.

[1] Federico Fabbrini and András Sajó, 'The dangers of constitutional identity' (2019) 25 European Law Journal 457, 458.
[2] Michel Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (OUP 2012) 756.
[3] ECtHR 9 June 2022, no. 49270/11, Savickis and Others v. Latvia, §198.
[4] Joint dissenting opinion of judges O'Leary, Grozev and Lemmens in ECtHR 9 June 2022, no. 49270/11, Savickis and Others v. Latvia, §18.

1 Research Plan

3. In this research plan, I will first elaborate on the significance of my research, as well as the research objectives and questions and the research methodology that I will use for this thesis. Second, I will define some legal concepts that are useful for the reader to understand before proceeding with the substantive part of the thesis.

1.1 Significance

4. The term 'constitutional identity' originates from European Union law, more precisely from article 4.2 TEU (calling it 'national identity'). The CJEU on the one hand and the domestic constitutional courts on the other hand interpret it in different ways to define the boundaries of EU law, the latter often referring to their autonomous constitutional concept of 'constitutional identity' – a concept that has both been used and misused. Since the European Court on Human Rights has very recently accepted the protection of constitutional identity as a legitimate aim within the framework of the ECHR[5], the notion has also become relevant for ECHR law today.

5. In my research, I will seek to find an answer to the question in what way the concept of constitutional identity is able to migrate to the ECHR system and to what extent it can have an added value there. It is significant to explore this legal problem, because it concerns the delicate tension between the increased need for fruitful judicial dialogue between supranational and domestic courts on the one hand and the (for some authors inherent) risk of abuse of the concept of constitutional identity on the other hand. Whereas a lot has been written about this already in the context of the EU law, it remains nearly uncharted territory within the context of the ECHR.

1.2 Research objectives

6. To conduct this research, I intend to *grosso modo* make a comparison between how the notion of constitutional (or national) identity has been applied in the European Union and how it can or should be applied in a similar way within the system of the ECHR, as a sort of constitutional migration. Within both legal orders/systems, I intend

[5] ECtHR 9 June 2022, no. 49270/11, Savickis and Others v. Latvia, §198.

to make additional comparisons between the visions the supranational court – the CJEU for the EU and the ECtHR for the ECHR – and a number of national constitutional courts to show possible tensions.

Concerning the latter category, I will also show the differences in approach of these courts in a democratically stable regime on the one hand and a democratically backsliding regime on the other hand, in order to show how the domestic concept of constitutional identity can both be applied in a constructive way and as a dangerous and slippery slope. More precisely, I will focus on the case-law of the Czech Constitutional Court and the German Federal Constitutional Court, on the one hand, and on the Romanian Constitutional Court and the Polish Constitutional Tribunal, on the other hand, since all of these courts have played an important role in using their constitutional identity (either explicitly or implicitly) to set counterlimits to the primacy of EU and ECHR law – the latter two in an abusive way. The part about EU law will, however, be more descriptive in nature than the part about the ECHR, as a lot has been written about it already and the innovative part of my research will be situated mainly in the second part.

7. I will thus divide my thesis in two main chapters. In the first chapter, I will focus on the role that the concept of constitutional identity has played in the context of EU law. In the first part of this chapter, I will examine how the Court of Justice of the European Union has used the concept of national identity in the sense of article 4.2 TEU as a limit to the primacy and uniformity of EU law. In the second part of this chapter, I will examine how the aforementioned domestic constitutional courts have used their autonomous concept of constitutional identity, to what extent this has created tensions with the CJEU and how these courts have tried to solve these tensions by means of judicial dialogue. However, before delving into the specific contexts of these domestic courts, I will set out the general context of transnational judicial dialogue that has preceded their main actions.

In the second chapter, I will examine in the first part to what extent domestic courts have (implicitly) used the concept of constitutional identity to limit the direct applicability or supremacy of the ECHR. For this, I will examine the approaches of two constitutional courts that has no significant issues with the rule of law (the German Federal

Constitutional Court and the Lithuanian Constitutional Court) and the approaches of two constitutional courts that do have significant issues with the rule of law (the Russian Constitutional Court and the Polish Constitutional Tribunal). In the second part, I will examine which influence these approaches have had on the margin of appreciation doctrine of the ECtHR and whether the later added concept of constitutional identity has the same potential and pitfalls as in the context of the EU.

1.3 Research Questions

8. Based on these objectives, I will divide my research topic in the following research question and subquestions:

- What is the potential role of the concept of constitutional identity within the system of the ECHR?
    1. How has the concept of constitutional (or national) identity been applied in the EU?
        - **A.** How has the concept of national identity been applied by the CJEU?
        - **B.** How has the concept of constitutional identity been used and abused by domestic courts?
        - **C.** To what extent have the different visions of the CJEU and the domestic courts permitted or obstructed fruitful judicial dialogue?
    2. To what extent can the concept of constitutional identity have an added value within the system of the ECHR?
        - **A.** To what extent have domestic courts (implicitly) used the concept of constitutional identity to limit the direct applicability or supremacy of the ECHR?
        - **B.** To what extent has the ECtHR (implicitly) widened the margin of appreciation in cases where the compatibility of constitutional law with the ECHR was at stake?
        - **C.** To what extent can the explicit usage of the concept of constitutional identity by the ECtHR have the same potential and/or pitfalls as in the context of the EU law?

1.4 Methodology

9. For this topic, I will engage in doctrinal legal research. The comparative legal research methodology that I will use shall be normative functionalism, as I seek to identify the legal doctrine of constitutional identity that exists in both the EU and the ECHR systems and to examine whether this doctrine, that already exists in the former system, is normatively valuable in the latter system, where it has recently emerged.[6] More precisely, I will engage in a detailed case study to see how this doctrine operates in both systems, by focusing on the case-law of both supranational courts, as well as the selected domestic courts.[7] Taking into account the differences in nature between both systems, I intend to examine whether the constitutional migration of the concept of constitutional identity from the EU to the ECHR is normatively justified.

10. The choices of the aforementioned jurisdictions as my main comparators within both of these systems is based on Hirschl's 'prototypical cases' principle[8]: while Czechia and Germany (for the EU) and Germany and Lithuania (for the ECHR) are prototypes of jurisdictions where the notion of constitutional identity is (implicitly) used in a constructive or even purely hypothetical way, Romania and Poland (for the EU) and Russia and Poland (for the ECHR) are prototypes of the exact opposite type of jurisdiction, where it is used for an illiberal discourse. Thus, by assessing the pros and cons of the usage of the concept of constitutional identity within the ECHR system based on these two comparators, I can make a case for its usefulness for judicial dialogue in every member state of the EU and the Council of Europe respectively.

1.5 Definition of some relevant notions

1.5.1 Direct applicability, direct effect, primacy and supremacy

11. The notion of 'direct applicability' refers to whether a norm of international law can be invoked by domestic authorities in the internal legal order of a State.[9] For the

[6] Vicki Jackson, 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 63.
[7] *Ibid.*, 64.
[8] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014) 256-260.
[9] Anders Hendriksen, *International Law* (OUP 2019) 15.

purpose of this thesis, I will mainly focus on the judiciary. In principle, States remain free to choose whether, and to what extent, they allow international law to penetrate into their internal legal orders.[10] Traditionally, States in which international law is directly applicable are called 'monist' and States in which it is not are called 'dualist', but in practice, almost every jurisdiction is partially monist and partially dualist, depending on the nature of the norm of international law and nature of the norm of domestic law that must eventually yield to it.[11] This means that a State can factually determine the hierarchical status of a norm of international law within its domestic legal order.

12. The notion of 'direct effect' – or, in American law, the 'self-executing' nature – of a norm of international law refers to the question whether, if it is directly applicable, it can also be applied by the domestic authority in question *in concreto*.[12] Again, for the purpose of this thesis, the focus will mainly be on the judiciary.

13. The notion of 'primacy' refers to the situation when a norm is directly applicable and has direct effect, and can thus be applied by setting aside incompatible norms of national law. The notion of 'supremacy', on the other hand, refers to which norm is *in abstracto* the hierarchically superior one. For example, from the perspective of most constitutional courts, EU law has primacy over national constitutional law because the constitution itself allows it, but the since the primacy of EU law depends on this constitutional approval, EU law does not have supremacy over national constitutional law. The opposite is also possible: since, as we will see, in Lithuania, the ECHR is not directly applicable vis-à-vis the Lithuanian Constitution, it does not have primacy over this norm, but this does not change, in the eyes of the Lithuanian Constitutional Court, that the ECHR has supremacy over the Lithuanian Constitution.

1.5.2 Constitutional identity and national identity

14. Whereas the notion of 'constitutional identity' traditionally refers to 'what makes a constitution this constitution rather than another', the notion of 'national identity'

[10] *Ibid.*
[11] *Ibid.*
[12] Duncan Hollis and Carlos Vázquez, 'Treaty Self-Execution as "Foreign" Foreign Relations Law' in Curtis Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 468.

traditionally refers to 'what makes a national group this national group rather than another'.[13] However, for the purpose of this thesis, this distinction will not be maintained for two reasons. Firstly, these two notions are often difficult to distinguish in practice because there is a lot of overlap between them.[14] Secondly, as we will see this distinction is not consistently used in domestic case-law either, as mostly, constitutional courts use the notion of 'constitutional identity', while sometimes referring to their 'national identity' or even their 'national constitutional identity' instead. For these reasons, I will consistently refer to the notion of 'constitutional identity', with the exception of the jurisprudence of the CJEU, where the notion of 'national identity' is consistently used due to the fact that this language is used in Article 4.2 TEU.

15. Within the contexts discussed in this thesis, the concept of constitutional identity is typically used to shield a part of a national constitution from the primacy or supremacy of EU law or the ECHR. However, it is also possible – especially when it is abused – that in practice, it can also be used to shield the whole constitution from the primacy or supremacy of those instruments[15], which has happened, as we will see, in Romania with regard to EU law. The notion of constitutional identity can be used either implicitly or explicitly and whereas it is usually used by domestic courts, it can also be used by the supranational court itself.

Thus, in the context of the EU, where the direct applicability of EU law is generally accepted, constitutional identity serves as a limit to the supremacy (or exceptionally: the direct effect)[16] of EU law. In the context of the ECHR, it is slightly more complicated, as, unlike EU law, the direct applicability of the ECHR is not universally accepted. This means that when a judgment of the ECtHR is not implemented, this may, formally, at least, be seen as a mere consequence of the constitutional system of the High Contracting Party in question rather than an example of the use or abuse of constitutional identity. For this reason, particular attention should be paid to the specific context.

[13] Elke Cloots, *National Identity in EU Law* (OUP 2015) 167.
[14] *Ibid.*
[15] Joseph Halevi Horowitz Weiler, 'On the power of the Word: Europe's constitutional iconography' (2005) 3(2-3) International Journal of Constitutional Law 173, 184: *"To protect national sovereignty is passé; to protect national identity by insisting on constitutional specificity is à la mode."*
[16] Højesteret 6 December 2016, no. 15/2014, Ajos, §48.

16. Based on the foregoing, the concept of 'national identity' can be defined as an application of Article 4.2 TEU by the CJEU to limit the uniformity of EU law. The concept of 'constitutional identity', on the other hand, can be defined as a means to wholly or partially limit the supremacy (or the direct effect) of EU law by a domestic court, or as a means to wholly or partially limit the direct applicability (and thus the primacy), the direct effect or the supremacy of the ECHR.

2 Constitutional identity within the legal order of the European Union

17. In this chapter, I will examine how the concept of constitutional identity is used within the legal order of the European Union. First, I will delve into the way the Court of Justice of the European Union (CJEU) uses this concept in its interpretation of the national identity clause of Article 4.2 TEU. Second, I will elaborate on how this differs from the way constitutional courts use (and abuse) their autonomous concept of constitutional identity and how conflicts with the CJEU are or should be solved through judicial dialogue. The objective of the case study in this part is also to assess whether conventional literature rightfully qualifies constitutional identity as an inherently dangerous concept for the rule of law or whether – on the contrary – it can also be used as a constructive tool to legitimately address accurate deficiencies in the way the CJEU interprets the national identity clause.

2.1 The national identity clause as interpreted by the Court of Justice of the European Union

18. In this part, I will start with a short overview of how the CJEU has established and elaborated on the principle of primacy of EU law as the guiding principle regulating the hierarchical relations between EU law and national constitutions. Secondly, I will elaborate on how the national identity clause of article 4.2 TEU has been introduced as an exception to this principle, and how the CJEU has interpreted this exception.

2.1.1 The primacy and supremacy of EU law

19. In the ground-breaking case of Costa/ENEL of 1964, the CJEU ruled that EU law is superior to domestic law, because a uniform application of the former across all Member States would only be possible with the hierarchical inferiority of the latter.[17] Later, in the Internationale Handelsgesellschaft case of 1970, the Court clarified that the supremacy of EU law is also applicable to domestic constitutional provisions.[18] Consequently, all national judges (and by extension: all administrative authorities)[19] have the obligation to set aside every domestic legal norm that violates EU law.[20] On the contrary, however, the CJEU reserves itself the monopoly to invalidate norms of secondary EU law.[21] Furthermore, it follows from the supremacy of EU law that the validity of acts and conduct of EU institutions can only be limited by EU law itself, such as fundamental rights[22], the principles of conferral[23], subsidiarity and proportionality[24] and the national identity clause[25].

2.1.2 The national identity clause as an exception to the primacy of EU law

20. The national identity clause was introduced for the first time by the Maastricht Treaty in 1992[26], in a more limited form than today. At the time, this provision was seen as a merely political statement without any legal value, that was supposed to persuade

[17] CJEU 15 July 1964, no. 6/64, ECLI:EU:C:1964:66, Costa/ENEL. At the same time, this judgment was a reaffirmation of the direct applicability and the consequent primacy of EU law, as the Italian Constitutional Court had given EU law the hierarchical value of an ordinary statute within the Italian legal order. See Corte Costituzionale 7 March 1964, no. 14/1964, §6.
[18] CJEU 17 December 1970, no. 11/70, ECLI:EU:C:1970:114, Internationale Handelsgesellschaft, §2.
[19] CJEU 22 June 1989, no. 103/88, ECLI:EU:C:1989:256, Fratelli Costanzo, §31.
[20] CJEU 9 March 1978, no. 106/77, ECLI:EU:C:1978:49, Simmenthal II, §21. This judgment was once again a reaction to the case-law of the Italian Constitutional Court, that had reserved itself the monopoly of enforcing the primacy of EU law. See, *inter alia*, Corte Costituzionale 22 October 2024, no. 232/1975, §6. As we will see, however, the Simmenthal II rule remains controversial and potentially counterproductive for judicial dialogue.
[21] CJEU 22 October 1987, no. 314/85, ECLI:EU:C:1987:452, Foto-Frost, §20.
[22] This includes the Charter of Fundamental Rights of the European Union (CFR), as well as the common constitutional traditions of the Member States and the European Convention of Human Rights. The latter two categories are enforced as general principles of EU law (Article 6.3 TEU), notwithstanding more specific general principles of EU law with a fundamental rights character.
[23] See Article 4.2 TEU.
[24] See Article 4.1 TEU.
[25] See Article 4.2 TEU.
[26] The old Article F.1 of the Maastricht Treaty proclaimed: *"The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy."*

the Member States into further integration.[27] Despite the fact that it was not enforceable until the entry into force of the Treaty of Lisbon in 2009[28], this did not stop the CJEU from taking the concept into account when justifying restrictions by Member States on the free movement of goods, services, people and capital – even before the national identity clause was introduced.[29]

21. Nevertheless, because the CJEU keeps submitting the usage of the current national identity clause[30] to a proportionality test, the number of cases where the Court has explicitly relied on it as a justification for a Member State to deviate from its obligations under EU law, remains extremely limited and can therefore be counted on one hand. A first example concerns the Sayn-Wittgenstein case, where the CJEU relied on the national identity clause to justify the Austrian prohibition on carrying a title of nobility[31] as a deviation from the free movement of people.[32] Similarly, the Court has also upheld a German prohibition on carrying a title of nobility.[33] A third and last example concerns the Runevič-Vardyn case, where the CJEU used the national identity clause to justify the Lithuanian authorities' adjustment of Lithuanian citizens' birth certificates obtained in another Member State to the spelling rules of the Lithuanian language, that is deemed to have a constitutional status in Lithuania.[34]

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[27] Denys Simon, 'Article F. Commentaire' in Vlad Constantinesco, Robert Kovar, and Denys Simon (eds), *Traité sur l'Union Européenne (signé à Maastricht le 7 février 1992). Commentaire article par article* (Economica 1995) 81-82 and 88-89; Monica Claes, 'Negotiating Constitutional Identity or whose Identity Is it Anyway?' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds), *Constitutional Conversations in Europe* (Intersentia 2012) 217.

[28] Pursuant to Article L of the Maastricht Treaty – that would later become the old Article 46 TEU – the CJEU did not have jurisdiction to enforce the national identity clause. See Elke Cloots, *National Identity in EU Law* (OUP 2015) 36-37.

[29] *Ibid.*, 66. See in particular CJEU 28 November 1989, no. C-379/87, ECLI:EU:C:1989:599, Groener, §24 (recognising the promotion of the national language as legitimate justification for a restriction of the free movement for workers under Regulation 1612/68); CJEU 14 October 2004, no. C-36/02, ECLI:EU:C:2004:614, Omega Spielhallen, §40 (accepting a deviation from the freedom of services based on the German conception of human dignity).

[30] Today, the first sentence of Article 4.2 TEU proclaims: *"The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."*

[31] See Article 149.1 of the Austrian Constitution.

[32] CJEU 22 December 2010, no. C-208/09, ECLI:EU:C:2010:806, Sayn-Wittgenstein, §93.

[33] CJEU 2 June 2016, no. C-438/14, ECLI:EU:C:2016:401, Bogendorff von Wolffersdorff, §64. However, this prohibition was based on Article 109 of the Weimar Constitution of 1919, that, pursuant to Article 123.1 of the German Basic Law, only had the legal value of an ordinary federal statute (*ibid.*, §5).

[34] CJEU 12 May 2011, no. C-391/09, ECLI:EU:C:2011:291, Runevič-Vardyn, §87.

It seems, therefore, that the CJEU has essentially limited the application of the national identity clause to the most symbolic cases, that have little impact on the integrity of the internal market. The advantage of this approach is that, as the Court itself mentioned in the Melloni case, it prevents the Member State from abusing the clause to deviate from the fundamental rights enshrined in the CFEU.[35] However, in the exact same sentence, the Court has also made clear that the Charter not only serves as a minimum, but also as a maximum level of protection, as the national identity clause cannot be used to provide a higher level of protection in cases where the primacy, unity or effectiveness would be compromised.[36] As we will see, this conception has resulted in the main source of conflicts between the CJEU and constitutional courts, although it has thus far not led to an escalation.

2.2 The concept of constitutional identity as interpreted by constitutional courts

22. In this part, I will start with an overview of the general evolution in the case-law of constitutional courts concerning their usage of the concept of constitutional identity, as well as its place in their judicial dialogue with the CJEU. Subsequently, I will proceed to a more detailed case study of how the concept of constitutional identity has been used in the Czech Holubec case and the German Weiss case and abused in the Romanian and Polish rule of law sagas, and what this tells us about its usefulness or pitfalls.

2.2.1 The preservation of constitutional identity as a general trend shared among constitutional courts

23. The constitutional identity jurisprudence of the different constitutional courts of the Member States can be divided into three important phases. In the first phase, the notion of constitutional identity was not used, but implicitly identifiable in the early case-

[35] See CJEU 26 February 2013, no. C-399/11, ECLI:EU:C:2013:107, Melloni, §60. This does not imply, however, that these the aforementioned cases do not have any implications on human rights. See, for example, in relation to the Runevič-Vardyn case, Egle Dagilyte, Panos Stasinopoulos and Adam Lazowski, 'The Importance of Being Earnest: Spelling of Names, EU Citizenship and Fundamental Rights' (2015) 11(1) Croatian Yearbook of European Law and Policy 1.
[36] See also CJEU 26 February 2013, no. C-617/10, ECLI:EU:C:2013:105, Åkerberg Fransson, §29; CJEU 18 December 2014, advisory opinion no. 2/13, ECLI:EU:C:2014:1454, §192.

law of the German Federal Constitutional Court.[37] This phase began procedurally as a direct reaction to the CJEU's judgment in Internationale Handelsgesellschaft, where it confirmed the supremacy of EU law vis-à-vis the constitutions of the Member States. The Verwaltungsgericht of Frankfurt, which had referred the case to the CJEU, was not entirely convinced of the CJEU's ruling and referred the case to the Federal Constitutional Court. Subsequently, in its well-known Solange I judgment of 1974, the Federal Constitutional Court ruled that as long as ('solange') EU law did not provide an equivalent level of fundamental rights protection as the Basic Law, it would submit it to constitutional review vis-à-vis the latter document.[38] In addition to a substantive improvement of the level of fundamental rights protection by the CJEU[39], the EU would have to make the European Parliament a directly elected institution and establish a fundamental rights catalogue on the EU level.[40]

Later, in its Solange II judgment, the Federal Constitutional Court reacted positively to the improvements made by the CJEU and made clear that as long as the level of fundamental rights protection would remain equivalent to the level of protection provided by the Basic Law, it would refrain from submitting EU law to judicial review any further (although a fundamental rights catalogue remained absent).[41] Unlike our contemporary understanding of constitutional identity, however, the Court was not concerned about any particular aspect of the German Basic Law, but simply wanted the CJEU to respect fundamental rights in general.[42] This is also illustrated by the so-called Bananenbeschluss of the Federal Constitutional Court, where it clarified that full compliance with the Basic Law would not be required; an occasional deviation from its level of fundamental rights protection would not affect the primacy of EU law.[43]

[37] Pál Sonnevend, 'Das Verfassungsgericht als Hüter nationaler Verfassungsidentität?' in Christoph Grabenwarter, Michael Holoubek, Verena Madner and Josef Pauser (eds), *Verfassungsgerichtsbarkeit in der Zukunft – Zukunft der Verfassungsgerichtsbarkeit* (Verlag Österreich 2021) 124-127.
[38] Bundesverfassungsgericht 19 May 1974, no. 2 BvL 52/71, Solange I, §45.
[39] Prior to Solange I, the CJEU had already recognised the common constitutional traditions of the Member States as general principles of EU law in Internationale Handelsgesellschaft. See CJEU 17 December 1970, no. 11/70, ECLI:EU:C:1970:114, Internationale Handelsgesellschaft, §4. Initially, the CJEU did not consider respect for fundamental rights to be relevant for the validity of secondary EU law. See CJEU 4 February 1959, no. 1/58, ECLI:EU:C:1959:4, Stork, §7.
[40] Bundesverfassungsgericht 19 May 1974, no. 2 BvL 52/71, Solange I, §56.
[41] Bundesverfassungsgericht 22 October 1986, no. 2 BvR 197/83, Solange II, §132.
[42] Pál Sonnevend, 'Das Verfassungsgericht als Hüter nationaler Verfassungsidentität?' in Christoph Grabenwarter, Michael Holoubek, Verena Madner and Josef Pauser (eds), *Verfassungsgerichtsbarkeit in der Zukunft – Zukunft der Verfassungsgerichtsbarkeit* (Verlag Österreich 2021) 124.
[43] Bundesverfassungsgericht 7 June 2000, no. 2 BvL 1/97, Bananenmarktordnung, §61.

24. In the second phase, constitutional courts would no longer be satisfied with an equivalent level of fundamental rights protection on the EU level, but would also require additional respects for their respective constitutional identities. This phase began in the period of the (failed) Treaty establishing a Constitution for Europe (Constitutonal Treaty) of 2004 and the Lisbon Treaty of 2007, but has its roots as early as 1973 – even before Solange I – in the Frontini case, where the Italian Constitutional Court ruled that Article 11 of the Italian Constitution (the constitutional basis for Italy's EU membership) imposed limits on the Italian sovereignty. Simultaneously, it sets limits to the competences transferred to the EU institutions as well: they would not be allowed to compromise the 'fundamental principles of Italian constitutional law' or the 'fundamental rights secured by the Italian Constitution'.[44]

In 2004, the Spanish Constitutional Tribunal confirmed the constitutionality of the Constitutional Treaty by reading its primacy clause[45] in conjunction with its identity clause[46], but reserved itself the right to have the last word in case the CJEU would not adequately protect the national identity of Spain.[47] In 2006, the French Constitutional Council would follow as the first constitutional court to refer to constitutional identity as an autonomous concept[48] when reviewing the constitutionality of statutes transposing a directive: *"Considérant, en premier lieu, que la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituent y ait consenti[.]"*[49]

It would be the German Federal Constitutional Court, however, who would turn out to be the most influential constitutional court. In 2009, in its so-called Lisbon judgment, it upheld the constitutionality of the Lisbon Treaty, but invented a new 'identity control': *"[I]t must be possible within the German jurisdiction to assert the responsibility for*

[44] Corte Costituzionale 27 December 1973, no. 183/73, Frontini, §9. See also Corte Costituzionale 8 June 1984, no. 170/84, Granital, §7.
[45] See Article I-6 of the Constitutional Treaty. In the Lisbon Treaty, this clause would no longer be legally enshrined in the Treaties themselves, but would be formulated in declaration no. 17 annexed to the Treaties instead.
[46] See Article I-5.1 of the Constitutional Treaty.
[47] Tribunal Constitucional 13 December 2004, no. 1/2004, §§2-4.
[48] Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 7(1) European Constitutional Law Review 96, 132-133.
[49] Conseil constitutionnel 27 July 2006, no. 2006-540 DC, §19. Before that, several judgments had already implicitly used the concept. See Conseil constitutionnel 29 July 2004, no. 2004-498 DC, §6; Conseil constitutionnel 19 November 2004, no. 2004-505 DC, §10.

integration if obvious transgressions of the boundaries occur when the European Union claims competences […] and to preserve the inviolable core content of the Basic Law's constitutional identity by means of a[n] identity review[.]"[50] As it brought its entire eternity clause under the notion of identity review[51], it implicitly overturned Solange II, where it had still been satisfied with equivalent fundamental rights protection.[52]

25. In the third phase, it would become clear that the concept of constitutional identity would mainly serve as an elaboration on the equivalent fundamental rights protection standard of Solange II: it also included a requirement of identical fundamental rights protection on the EU level as on the constitutional level. This third phase occurred as a reaction to the CJEU's Melloni judgment, in which it had stated that the level of fundamental rights protection provided by domestic constitutions could not compromise the primacy, unity or effectiveness of EU law.[53] The first reaction was a direct reaction in the Melloni case itself by the Spanish Constitutional Tribunal, who had referred the case to the CJEU for a preliminary ruling.

The facts of the case were about Stefano Melloni, a man who was convicted to ten years of imprisonment *in absentia* for bankruptcy fraud, while he had fled to Spain. After the Italian authorities had issued a European Arrest Warrant against him, he would have no grounds to oppose this under EU law, because as he had been represented by two lawyers of his choice, the requirements of a fair trial under the Charter had been fulfilled.[54] However, the Spanish Constitution provided a higher level of protection, as it included a more absolute right to be present at one's criminal trial.[55] This left the Constitutional Tribunal in an awkward position, as it had earlier made clear that it would not tolerate a deviation from the fundamental rights secured by the

[50] Bundesverfassungsgericht 30 June 2009, no. 2 BvE 2/08, Lissabon-Urteil, §240.
[51] *Ibid.* See Article 79.3 of the German Basic Law.
[52] Franz Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' 9(3)(4) (2011) International Journal of Constitutional Law 757, 781-782.
[53] CJEU 26 February 2013, no. C-399/11, ECLI:EU:C:2013:107, Melloni, §60.
[54] Article 4.a.1 of Framework Decision 2002/584/JHA did not allow any further discretion on behalf of the Member States.
[55] See Article 24.2 of the Spanish Constitution. However, this does not result from the text of the constitutional provision itself, but from the way the Constitutional Tribunal has interpreted it. See Tribunal Constitucional 20 March 2000, no. 91/2000, §§12-13.

Spanish Constitution.[56] Ultimately, it hesitantly decided to reinterpret the Constitution in accordance with the Charter.[57]

Other constitutional courts did not refrain from expressing their disapproval of Melloni either. In 2015, in a case that also related to the European Arrest Warrant, the German Federal Constitutional Court explicitly rejected Melloni and thereby explicitly departed from its Solange II case-law in favour of identical fundamental rights protection, at least insofar as the fundamental rights of the German Basic Law were covered by its eternity clause.[58] Further implicit but clear rejections of Melloni were made in the next years by the Belgian Constitutional Court and the French Constitutional Council.[59] Furthermore, according to André Alen, former Dutch speaking president of the Belgian Constitutional Court, many other constitutional courts have expressed their dissatisfaction with the Melloni judgment during multilateral congresses and bilateral meetings.[60]

26. Due to the different legal views of the CJEU on the one hand and the constitutional courts on the other hand, the situation almost escalated in the Taricco case. In this case, Ivo Taricco was prosecuted by the Italian authorities for tax fraud. The charges against him normally had to be dropped, as the prescription period for tax fraud under Italian law had already been exceeded – and this period is deemed to be an integral part of the constitutional principle of legality in Italy.[61] After the competent criminal court had referred the case to the CJEU, the latter court confirmed Melloni and instructed the former court to set the Italian prescription law aside.[62] Later, however, an equivalent case reached the Italian Constitutional Court, which decided to make a

[56] Tribunal Constitucional 13 December 2004, no. 1/2004, §2.
[57] Tribunal Constitucional 13 February 2014, no. 26/2014, §26. For a critical analysis of the Tribunal's reasoning, see Aida Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10(2) European Constitutional Law Review 308, 322-323.
[58] Bundesverfassungsgericht 15 December 2015, no. 2 BvR 2735/14, §49 and §83.
[59] Grondwettelijk Hof 28 April 2016, no. 62/2016, B.8.7; Grondwettelijk Hof 30 September 2021, no. 127/2021, B.12; Conseil constitutionnel 15 October 2021, no. 2021-940 QPC, Société Air France, §13.
[60] André Alen, 'De nationale identiteit – Slotwoord' (2017) 6 Tijdschrift voor Bestuurswetenschappen en Publiekrecht 366, 368, no. 6.
[61] Giovanni Piccirilli, 'The Taricco Saga: The Italian Constitutional Court Continues Its European Journey' (2018) 14(4) European Constitutional Law Review 814, 818.
[62] CJEU 8 September 2015, no. C-105/14, ECLI:EU:C:2015:555, Taricco, §58.

new preliminary reference to the CJEU, where it clearly indicated that it would declare the CJEU's judgment *ultra vires* if the latter court would not deviate from Melloni.[63]

In what would be nicknamed Taricco II, the CJEU clearly felt intimidated by this and accepted the Italian Constitutional Court's request, but without referring to the national identity clause.[64] Because of this, it is unclear whether this has been a single exception for a particular case, or whether the CJEU had overturned Melloni entirely with a reinterpretation of Article 53 of the Charter[65].[66] What is crystal clear, however, is that not only was and is constitutional identity predominantly used to foster fundamental rights protection on the EU level, it has also forced the CJEU to make the necessary adjustments in its case-law. In the light of the rule of law, this can only be encouraged.[67]

2.2.2 The use of constitutional identity in particular cases

2.2.2.1 Czechia: the Holubec case (2012)

27. Before Holubec, the Czech Constitutional Court has always been very open towards EU law. For example, in the Sugar Quota III case, the Court noted that the Czechia could transfer certain competences to the European Union, as long as the essence of the Czech state sovereignty would be safeguarded.[68] While it did not

[63] Corte Costituzionale 23 November 2016, no. 24/2017. See also Giovanni Piccirilli, 'The Taricco Saga: The Italian Constitutional Court Continues Its European Journey' (2018) 14(4) European Constitutional Law Review 814, 819.
[64] CJEU 5 December 2017, no. C-42/17, ECLI:EU:C:2017:936, M.A.S. and M.B., §62.
[65] Article 53 CFEU, whose literal interpretation seems to support a higher level of fundamental rights protection on the constitutional level, provides (underlining added): *"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States constitutions."*
[66] Francesco Viganò, 'Melloni Overruled: Considerations on the Taricco II Judgment of the Court of Justice' (2018) 9(1) New Journal of European Criminal Law 18, 22-23; Cristina Sáenz Pérez, 'Constitutional Identity as a Tool to Improve Defence Rights in European Criminal Law' (2018) 9(4) New Journal of European Criminal Law 446, 462.
[67] For criticism on this line of argument, see nonetheless Aida Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10(2) European Constitutional Law Review 308, 317; Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50(5) Common Market Law Review 1267, 1295-1296. The last author argues that it is not always clear when there is a 'higher' level of fundamental rights protection, as the enhanced protection of one fundamental right often implies the restriction of another fundamental right.
[68] Ústavní Soud 8 March 2006, no. Pl. Ús 50/04, Sugar Quota III, VI.B.

exclude the possibility of judicial review of EU law[69], it is clear that it did not want to seriously consider this possibility in this case.[70] Moreover, unlike what has been the trend in the so-called third phase of constitutional identity, as elaborated upon above, the Czech Constitutional Court has upheld the legislation implementing the required legal framework for the European Arrest Warrant, in the assumption that – similar to Solange II – the level of fundamental rights protection on the EU level is equivalent as the one provided by the Czech Constitution.[71] For these reasons, it seemed unthinkable for a long time that the Czech Constitutional Court would ever oppose the primacy of EU law in a concrete case.

Nevertheless, this is exactly what happened in the Holubec case of 2012. After the division of Czechoslovakia in 1992, the new States of Czechia and Slovakia agreed that the pensions and the authority who would finance these pensions would be determined by the State where the employer was situated at the moment of the division.[72] However, because the Slovak pensions were generally lower, the Czech Constitutional Court ruled that Czech citizens receiving full or partial Slovak pensions would receive a raise to cover for the difference.[73] Nevertheless, the Czech Supreme Administrative Court never accepted this case-law, and as of 2012, its refusal to allocate these raises had to be quashed by the Constitutional Court not less than sixteen times.[74] In the seventeenth case, also known as the Landtová case, the Supreme Administrative Court decided to make a preliminary reference to the CJEU, arguing that the case-law of the Constitutional Court was in violation of EU law because it discriminated against non-Czech EU citizens, who could not benefit from such raises. In its response, the CJEU confirmed this interpretation, but also stressed that the discrimination could be resolved by extending the raise to all EU citizens.[75]

[69] *Ibid.*, VI.A-3. See also Ústavní Soud 26 November 2008, no. Pl. ÚS 19/08, Lisbon I, §5.
[70] Jiří Přibáň, 'The Semantics of Constitutional Sovereignty in Post-Sovereign New Europe: A Case Study of the Czech Constitutional Court's Jurisprudence' (2015) 13(1) International Journal of Constitutional Law 180, 186.
[71] Ústavní Soud 3 May 2006, no. Pl. ÚS 66/04, §71. Please note, however, that this judgment was issued seven years before the Melloni controversy emerged.
[72] Jan Komárek, 'Czech Constitutional Court Playing With Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires: Judgment of 31 January 2012' (2012) 8(2) European Constitutional Law Review 323, 328.
[73] Ústavní Soud 2 June 2003, no. II. ÚS 405/02, Slovak Pensions I.
[74] Jan Komárek, 'Czech Constitutional Court Playing With Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires: Judgment of 31 January 2012' (2012) 8(2) European Constitutional Law Review 323, 325.
[75] CJEU 22 June 2011, no. C-399/09, ECLI:EU:C:2011:415, Landtová, §43 and §53.

28. After the Landtová case was referred back to the Supreme Administrative Court, it considered itself no longer bound by the Constitutional Court's case-law and explicitly defied the latter institution to disobey the judgment of the CJEU in case it still intended to insist on its institutional right to have the last word.[76] And this is exactly what the Constitutional Court did in the Holubec case, a parallel case to the previous one. It stated: *"The failure to distinguish legal relationships arising from the dissolution of a state with a uniform social security system from legal relationships arising from the free movement of persons in the European Communities or the European Union, for social security systems of the Member States, is a failure to respect European history; it is comparing matters that are not comparable […] Following the principle explicitly stated in [Lisbon I], it is not possible to do otherwise than to find […] that an act ultra vires has occurred."*[77] In sum, the Constitutional Court reasoned that this matter concerned a purely internal situation in which EU law could not be applicable, as there was no cross-border element between Czechia and Slovakia before the dissolution of Czechoslovakia.[78]

29. Although the Constitutional Court did not phrase the issue as a matter of constitutional identity, the fact that it talked about 'a failure to respect European history' clearly reveals that this rationale is implicitly present.[79] This also stems from the Court's odd attempt to personally approach the CJEU in the Landtová case to explain its point of view.[80] It cannot be overseen that the Constitutional Court did not seek to maintain its level of fundamental rights protection here. After all, the CJEU had indicated that it could extend the pension raise to all EU citizens. Nevertheless, it should also be noted that escalations in sensitive issues like these are extremely rare, especially when we take into account that this clash occurred in the background of fierce inter-judicial

[76] Jan Komárek, 'Czech Constitutional Court Playing With Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires: Judgment of 31 January 2012' (2012) 8(2) European Constitutional Law Review 323, 328.
[77] Ústavní Soud 31 January 2012, no. Pl. ÚS 5/12, Holubec, §§12-13.
[78] So-called 'purely internal situation' also form general limits to the scope of EU free movement law. See for example Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP 2013) 115-116.
[79] David Kosař and Ladislav Vyhnánek, 'Constitutional Identity in the Czech Republic – A New Twist on an Old-Fashioned Idea?' in Christian Calliess and Gerhard van der Schyff, *Constitutional Identity in A Europe of Multilevel Constitutionalism* (CUP 2019) 86.
[80] Jan Komárek, 'Czech Constitutional Court Playing With Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires: Judgment of 31 January 2012' (2012) 8(2) European Constitutional Law Review 323, 331.

competition.[81] It was probably for this reason that the current issue passed without much further attention: no infringement proceedings were initiated against Czechia by the Commission, and the Supreme Administrative Court would reject the Holubec precedent of the Constitutional Court once more in the parallel Landtová case, but would then finally align with its views.[82]

2.2.2.2 Germany: the Weiss case (2020)

30. In Germany, the Federal Constitutional Court had already indicated a possibility to declare judgments of the CJEU *ultra vires* even before it had recognised the notion of constitutional identity as a limit to the primacy of EU law, namely in its Maastricht judgment of 1993.[83] In its Lisbon judgment, it more explicitly distinguished a so-called '*ultra vires* review' from its 'identity review'[84], but it is clear that these categories overlap, since the principle of democracy[85], that is part of the German constitutional identity[86], is safeguarded by the principle of conferral on the EU level[87], which is ultimately safeguarded by the Federal Constitutional Court through its '*ultra vires* review'. Because the Lisbon judgment was generally considered to be EU unfriendly and criticised for leaving too many possibilities for the Federal Constitutional Court to interfere[88], it created a higher threshold in its Honeywell judgment: a judgment of the CJEU would only be declared *ultra vires* if there would be a 'sufficiently qualified' breach of the principle of conferral, i.e. a 'manifest violation of competences' that would

[81] Michal Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10(1) European Constitutional Law Review 54, 59. The author mentions *inter alia* that at one point, the judges of the Supreme Administrative Court where threatened with disciplinary proceedings by the Constitutional Court, and that the Supreme Administrative Court openly insinuated that the judges of the Constitutional Court did not understand the basics of social security law.

[82] For a full overview of this shift in attitude and the further context, see *ibid.*, 63-71. However, after the Holubec case was referred back to the Supreme Administrative Court, it would make once last preliminary reference to the CJEU, but this case was ultimately settled. See CJEU 27 March 2013, no. C-253/12, ECLI:EU:C:2013:212, JS, §1.

[83] Bundesverfassungsgericht 12 October 1993, nos. 2 BvR 2134/92 and 2 BvR 2159/92, Maastricht-Urteil, §108.

[84] Bundesverfassungsgericht 30 June 2009, no. 2 BvE 2/08, Lissabon-Urteil, §240.

[85] See Article 20.1 of the German Basic Law.

[86] Pursuant to Article 79.3, it is part of the 'inviolable core content' of the Basic Law, which, as the Federal Constitutional Court expressed in its Lisbon judgment, is part of the constitutional identity of Germany. See Bundesverfassungsgericht 30 June 2009, no. 2 BvE 2/08, Lissabon-Urteil, §240.

[87] See Article 5.1 TEU.

[88] Franz Mayer, 'Rashomon in Karlsruhe: A reflection on democracy and identity in the European Union' (2011) 9(3-4) International Journal of Constitutional Law 757, 762; Franz Mayer, 'The ultra vires ruling: deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020' (2020) 16 European Constitutional Law Review 733, 742.

lead to a 'structurally significant shift to the detriment of the Member States in the structure of competences'.[89]

31. The first time the Federal Constitutional Court came close to a clash with the CJEU, was in the Gauweiler case. The case concerned the legality of a decision of the European Central Bank relating to the Outright Monetary Transactions Programme (OMT), that envisaged an unlimited amount of purchases by the European Central Bank of so-called 'sovereign bonds' to deal with the Euro crisis. One of the legal questions of the case related to its compatibility with Articles 119 and 127 TFEU, pursuant to which the European Central Bank is competent to regulate monetary policy, but not economic policy.[90] Before referring the case to the CJEU[91], the Federal Constitutional Court clearly indicated that the ECB had acted outside the scope of these provisions and thus violated the principle of conferral, that transposed the principle of democracy on the EU level.[92] Despite these strong objections, the CJEU upheld the OMT Decision without any possibility for reinterpretation[93], and eventually forced the Federal Constitutional Court to accept it.[94]

The Federal Constitutional Court would not be willing to do the same for a second time in the Weiss case, however, when it was confronted with the same legal issue when the European Central Bank adopted its decision concerning the Public Sector Purchase Programme (PSPP). When constitutional complaints were made before the Federal Constitutional Court, it once again expressed the same objections when referring the case to the CJEU.[95] Nevertheless, the CJEU refused to change its mind

[89] Bundesverfassungsgericht 6 July 2010, no. 2 BvR 2661/06, Honeywell, §61. On the basis of this test, the Federal Constitutional Court upheld the horizontal direct effect of general principles of EU law in a direct reaction to the CJEU's Mangold judgment (see CJEU 22 November 2005, no. C-144/04, ECLI:EU:C:2005:709, Mangold, §78). The Danish Supreme Court, on the other hand, applied much stricter scrutiny and declared this case-law ultra vires (see Højesteret 6 December 2016, no. 15/2014, Ajos, §48). For a case note on this last case, see Helle Krunke and Sune Klinge, 'The Danish Ajos Case: The Missing Case From Maastricht and Lisbon' (2018) 3(1) European Papers 157.

[90] For more details about the economic background of the case, see Carsten Gerner-Beuerle, Esin Küçük and Edmund Schuster, 'Law Meets Economics in the German Constitutional Court: Outright Monetary Transactions on Trial' (2014) 15(2) German Law Journal 281, 281-285.

[91] Bundesverfassunsgericht 14 January 2014, no. 2 BvR 2728/13, Gauweiler I.

[92] Franz Mayer, 'Rebels without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' (2014) 15(2) German Law Journal 111, 114 and 120.

[93] CJEU 16 June 2015, no. C-62/14, ECLI:EU:C:2015:400, Gauweiler, §127.

[94] Bundesverfassungsgericht 21 June 2016, no. 2 BvR 2728/13, Gauweiler II.

[95] Bundesverfassungsgericht 18 July 2017, no. 2 BvR 859/15, Weiss I.

and upheld the PSPP Decision.[96] After the case was referred back to the Federal Constitutional Court, it did not shy away from using strong language to criticise the CJEU when declaring its judgment *ultra vires*: it refined its Honeywell test by stating that if could only interfere if the motivation of the CJEU was 'simply not comprehensible' and thus 'objectively arbitrary'[97] and essentially decided that this extremely high threshold was met because neither the ECB nor the CJEU had motivated the PSPP Decision.[98]

32. This judgment has undoubtedly been the most criticised out of all EU sceptical judgments[99], especially because the Federal Constitutional Court would have used inappropriate language and poorly applied its refined Honeywell test.[100] Whether the Federal Constitutional Court was right or wrong in this particular case, falls outside of the scope of this thesis. It can nonetheless be confirmed that the criticism that the Court had threatened the stability of the EU as a whole by abusing its constitutional identity, is unconvincing. In fact, the German Bundesbank was only temporarily banned from participating in the PSPP, as the Court gave the ECB three months to motivate its decision.[101] And after this happened (privately), the Federal Constitutional Court refused to enforce its earlier judgment.[102]

2.2.3 The abuse of constitutional identity in particular cases

2.2.3.1 The Romanian rule of law saga (2021)

33. In 2018, a large judicial reform was made in Romania whereby the independence of the judiciary was heavily compromised, *inter alia* through the creation of a politicised ministry that would be competent to prosecute judges in the exercise of

[96] CJEU 11 December 2018, no. C-493/17, ECLI:EU:C:2018:1000, Weiss, §158.
[97] Bundesverfassungsgericht 5 May 2020, no. 2 BvR 859/15, Weiss II, §118.
[98] *Ibid.*, §§162-163.
[99] For a (very) long overview, see Franz Mayer, 'The ultra vires ruling: deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020' (2020) 16 European Constitutional Law Review 733, 734-735, footnotes 3-12.
[100] Sven Simon and Hannes Rathke, '"Simply not comprehensible." Why?' (2020) 21 German Law Journal 950, 953; Franz Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's ultra vires Decision of May 5, 2020' 21 German Law Journal 1116, 1122-1124.
[101] Bundesverfassungsgericht 5 May 2020, no. 2 BvR 859/15, Weiss II, §118.
[102] Bundesverfassunsgericht 29 April 2021, no. 2 BvR 1651/15, Weiss III, §95.

their judicial functions.[103] The Romanian Constitutional Court has upheld this reform to a large extent in two judgments[104], but in its so-called AFJR judgment, the CJEU disagreed and invited the referring judges to set aside these judgments of the Constitutional Court.[105] Although the competence of all judges to set aside national law (including judgments) incompatible with EU law had already been established in Simmenthal II[106], this was apparently never accepted in Romania, where the judges of the AFJR case were threatened with disciplinary sanctions for referring the case to the CJEU.[107] In 2021, the Romanian Constitutional Court referred to its own concept of 'national constitutional identity' (that was priorly undefined)[108] to declare the AFJR judgment *ultra vires*, essentially because it had distorted the centralised model of judicial review in Romania.[109]

However, in a follow-up case of 2022, the CJEU spectacularly responded to the judgment of the Constitutional Court when the court of appeal of Craiova asked for a new preliminary ruling in a parallel case, where it was also threatened by disciplinary proceedings. In its RS judgment, the CJEU not only reiterated its earlier findings in AFJR, but for the first time, it also explicitly engaged with the constitutional identity argument and ordered the referring judges to set aside the judgment of the

[103] For the full context, see Madalina Moraru and Raluca Bercea, 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/18, Asociaţia 'Forumul Judecătorilor din România, and their follow-up at the national level' (2022) 18(1) European Constitutional Law Review 85.

[104] Curtea Constituțională 15 February 2018, no. 33/2018; Curtea Constituțională 29 May 2018, no. 104/2018.

[105] CJEU 18 May 2021, nos. C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/18, ECLI:EU:C:2021:393, Asociaţia 'Forumul Judecătorilor din România, §252.

[106] CJEU 9 March 1978, no. 106/77, ECLI:EU:C:1978:49, Simmenthal II, §21.

[107] Madalina Moraru and Raluca Bercea, 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/18, Asociaţia 'Forumul Judecătorilor din România, and their follow-up at the national level' (2022) 18(1) European Constitutional Law Review 85, 93.

[108] Petra Bárd, Nóra Chronowski and Zoltán Fleck, 'Use, Misuse and Abuse of Constitutional Identity in Europe', CEU DI Working Paper 2023/06, <https://ssrn.com/abstract=4367087> accessed 29 November 2023, 19.

[109] Curtea Constituțională 8 June 2021, no. 390/2021, §§76-78. The abuse of the concept of 'national constitutional identity' was particularly obvious in this case, because the Constitutional Court identified the full supremacy of the Romanian Constitution as being part of it, thus eroding its obligations under EU law.

Constitutional Court[110] as well as the legislation on the basis of which disciplinary proceedings could be initiated.[111]

34. As a result, the Constitutional Court was effectively sidestepped by the ordinary judiciary.[112] Whereas this achievement is certainly desirable from a normative perspective in cases where the rule of law is seriously compromised, like the present one, the RS precedent can be counterproductive for judicial dialogue in different contexts, especially when the objections expressed by constitutional courts are – arguably – legitimate. After all, it should be kept in mind that similar to RS, Simmenthal II was established by the CJEU to sidestep the Italian Constitutional Court. Clearly the decentralisation of judicial review of EU law has always been controversial, as it has effectively marginalised constitutional courts.[113] This also explains why, in the last phase of the Taricco saga, after the CJEU had referred its case back to the Italian Constitutional Court, the latter court still felt the need to firmly reconfirm its monopoly of judicial review of EU law vis-à-vis the Italian Constitution[114], despite the favourable outcome it had received from the CJEU – as if it saw the RS judgment coming in the future.

[110] CJEU 22 February 2022, no. 430/21, ECLI:EU:C:2022:99, RS, §§68-70: *"The findings set out in the preceding paragraphs are all the more relevant in a situation […] in which a judgment of the constitutional court of the Member State concerned refuses to give effect to a preliminary ruling […] on the basis […] of the constitutional identity of the Member State concerned and of the contention that the Court [of Justice] has exceeded its jurisdiction. In that regard, it is indeed true that the Court may, under [the national identity clause of] Article 4(2) TEU, be called upon to determine that an obligation of EU law does not undermine the national identity of a Member State […] By contrast, that provision has neither the object nor the effect of authorising a constitutional court of a Member State […] to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court."*

[111] *Ibid.*, §78 and §93.

[112] Dragoș Călin, 'Constitutional courts cannot build brick walls between the CJEU and national judges concerning the rule of law values in Article 2 TEU: RS' (2023) 60 Common Market Law Review 819, 834.

[113] Jan Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9 European Constitutional Law Review 420, 421.

[114] Corte Costituzionale 31 May 2018, no. 115/2018, §8. See also Maria Daniela Poli, 'The Judicial Dialogue in Europe – Adding Clarity to a Persistently Cloudy Concept' (2017) 11(3) Vienna Journal on International Constitutional Law 351, 354; Giovanni Piccirilli, 'The Taricco Saga: The Italian Constitutional Court Continues Its European Journey' (2018) 14(4) European Constitutional Law Review 814, 830-832.

2.2.3.2 The Polish rule of law saga (2021)

35. In Poland, erosion of the rule of law and democracy became particularly prevalent when the Law and Justice party (PiS) won the parliamentary elections in 2015. Similar to what happened in Romania, the new Polish government established a new politicised Disciplinary Chamber that threatened the independence of the judiciary.[115] Moreover, PiS has succeeded in packing the Constitutional Tribunal: although a part of the appointments of new judges was declared unconstitutional by the Tribunal itself[116], the government refused to publish this judgment, thus depriving it of its legally binding force.[117] When the CJEU sought to impose interim measures on Poland in a case where the compatibility of the Disciplinary Chamber with EU law was at stake[118], the packed Constitutional Tribunal ruled in 2021 that the Polish Constitution could not be interpreted as allowing such an intervention.[119] Even more confrontationally, the Constitutional Tribunal declared a judgment of the CJEU[120] *ultra vires* where it had confirmed the incompatibility of the Disciplinary Chamber with EU law.[121]

36. It is striking that, in the last of the aforementioned judgments, the Polish government explicitly referred to the Weiss case of the German Federal Constitutional Court.[122] In this fact resonates the earlier criticism on this Court's attitude and the usage of constitutional identity in general, that would inspire countries like Poland and Hungary to further defy the primacy of EU law.[123] However, this is unconvincing for two

[115] For a full overview, see for example Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 Hague Journal on the Rule of Law 1.
[116] Trybunał Konstytucyjny 3 December 2015, no. K 34/15.
[117] Marcin Szwed, 'The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights' (2022) 18 European Constitutional Law Review 132, 135.
[118] CJEU 19 November 2019, nos. C-5-85/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, A.K..
[119] Trybunał Konstytucyjny 14 July 2021, no. P 7/20.
[120] CJEU 15 July 2021, no. C-791/19, ECLI:EU:C:2021:596, Commission v. Poland, §235.
[121] Trybunał Konstytucyjny 7 October 2021, no. K 3/21. In the application of (former) prime minister Morawiecki on the basis of which this judgment was issued, references were made to Poland's constitutional identity. See Jakub Jaraczewski, 'Gazing into the Abyss – The K 3/21 decision of the Polish Constitutional Tribunal' (Verfassungsblog, 12 October 2021) https://verfassungsblog.de/gazing-into-the-abyss/ accessed 13 June 2024.
[122] *Ibid.*
[123] See in that sense most explicitly Daniel Kelemen, Piet Eeckhout, Federico Fabbrini, Laurent Pech and Renáta Uitz, 'National Courts Cannot Override CJEU Judgments – A Joint Statement in Defense of the EU Legal Order' (Verfassungsblog, 26 May 2020) https://verfassungsblog.de/national-courts-cannot-override-cjeu-

reasons. Firstly, the Weiss case and the Polish rule of law saga occurred in two completely different contexts:[124] in Germany, a fully independent court used its constitutional identity for questionable but not indefensible reasons, whereas in Poland, a packed court was used to enforce the will of the government. The German precedent was, in other words, by no means decisive for the Polish outcome. Secondly, it would be unreasonable to expect from independent courts to refrain from using the concept of constitutional identity to protect the rule of law for the sole reason that other, non-independent courts might misuse these precedents to damage it instead.[125] Instead, escalations such as in Weiss should be avoided through judicial dialogue with respect for the fundamental rights catalogues of national constitutions.

2.3 Conclusion

37. Although the CJEU has recognised the national identity clause of Article 4.2 TEU as a limit to the uniformity of EU law, the cases where it has accepted this clause to approve a deviation from an obligation of EU law can be counted on one hand and have been purely symbolic, as they mainly concern prohibitions on the use of nobility titles and the spelling rules of names on birth certificates in a specific language. Moreover, the CJEU has ruled in the Melloni case that the Member States cannot rely on the fundamental rights catalogues in their national constitutions when this would compromise the primacy, unity or effectiveness of EU law.

38. It is in this context that the national constitutional courts' parallel concept of constitutional identity has emerged, although this happened rather gradually in three different phases. In the first phase (1974-2004), the German Federal Constitutional Court demanded an equivalent level of fundamental rights protection on the EU level. In the second phase (2004-2013), constitutional courts started setting additional limits to the primacy of EU law through their 'constitutional identities', without clearly identifying this concept. In the third phase (2013-present), the constitutional courts

judgments/#:~:text=While%20there%20have%20been%20proposals,can%20overrule%20a%20CJEU%20judgment accessed 13 June 2024.

[124] For a thorough comparison, see Alexander Thiele, 'Whoever equates Karlsruhe to Warsaw is wildly mistaken' (Verfassungsblog, 10 October 2021) https://verfassungsblog.de/whoever-equals-karlsruhe-to-warsaw-is-wildly-mistaken/ accessed 13 June 2024.

[125] Dieter Grimm, 'A Long Time Coming' (2020) 21 German Law Journal 944, 949.

started mobilising their constitutional identity to demand identical fundamental rights protections on the EU level as provided in their constitutional fundamental rights catalogues.

39. While this evolution can be considered legitimate from a rule of law perspective, it has nonetheless become clear that it is not always that simple when constitutional courts clash with the CJEU. More precisely, two cases of (questionable) use and two cases of abuse of constitutional identity have been identified in this chapter. Concerning the use of constitutional identity, the Czech Constitutional Court and the German Federal Constitutional Court have clashed with the CJEU in the Holubec (2012) and Weiss (2020) cases respectively. Although these cases have been controversial, they occurred in very specific circumstances and did not threaten the integrity of the EU legal order or the rule of law as a whole. Concerning the abuse of constitutional identity, on the other hand, the Romanian Constitutional Court and the Polish Constitutional Tribunal have seriously abused their concept of constitutional identity to undermine the rule of law.

However, these last two cases should be distinguished from the previous two cases, as the Romanian and Polish courts were lacking the independence to make credible judgments. In this context, it would be unreasonable to expect from other constitutional courts that they refrain from protecting their constitutional identities in a legitimate – or at least defensible – way, just because constitutional courts that have lost their independence might use the same arguments to undermine the rule of law. Instead, the CJEU should focus more on judicial dialogue than on the primacy of EU law. It can do so by definitively overruling Melloni and by taking the national identity clause more seriously. This way, clashes with constitutional courts will be avoided or at least reduced to a minimum, and non-independent courts such as the Romanian Constitutional Court and the Polish Constitutional Tribunal will be more isolated in their rebellions against the CJEU and the rule of law.

3 Constitutional identity within the system of the European Convention on Human Rights

40. Now that it is clear which role the concept of constitutional identity has played in the legal order of the European Union, this chapter will elaborate on how the concept has migrated to the system of the ECHR and how it has been applied by the ECtHR. To that end, this chapter will be divided in two main parts. In the first part, I will explain how the concept of constitutional identity has already been implicitly used and abused by national constitutional courts. In the second part, I will elaborate on the ECtHR's attitude towards national constitutional law and how the findings of the first part have influenced this attitude and ultimately convinced the Court to recognise the concept of constitutional identity as a legitimate aim within the system of the ECHR. I will then proceed by explaining how this concept has been applied thus far in the case-law of the ECtHR.

3.1 The implicit use and abuse of constitutional identity by constitutional courts

41. In this part, I will first elaborate on how the concept of constitutional identity has already been used in the case-law of the German Federal Constitutional Court and the Lithuanian Constitutional Court. Subsequently, I will elaborate on how it has been abused by the Russian Constitutional Court and by the Polish Constitutional Tribunal.

3.1.1 The implicit use of constitutional identity by constitutional courts

3.1.1.1 Germany: the Görgülü case

42. In Germany, the Federal Constitutional Court has had the opportunity to clarify the status of the ECHR within the German legal order in the Görgülü case of 2004. The case was about Mr. Görgülü, who sought child custody of and access to his son. After he had lost his case on the domestic level, he turned to the European Court of Human Rights, which found a violation of Article 8 ECHR insofar as he did not at least get the

right to maintain personal contact with his son.[126] When the case ended up again before the domestic judiciary to enforce this judgment, it was referred to the Federal Constitutional Court, which ruled that the ECHR has the hierarchical status of a federal law within the German legal order and that the principle of the rule of law[127] compelled the judiciary to 'take into account' the judgments of the ECtHR in which Germany had been convicted.[128]

Moreover, it also expressed a 'reservation of sovereignty' that the neither the ECHR nor the ECtHR could affect: *"The Basic Law […] does not seek submission to non-German acts of sovereignty that is removed from every constitutional limit and control. Even the far-reaching supranational integration of Europe […] is subject to a reservation of sovereignty, albeit one that is greatly reduced. The law of international agreements applies on the domestic level only when it has been incorporated […] in conformity with substantive constitutional law."*[129]

43. Although the Federal Constitutional Court did not mention any concept of constitutional identity in Görgülü, it can be read between the lines that this idea is there, especially since the case is the most well-known for expressing its reservation of sovereignty.[130] In a case of 2011, the Federal Constitutional Court even linked this reservation of sovereignty subtly but unambiguously to the German constitutional identity.[131] To a certain extent, this stems from a selective reading of the Görgülü judgment, as the Federal Constitutional Court clearly expressed its willingness to interpret the Basic Law in the light of the ECHR (principle of

[126] ECtHR 26 February 2004, no. 74969/01, Görgülü v. Germany, §§50-51.
[127] See Article 20.3 of the German Basic Law.
[128] Bundesverfassungsgericht 14 October 2004, no. 2 BvR 1481/04, Görgülü, §30.
[129] *Ibid.*, §36. See also Bundesverfassungsgericht 12 June 2018, no. 2 BvR 1738/12, §133.
[130] Nico Krisch, 'The Open Architecture of European Human Rights Law (2008) 71 Modern Law Review 183, 183.
[131] Bundesverfassungsgericht 4 May 2011, no. 2 BvR 2365/09, §93 (underlining added): *"Limits to an interpretation that is open to international law follow from the Basic Law [...] The possibilities of interpretation in a manner open to the Convention end where it no longer appears justifiable according to the recognised methods of interpretation of statutes and of the constitution (see BVerfGE 111, 307 <329>; see also Bernhardt, in: Festschrift für Helmut Steinberger, 2002, p. 391 <397>; Müller/Christensen, Juristische Methodik, vol. II, 2nd ed. 2007, p. 148, marginal no. 184; on the absolute limit on the core content of the constitutional identity of the Basic Law under Article 79.3 of the Basic Law, see BVerfGE 123, 267 <344> [i.e. the Lisbon judgment]; see also A. Peters, Zeitschrift für öffentliches Recht – ZÖR 65 (2010), p. 3 <59 et seq.>)."*

'Völkerrechtsfreundlichkeit').[132] As a result, the Court has never defied the ECtHR and its reservation of sovereignty has not gained any practical relevance.[133]

44. Nevertheless, while the effects of the so-called reservation of sovereignty have thus remained extremely limited in Görgülü, Hellen Keller and Reto Walther argue that this judgment has 'let the genie out of the bottle' and triggered a spread of sovereigntist legal thought abroad.[134] Although, as I have argued in the previous chapter concerning the EU, the fact that Görgülü has been cited in bad faith by several foreign courts – as we will see – does not as such imply a causal link between this reference and the outcome of the case at hand, it is still normatively undesirable to give those courts a helping hand by expressing such reservations of sovereignty when there is no practical relevance in the case at hand to do so.

3.1.1.2 Lithuania: the Paksas II case (2012)

45. In 2004, the Lithuanian president Rolandas Paksas was impeached by the Lithuanian Parliament for allegations of corruption. Consequently, he was barred from participating in the upcoming presidential elections. Initially, this ban was only valid for five years and only concerned the presidential elections, but the Lithuanian Constitutional Court removed this time limit and extended the scope of the ban to all public offices, including the position of member of Parliament.[135] Subsequently, Paksas filed a petition before the European Court of Human Right, which considered the permanent and irreversible nature of the ban disproportional insofar as it concerned the parliamentary elections.[136] Therefore, the Lithuanian Parliament amended the applicable legislation to comply with this judgment.

Nevertheless, this legislative amendment was challenged by the opposition before the Constitutional Court in 2012. As an argument of justification, the Lithuanian Parliament

[132] Bundesverfassungsgericht 14 October 2004, no. 2 BvR 1481/04, Görgülü, §33.
[133] Heiko Sauer, 'Principled Resistance Against the ECtHR Judgments in Germany' in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019) 55.
[134] Helen Keller and Reto Walther, 'The Bell of Görgülü cannot Be Unrung–Can it?' in Giuliana Ziccardi Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence 2019* (OUP 2020) 84-86.
[135] Konstitucinis Teismas 25 May 2004, no. 24/04, Paksas I. This was implicitly derived from Articles 56, 59(2) and 74 of the Lithuanian Constitution.
[136] ECtHR 6 January 2011, no. 34932/04, Paksas v. Lithuania, §112.

referred to Vermeire v. Belgium[137], on the basis of which the judiciary ought to enforce ECtHR judgments in which its State had been convicted without awaiting the necessary (legislative) reforms.[138] The Constitutional Court disagreed with this line of reasoning and ruled that the Constitution ought to be amended first: *"[I]t needs to be noted that […] a duty arises for the Republic of Lithuania to remove the aforesaid incompatibility of […] the Convention with […] the Constitution […] While taking account of the fact that […] the legal system of Lithuania is grounded upon the principle of superiority of the Constitution, the adoption of the corresponding amendment(s) to the Constitution is the only way to remove this incompatibility."*[139]

46. For this reason, the Paksas II judgment has been criticised as form of substantive backlash against the ECtHR that went even further than Görgülü, especially because it refused to reinterpret the relevant constitutional provisions to comply with the judgment.[140] For this last reason, Paksas II can be placed in the list of national judgments where a notion of constitutional identity is implicitly present and that might inspire courts from other jurisdictions in the future. This criticism is nonetheless at least partially unsubstantiated: rather than questioning the binding force of ECtHR judgments for substantive reasons, the Constitutional Court limited its direct applicability, which it has the right to do under international law.[141] This option of referring the task of the execution of ECtHR judgments back to other State branches is even endorsed by the Venice Commission.[142] In the end, Lithuania has complied with the judgment, as Article 74 of the Lithuanian Constitution has been amended on 21 April 2022 to that end.[143]

[137] Konstitucinis Teismas 5 September 2012, no. 8/2012, Paksas II, § II.2.5, at page 5.
[138] ECtHR 29 November 1991, no. 12849/87, Vermeire v. Belgium, §26. This judgment will be discussed more in detail in the section about the case-law of the European Court of Human Rights.
[139] *Ibid.*, § III.6, at page 23.
[140] Helen Keller and Reto Walther, 'The Bell of Görgülü cannot Be Unrung–Can it?' in Giuliana Ziccardi Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence 2019* (OUP 2020) 90-92.
[141] Aušra Padskočimaitė, 'Constitutional Courts and (Non)execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania' (2017) 77 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 651, 667.
[142] Venice Commission, 'Russian Federation – Final Opinion On The Amendments To The Federal Constitutional Law On The Constitutional Court' (Venice Commission, 13 June 2016) https://venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e accessed 13 June 2024, §§ 25-26.
[143] Committee of Ministers, 'Resolution CM/ResDH(2022)253 of the Committee of Ministers concerning the Execution of the judgment of the European Court of Human Rights Paksas against Lithuania'

3.1.2 The implicit abuse of constitutional identity by constitutional courts

3.1.2.1 The Russian rule of law saga (2015-2017)

47. Although the Russian ratification of the ECHR[144] in 1998 was part of a progressive period where Russia sought to copy Western patterns of human rights and the rule of law, it did not last more than a decade before the compliance with ECtHR judgments was considered by the Russian political elite as a form of excessive 'Westernisation' to the detriment of more traditional Russian values.[145] This includes the Russian Constitutional Court and the ordinary judiciary as well, as they do not provide an effective check on the other State branches; in Russian legal culture, checks and balances are rather seen as an obstacle to an effective State.[146] Several measures were taken by the Russian legislature to limit the influence of the ECHR in Russia, but nevertheless, the Russian judiciary has respected ECtHR judgments relatively well until approximately 2012.[147] In that year, the Grand Chamber of the ECtHR found a violation of Article 14 ECHR because military servicemen did not have the same rights to parental leave as military servicewomen.[148]

This judgment was received with particular dissatisfaction by the Russian authorities[149] and in the next year, the Constitutional Court ruled for the first time that the Russian Constitution as a whole had primacy over the ECHR.[150] In 2015, the Court even went further by confirming that it had the authority to block the execution of ECtHR

(Committee of Ministers, 22 September 2022) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-220578%22]} accessed 13 June 2024.

[144] It should be noted that since 16 September 2022, Russia is no longer a party to the ECHR due to its invasion of Ukraine. Nevertheless, the findings of this subsection are still relevant for this thesis.

[145] Vladislav Starzhenetskiy, 'The Execution of ECtHR Judgments and the 'Right to Object' of the Russian Constitutional Court' in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019) 245-247.

[146] Angelika Nußberger, 'Verfassungsgerichtsbarkeit als Krönung des Rechtsstaats oder als Feigenblatt autoritärer Regime? Zu den rechtskulturellen Voraussetzungen für das effektive Wirken von Verfassungsgerichten am Beispiel des Russischen Verfassungsgerichts' (2010) 65 Juristenzeitung 533, 537.

[147] Aaron Matta and Armen Mazmanyan, 'Russia: In Quest for a European Identity' in Patricia Popelier, Sarah Lambrecht and Koen Lemmens (eds), *Criticism of the European Court of Human Rights* (Intersentia 2017) 498-500.

[148] ECtHR 22 March 2012, no. 30078/06, Konstantin Markin v. Russia, §§151-152.

[149] Vladislav Starzhenetskiy, 'The Execution of ECtHR Judgments and the 'Right to Object' of the Russian Constitutional Court' in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019) 256-257.

[150] Konstitutsionnyy sud 6 December 2013, no. N 27-P/2013.

judgments – with an explicit reference to Görgülü.[151] Subsequently, the Russian Parliament amended the Federal Constitutional Law to codify this jurisprudence by creating a special procedure in which the Constitutional Court could use its veto power.[152]

48. Since the 2015 reforms, the Constitutional Court has declared two ECtHR judgments 'non-executable'. The first time occurred in 2016, when the Constitutional Court struck down a judgment of the ECtHR[153], where it had ruled that convicted prisoners may not automatically lose their voting rights, as this loss of voting rights was explicitly proclaimed by Article 32.3 of the Russian Constitution.[154] The second time occurred in 2017 and was aimed against a ECtHR judgment[155] where it had ordered the Russian State to pay more than a billion dollars to an oil company that had gone bankrupt through illegal tax prosecutions.[156] In neither of the two cases, the Constitutional Court mentioned the concept of constitutional identity, but it is clear that this is this is the underlying rationale.[157] Given the total lack of independence of the Constitutional Court, it is furthermore clear that the abuse of constitutional identity in these cases was politically motivated by conservative 'Russian values'. This is especially true for the 2017 case, where there was no clear constitutional provision opposing the execution of the ECtHR judgment.[158]

3.1.2.2 The Polish rule of law saga (2021-2022)

49. In Poland, the packed Constitutional Tribunal has not only rebelled against the CJEU, as set out in the previous chapter, but also against several judgments of the ECtHR. It did so in two judgments. In the first judgment, the Constitutional Tribunal

[151] Konstitutsionnyy sud 14 July 2015, no. N 21-P/2015.
[152] See Federal Constitutional Law N 7-FKZ of 14 December 2015.
[153] ECtHR 4 July 2013, nos. 11157/04 and 15162/05, Anchugov and Gladkov v. Russia, §113.
[154] Konstitutsionnyy sud 19 April 2016, no. 12-P/2016, Anchugov and Gladkov, §4.4.
[155] ECtHR 31 July 2014, no. 14902/04, Oao Neftyanaya Kompaniya Yukos v. Russia. The tax prosecutions had been found in violation of the ECHR in a separate judgment, see ECtHR 20 September 2011, no. 14902/04, Oao Neftyanaya Kompaniya Yukos v. Russia, §658.
[156] Konstitutsionnyy sud 19 January 2017, no. 1-P/2017, Oao Neftyanaya Kompaniya Yukos, §3.
[157] Jeffrey Kahn, 'The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg' (2019) 30(3) The European Journal of International Law 933, 955. However, the concept was later explicitly referred to in Konstitutsionnyy sud 15 November 2016, no. 24-P/2016, §2.3
[158] The Constitutional Court justified its judgment mainly on the basis of the 'principles of equality and fairness'. For a full overview of its reasoning, see *ibid.*, 953-958.

reacted against a ECtHR[159] judgment where the ECtHR had found the Tribunal's composition in violation of Article 6 ECHR.[160] In the second judgment, the Constitutional Tribunal reacted against several ECtHR judgments[161] in which the ECtHR more generally condemned the judicial reforms that the PiS party had made in the previous years.[162] Strikingly, the Constitutional Tribunal did not quash the ECtHR judgment as such, but instead declared several parts of the ECHR itself unconstitutional. Moreover, the Constitutional Tribunal referred to 'fundamental systemic principles expressed in the Constitution', which is an implicit yet crystal clear reference to the constitutional identity of Poland.[163] Needless to specify, this form abuse of constitutional identity occurred in the exact same politicised context as the Polish cases concerning the European Union.

3.2 Constitutional identity as a new concept in the case-law of the European Court of Human Rights

50. In this part, I will first explain how the ECtHR initially positioned itself towards national constitutions. Second, I will elaborate on how this attitude has led to particularly controversial outcomes in two particular cases on Bosnia and Herzegovina and on Hungary. Thirdly, I will explain how and why, in the light of the findings of the previous part, the ECtHR has radically changed its approach by recognising the concept of constitutional identity as a legitimate aim within the system of the ECHR.

3.2.1 Prior history: the European Court of Human Rights and national constitutions

51. From the beginning, the ECtHR has had to deal with concrete cases where the compatibility of constitutional provisions with the ECHR was at stake, but it generally treated those cases in the same way as other cases, without paying much attention to

[159] ECtHR 7 May 2021, no. 4907/18, Xero Flor w Polsce sp. z o.o v. Poland, §§289-291.
[160] Trybunał Konstytucyjny 24 November 2021, no. K 6/21.
[161] ECtHR 8 November 2021, nos. 49868/19 and 57511/19, Dolińska-Ficek and Ozimek v. Poland; ECtHR 29 June 2021, nos. 26691/18 and 27367/18, Broda and Bojara v. Poland; ECtHR 22 July 2021, no. 43447/19, Reczkowicz v. Poland.
[162] Trybunał Konstytucyjny 10 March 2022, no. K 7/21.
[163] Adam Ploszka, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional' (2023) 15 Hague Journal on the Rule of Law 51, 60.

the fact that it was dealing with national constitutional law. A first example of this can be found in an Irish case of 1992, that was about an injunction of the Irish Supreme Court prohibiting counselling agencies from providing pregnant women with information about abortion facilities abroad. Despite the objection of the Irish government that the Supreme Court had merely sustained the logic of the Irish Constitution[164], the ECtHR proceeded with its proportionality assessment and found a violation of Article 10 ECHR.[165]

52. However, in the 1998 case of United Communist Party of Turkey and Others v. Turkey, it would state its attitude towards national constitutional law more explicitly. This case was about a communist party that was banned by the Turkish Constitutional Court. The Turkish government argued that Article 11 ECHR was inapplicable, as the Turkish Constitution prohibited political parties from attacking the Turkish 'constitutional order'[166], and the High Contracting Parties would never have had the intention to make their constitutional institutions subject to the ECHR.[167]

The ECtHR disagreed and explained that Article 1 ECHR, pursuant to which the High Contracting Parties had the obligation to secure the rights and obligations of the ECHR to everyone within their jurisdiction, did not make a distinction between constitutional law and ordinary legislation.[168] It furthermore stated: *"The political and institutional organisation of the Member States must accordingly respect the rights and principles enshrined in the Convention. It matters little in this context whether the provisions in issue are constitutional […] or merely legislative […] From the moment that such provisions are the means by which the State concerned exercises its jurisdiction, they*

[164] Article 40.3.3° of the Irish Constitution, before it was repealed in 2018, provided: *"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."*

[165] ECtHR 29 October 1992, nos. 14234/88 and 14235/88, Open Door and Dublin Well Woman v. Ireland, §§67-68 and 80.

[166] Article 68, fourth paragraph of the Turkish 1982 Constitution provided: *"The statutes and programs, as well as the activities of political parties shall not be contrary to the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to promote or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime."* Pursuant to Article 69 of the 1982 Constitution, the Constitutional Court was under certain conditions obliged to ban political parties that violated these principles.

[167] ECtHR 30 January 1998, no. 133/19996/752/951, United Communist Party of Turkey and Others v. Turkey, §§19-21.

[168] *Ibid.*, §29.

are subject to review under the Convention."[169] As a result, the ECtHR declared Article 11 ECHR applicable and later found a violation of this provision.[170] In other cases, the Court has not paid any particular attention to domestic constitutional law anymore where their compatibility with the ECHR was at stake.[171]

3.2.2 The European Court of Human Rights and the 'supra-constitutional effect' of the European Convention on Human Rights

53. The cases discussed so far have only concerned specific parts of national constitutions and have thus not been the most controversial cases (albeit not entirely uncontroversial either). The ECtHR's attitude becomes a lot more controversial when, although it formally only assesses concrete and individual cases[172], it factually starts reviewing the very core of certain constitutions or certain constitutional amendments or replacements, without widening the margin of appreciation or paying any particular attention to its role in another way. This has occurred *inter alia* in two specific cases, from Bosnia and Herzegovina and from Hungary, that will be discussed in this subsection.

3.2.2.1 Bosnia and Herzegovina: the Sejdić and Finci case (2009)

54. Following the disintegration of Yugoslavia in the early 1990s, Bosnia and Herzegovina declared its independence on 3 March 1992, resulting from the desire of Bosniacs (Bosnian Muslims) and Croats to establish a sovereign state free from Serbian dominance. However, the independence process was boycotted by the Serb population and forces, which led to a brutal civil war in which the Serb forces and Bosnian Serb leaders engaged in ethnic violence and ethnic cleansing. As a result, the international community intervened and made the parties involved sign the Dayton Agreement, which created a complex constitutional structure for an independent

[169] *Ibid.*, §30. See also more recently ECtHR 4 July 2013, nos. 11157/04 and 15162/05, Anchugov and Gladkov v. Russia, §50.
[170] ECtHR 30 January 1998, no. 133/19996/752/951, United Communist Party of Turkey and Others v. Turkey, §34 and §61.
[171] See, for example, ECtHR 1 July 1997, nos. 18747/91, 19376/92 and 19379/92, Gitonas and Others v. Greece; ECtHR 16 December 2010, no. 25579/05, A, B and C v. Ireland; ECtHR 10 July 2020, no. 310/15, Mugemangango v. Belgium.
[172] See in this sense ECtHR 4 July 2013, nos. 11157/04 and 15162/05, Anchugov and Gladkov v. Russia, §§51-52.

Bosnia and Herzegovina that managed to pacify (or at least stabilise) the ethnic tensions. Annexed to this peace treaty was the Constitution of Bosnia and Herzegovina itself[173], that made a distinction between its so-called 'constituent peoples': the so-called House of Peoples, that served as the upper chamber of the legislature, comprised five Croats, five Bosniacs and five Serbs[174], and the Presidency consisted of one Bosniac, one Croat and one Serb.[175]

Due to this constitutional arrangement, it was not possible for people form other ethnicities to participate in the aforementioned institutions without self-identifying as one of the major ethnicities first. The potentially discriminatory nature of this arrangement was exactly what a Jewish and a Roma applicant argued when the case of Sejdić and Finci v. Bosnia and Herzegovina eventually reached the Grand Chamber of the ECtHR in 2009. Despite the extremely sensitive context of this case, the ECtHR did not pay attention to the fact that it was dealing with the very core of the Constitution of Bosnia and Herzegovina; it only paid minor attention to this when assessing the admissibility of the case by stating that, although the Constitution was part of a peace treaty, the State of Bosnia and Herzegovina was nonetheless responsible for its substance because it had the power to amend it.[176]

55. When the Court proceeded with the examination of the merits, it only summarily addressed the historical background[177] and then found a violation by briefly stating that there are other mechanisms that could be put in place instead and that would not discriminate against other ethnicities.[178] This somewhat negligent attitude of the Court was heavily criticised by judge Bonello in his dissenting opinion[179] and also received

[173] See Annex 4 of the Dayton Agreement.
[174] See Article IV.1. of the Constitution of Bosnia and Herzegovina.
[175] See Article V of the Constitution of Bosnia and Herzegovina.
[176] ECtHR 22 December 2009, nos. 27996/06 and 34836/06, Sejdić and Finci v. Bosnia and Herzegovina, §30.
[177] *Ibid.*, §45.
[178] Ibid., §§48-50 and §56. More precisely, the ECtHR found a violation of Article 14 ECHR taken in conjunction with Article 3 of Protocol 1 ECHR concerning the House of Peoples and a violation of Article 1 of Protocol 12 concerning the Presidency.
[179] Dissenting opinion of judge Bonello in ECtHR 22 December 2009, nos. 27996/06 and 34836/06, Sejdić and Finci v. Bosnia and Herzegovina: *"The Court has not found a hazard of civil war, the avoidance of carnage or the safeguard of territorial cohesion to have sufficient social value to justify some limitation on the rights of the two applicants. I do not identify with this. I cannot endorse a Court that sows ideals and harvests massacre."*

milder criticism in several case notes.[180] Perhaps unsurprisingly, the Sejdić and Finci judgment has not been implemented yet. On the contrary, the ECtHR has had to reaffirm its precedent in several other cases[181], each time without paying particular attention to the specificities of the constitutional system of Bosnia and Herzegovina.[182]

3.2.2.2 Hungary: the Baka case (2016)

56. In Hungary, the government of the populist leader Viktor Orbán and his political party, Fidesz, have played a large role in the erosion of the rule of law and democracy in Hungary, *inter alia* by weakening checks and balances, restricting judicial independence and controlling the media.[183] In 2010, Fidesz gained a two-thirds majority in Parliament, allowing it to massively amend and ultimately replace the 1949 Constitution in 2011. After András Baka, who was President of the Hungarian Supreme Court and the Hungarian National Council of Justice, openly criticised several reforms, he was ultimately removed from both offices by the new constituent power.[184] The case eventually ended up before the Grand Chamber of the ECtHR, that once again did not pay much attention to the constitutional nature of the impugned provision: it only mentioned this indicating that Mr Baka did not file a constitutional complaint against his removal from office because it was not possible to challenge a transitional provision

[180] Marko Milanovic, 'Sejdić & Finci v. Bosnia and Herzegovina. App. Nos. 27996/06 & 34836/06' (2010) 104 American Journal of International Law 636, 638-639; Samo Bardutzky, 'The Strasbourg Court on the Dayton Constitution – Judgment in the case of Sejdić and Finci v. Bosnia and Herzegovina, 22 December 2009' (2010) 6 European Constitutional Law Review 309, 328.

[181] ECtHR 15 July 2014, no. 3681/06, Zornić v. Bosnia and Herzegovina; ECtHR 26 May 2016, no. 56666/12, Šlaku v. Bosnia and Herzegovina; ECtHR 9 June 2018, no. 41939/07, Pilav v. Bosnia and Herzegovina; ECtHR 8 December 2020, no. 55799/18, Pudarić v. Bosnia and Herzegovina; ECtHR 23 August 2023, no. 43651/22, Kovačević v. Bosnia and Herzegovina.

[182] This attitude is most particularly noticeable in ECtHR 15 July 2014, no. 3681/06, Zornić v. Bosnia and Herzegovina, §43: *"In Sejdić and Finci the Court observed that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing" […] The nature of the conflict was such that the approval of the "constituent peoples" was necessary to ensure peace […] However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples […] without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina."*

[183] For a more comprehensive analysis, see for example András Jakab, 'Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary' (2020) 68 The American Journal of Comparative Law 760.

[184] See Section 11.2 of the Transitional Provisions of the Hungarian 2011 Constitution, which came into force on 1 January 2012.

of the 2011 Constitution.[185] The Court then proceeded with its proportionality assessment like in every other case and found a violation of Article 6 ECHR and Article 10 ECHR.[186]

In their joint concurring opinion, judges Pinto de Albuquerque and Dedov also highlighted the Court's negligence: *"[T]he Court seems to take for granted its jurisdiction to assess the compatibility of constitutional provisions with the European Convention on Human Rights […] without explaining the grounds and breadth of its remit. Both the substance and the procedure for adopting the impugned provisions were assessed under the presumption that the Court had a "natural" or "legal" Kompetenz-Kompetenz to verify the Convention compliance of the constitutional reforms in question, including on issues related to the independence of the judiciary and the rule of law."*[187] While there would have been few reasons to widen the margin appreciation in this case, it would nonetheless have been beneficial if the Court had elaborated more on the Convention's 'supra-constitutional effect' and its role that is at least similar to that of a constitutional court.[188] Otherwise, sensitive cases like this would contribute towards the perception that the ECtHR is recklessly meddling in States' internal sovereignty.[189]

3.2.3 From indifference to oversensitivity: the Latvian cases (2022-2023)

57. To the indifferent attitude of the ECtHR towards national constitutional law would seemingly come an end in the Savickis and Others v. Latvia case of 2022, where it recognised the concept of constitutional identity for the first time as a legitimate aim within the meaning of the ECHR.[190] Latvia had been illegally occupied by the Soviet

[185] ECtHR 23 June 2016, no. 20261/12, Baka v. Hungary, §115.
[186] *Ibid.*, §122 and §176.
[187] Joint concurring opinion of judges Pinto de Albuquerque and Dedov in ECtHR 23 June 2016, no. 20261/12, Baka v. Hungary, §1.
[188] *Ibid.*, §1 and §23.
[189] Apparently, this perception has even reached the ECtHR itself. See dissenting opinion of judge Pejchal in ECtHR 23 June 2016, no. 20261/12, Baka v. Hungary: *"In my opinion, an international court established by the member States of an international organisation cannot de facto decide on the question of who may or may not hold the highest judicial office in a sovereign democratic State, governed by the rule of law, which has equal standing to the other member States of that international organisation."*
[190] Federico Fabbrini and András Sajó already have argued that the ECtHR has implicitly used the concept of constitutional identity by widening the margin of appreciation in certain politically sensitive cases. See Federico Fabbrini and András Sajó, 'The dangers of constitutional identity' (2019) 25

Union from 1940 to 1991. After the Latvian independence was restored, people who had emigrated to the country (mostly Russians) did not get Latvian citizenship, but the status of 'permanently resident non-citizen'. As a result, unlike Latvian citizens, people with this status would not get a Latvian pension for periods during which they had worked abroad. When a first case ended up before the Grand Chamber of the ECtHR, the Court ruled that such a distinction on the basis of nationality required 'very weighty reasons' as a justification.[191] As there were no such reasons available in the case at hand, it found a violation of Article 14 ECHR read in conjunction with Article 1 Protocol 1 ECHR.[192]

However, although this judgment was executed with regard to the applicant in the case, neither the Latvian judiciary nor the author Latvian authorities accepted a violation of the ECHR in analogous cases. Consequently, the case of Savickis and Others v. Latvia ended up before the Grand Chamber of the ECtHR once again in 2022. Yet, this time, the government not only invoked the protection of its economic system as a legitimate aim, but also the safeguarding of its constitutional identity, situated in the implementation of the doctrine of State continuity.[193] To be responsible for paying the pensions of permanently resident non-citizens' work abroad would, in other words, amount to the legitimisation of the illegal occupation by the Soviet Union: *"ex iniuria ius non oritur."*[194]

58. Perhaps surprisingly at first sight, the ECtHR accepted this constitutional identity argument as a legitimate aim: *"The first, and most important [legitimate aim] according to the domestic authorities, was the need to protect the constitutional identity of the Republic of Latvia, which is based on the principle of State continuity as set out in the Declaration on the Restoration of Independence and subsequent constitutional provisions and doctrine. The Court observes that the essential point in this regard is*

European Law Journal 457, 461-462. However, in most of the cases that the authors mention, there was no link with national constitutional law and although the issues mentioned were certainly politically sensitive, there is no indication that the domestic judiciary or other domestic authorities would not have accepted a different outcome.

[191] ECtHR 18 February 2009, no. 55707/00, Andrejeva v. Latvia, §87.

[192] *Ibid.*, §92.

[193] ECtHR 9 June 2022, no. 49270/11, Savickis and Others v. Latvia, §176, §196 and §198. The Latvian government borrowed the argument of State continuity from the reasoning of the Latvian Constitutional Court, but it should be noted that this court has never used the concept of constitutional identity itself.

[194] *Ibid.*, §99.

not the doctrine of State continuity per se but rather the constitutional foundation of the Republic of Latvia following the restoration of its independence [...] More specifically, the Court acknowledges that the aim in that context was to avoid retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country. In this specific historical context [...] the Court accepts this aim as legitimate."[195] The Court then proceeded with its proportionality assessment, in which it – formally, at least – still applied the 'very weighty reasons test'[196], but that did not prevent it from not finding a violation this time, thus implicitly overruling its previous Grand Chamber judgment.[197]

59. Several remarks should be made about this judgment. Firstly, it is not surprising that with its recognition of the concept of constitutional identity, the ECtHR radically shifted from a completely indifferent to a seemingly oversensitive attitude vis-à-vis national constitutional law. Compared to the CJEU, the ECtHR is in a much weaker position vis-à-vis domestic constitutional courts: whereas the CJEU has been able to confer direct applicability to EU law and to autonomously determine its conditions for having direct effect, the ECtHR has attempted, but failed to do this. In Vermeire v. Belgium in 1991, it tried to confer direct applicability and direct effect to the ECHR, the latter on the main condition that the State in question had already been condemned by the Court.[198] In 2007, it tried to extend this case-law by imposing an obligation of conventionality control on domestic courts, but based itself on its false perception that the ECHR was directly applicable in all domestic legal orders.[199]

[195] *Ibid*., §198.
[196] *Ibid.*, §205.
[197] *Ibid.*, §§220-221.
[198] ECtHR 29 November 1991, no. 12849/87, Vermeire v. Belgium, §§25-26: *"It cannot be seen what prevented the Brussels Court of Appeal and the Court of Cassation from complying with the findings of the Marckx judgment, as the Court of First Instance had done. There was nothing imprecise or incomplete about the rule which prohibited discrimination […] on the grounds of the "illegitimate" nature of the kinship […] The freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 [now Article 46] cannot allow it to suspend the application of the Convention while waiting for [a legislative] reform to be completed[.]"*
[199] ECtHR 26 April 2007, no. 71525/01, Dumitru Popescu (no. 2) v. Romania, §103: *"Il n'est pas dépourvu d'importance de rappeler à cet égard […] que le Comité des Ministres s'est félicité de ce que la Convention faisait partie intégrante de l'ordre juridique interne de l'ensemble des Etats parties. Cela implique l'obligation pour le juge national d'assurer le plein effet de ses normes en les faisant au besoin passer avant toute disposition contraire qui se trouve dans la législation nationale, sans devoir attendre son abrogation par le législateur[.]"*

As we have seen in the Paksas II judgment of the Lithuanian Constitutional Court in 2012, this remains far from accepted among the High Contracting Parties. Thus, it is not surprising that only one year later, the ECtHR felt forced to narrow down its conventionality control doctrine by only making it applicable to domestic courts 'in conformity with their constitutional order'.[200] After all, unlike the EU, the ECHR was not created for reasons of political or economic integration, but rather to create minimum standards of human rights protection within the Council of Europe.[201] Consequently, domestic courts are less likely to identify as 'European courts' as well, thus making it impossible to apply divide-and-conquer strategies like the CJEU did in Simmenthal II and RS. For this reason, the ECtHR is a lot more dependent on judicial dialogue than the CJEU, which has made the former court's indifferent attitude towards national constitutional law untenable, especially in times where nationalism and populism are on the rise.

60. Secondly, it is unclear why the ECtHR has recognised the concept of constitutional identity in this case. After all, it was the government who had invoked the concept and not the Latvian Constitutional Court (or any other Latvian court).[202] By relying solely on how a national government defines its constitutional identity, there is a high risk that the ECtHR will promote abuse. In other words: *"By giving constitutional identity such a magic twist, the Court turns the respondent State into a judge on its own case: invoking a spell to transubstantiate violations of the ECHR."*[203] Instead, the ECtHR should focus on judicial dialogue and only recognise the constitutional identity argument as a legitimate aim in situations where it is realistic that a constitutional court or other domestic court would otherwise oppose the outcome of the case. Thirdly, it is unclear whether the protection of constitutional identity is an autonomous legitimate

[200] ECtHR 7 February 2013, no. 16574/08, Fabris v. France, §72.
[201] Laurence Burgorgue-Larsen, 'The Added Value of the Inter-American Human Rights System: Comparative Thoughts' in Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antioniazzi, Flávia Piovesan and Ximena Soley (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP 2017) 401.
[202] Clearly, it was the invocation by the government that has been decisive for the ECtHR to apply constitutional identity arguments as a legitimate aim, as the case of Kovačević v. Bosnia and Herzegovina (which is equivalent to the Sejdić and Finci case) was decided after Savickis, but without any mention of a constitutional identity argument. See ECtHR 23 August 2023, no. 43651/22, Kovačević v. Bosnia and Herzegovina.
[203] Sarah Ganty, Dimitry Vladimirovich Kochenov and Ignatius Yordan Nugraha, 'The ECtHR's Bizarre Turn in Three Latvian Cases' (Verfassungsblog, 21 December 2023) https://verfassungsblog.de/constitutional-identity-vs-human-rights/ accessed 16 June 2024.

aim or should instead supplement other, already recognised legitimate aims.[204] To avoid arbitrariness, it would be better for the ECtHR to take the second approach.

Fourthly – and most importantly – the ECtHR has not taken its proportionality assessment seriously in the Savickis case.[205] In the equivalent case of Valiullina and Others v. Latvia, concerning the right of Russian-speaking minorities to get education in their native language, the Court stated: *"The Court considers that the questions pertaining to the need to protect and strengthen the State language go to the heart of the constitutional identity of the State, and it is not the Court's role to question the assessment made by the Constitutional Court in that regard unless it was arbitrary, which the Court does not find in the present case."*[206] While there are certainly cases in which a significant widening of the margin of appreciation could be justified[207], such as in Sejdić and Finci v. Bosnia and Herzegovina, it is untenable that the proportionality test is completely neglected in these Latvian cases.[208] Otherwise, domestic governments and courts would be encouraged to invoke the constitutional identity argument even more often, since it is so easily accepted and deemed decisive by the

[204] It is relevant to note in that regard that the ECtHR has considered the legitimate aims that are mentioned in Articles 8-11 ECHR to be exhaustive, at least concerning the scope of those provisions. See ECtHR 28 November 2017, no. 72508/13, Merabishvili v. Georgia, §294.

[205] Joint dissenting opinion of judges O'Leary, Grozev and Lemmens in ECtHR 9 June 2022, no. 49270/11, Savickis and Others v. Latvia, §8: *"It is difficult for us to understand what exactly the majority purport to say. At best, they blow hot and cold at the same time. At worst, they undermine the strict interpretation of "very weighty reasons" by giving the notion of a wide margin of appreciation a prominent, perhaps even determinative place in it."*

[206] ECtHR 14 September 2023, nos. 56928/19, 7306/20 and 11937/20, Valiullina and Others v. Latvia, §208. See also, more implicitly, ECtHR 16 November 2023, nos. 225/20, 11642/20 and 21815/20, Džibuti and Others v. Latvia, §§140-151. It should be noted that, unlike what the language of the Court seems to suggest, it was not the Constitutional Court, but the government that invoked the argument of constitutional identity.

[207] Whether the outcome should have been different in the Latvian cases, falls beyond the scope of this thesis. For heavy criticism, see Sarah Ganty and Dimitry Vladimirovich Kochenov: 'Hijacking Human Rights to Enable Punishment by Association: Valiullina, Džibuti and Outlawing Minority Schooling in Latvia' (Strasbourg Observers, 23 November 2023) https://strasbourgobservers.com/2023/11/23/hijacking-human-rights-to-enable-punishment-by-association-valiullina-dzibuti-and-outlawing-minority-schooling-in-latvia/ accessed 16 June 2024; Sarah Ganty, Dimitry Vladimirovich Kochenov and Ignatius Yordan Nugraha, 'The ECtHR's Bizarre Turn in Three Latvian Cases' (Verfassungsblog, 21 December 2023) https://verfassungsblog.de/constitutional-identity-vs-human-rights/ accessed 16 June 2024.

[208] Ignatius Yordan Nugraha, 'Protection of Constitutional Identity as a Legitimate Aim for Differential Treatment – ECtHR 9 June 2022, No. 49270/11, Savickis and Others v. Latvia' (2023) 19 European Constitutional Law Review 141, 161.

ECtHR. This way, the concept of constitutional identity would effectively turn into a 'dangerous and slippery slope'.[209]

3.3 Conclusion

61. Unlike the legal order of the EU, there is no equivalent for the national identity clause of Article 4.2 TEU in the system of the ECHR. Instead, constitutional courts have made constitutional reservations to the direct applicability or supremacy of the ECHR in a language where the idea of constitutional identity was often implicitly present. Like in the EU, this has happened in ways that were relatively innocent, but also in ways that clearly undermined the rule of law. Concerning the former category, the German Federal Constitutional Court has expressed a reservation of sovereignty in the Görgülü case (2004) for rather hypothetical cases where the ECtHR would threaten the German constitutional order, whereas in Paksas II (2012), the Lithuanian Constitutional Court has directly defied a judgement of the ECtHR, but only to delegate the task of executing this judgment to the constituted power.

Concerning the second category, the Russian Constitutional Court (2015-2017) and the Polish Constitutional Tribunal (2021-2022) have clashed with the ECtHR in a way that seriously undermines the rule of law. There are many good reasons why even the rather innocent reservations of sovereignty that were made were unnecessary and have inspired other courts, such as in Russia and in Poland, to use similar arguments to undermine the rule of law. However, even if one accepts the causal link between Görgülü-like thought and the case-law of the latter courts, the genie has already been let out of the bottle, and will remain present, whether we like it or not.[210]

62. It is in the light of this reality that we should comprehend the decision of the ECtHR to recognise the concept of constitutional identity as a legitimate aim within the system of the ECHR. Initially, the Court was completely indifferent towards the constitutional nature of impugned provisions. The sensitivity of this approach has

[209] Joint dissenting opinion of judges O'Leary, Grozev and Lemmens in ECtHR 9 June 2022, no. 49270/11, Savickis and Others v. Latvia, §18.
[210] Helen Keller and Reto Walther, 'The Bell of Görgülü cannot Be Unrung–Can it?' in Giuliana Ziccardi Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence 2019* (OUP 2020) 112.

become clear in the cases of Sejdić and Finci v. Bosnia and Herzegovina (2009) and Baka v. Hungary (2016): in the former case, it became clear that there might be good reasons for the Court to be more deferent than usual in cases where the very core of a constitution that is based on a peace treaty is being questioned; in the latter case, on the other hand, it became clear that there might also be very good reasons to invalidate constitutional reforms when they are aimed at compromising the rule of law, but that even in such cases, more careful considerate language would be appropriate to avoid the perception that Strasbourg recklessly meddles in internal matters.

In the light of the constitutional reservations that many constitutional courts have expressed, the ECtHR was forced to radically change its indifferent attitude in Savickis and Others v. Latvia and the other Latvian cases (2022-2023). Unlike what many authors have written, this shift in attitude should in principle be applauded, as it paves the way towards more fruitful judicial dialogue. After all, because the ECHR is a human rights treaty that seeks to set out minimum standards of human rights protection rather than to foster European integration, the ECtHR is not in a position to convince domestic courts to act as European courts by sidestepping their constitutional courts, as the CJEU has done in Simmenthal II and RS.

63. Nevertheless, the way in which the ECtHR has applied the constitutional identity argument in the Latvian cases, is deeply problematic for two main reasons. First, the ECtHR seems to accept constitutional identity as a legitimate aim each time the government in question uses the argument, even without national case-law pointing in that direction, which increases the chances of arbitrary usage too much and significantly hinders judicial dialogue. Second, once the constitutional identity argument has been accepted, the ECtHR completely marginalises its proportionality assessment, as it has made clear that it will accept the domestic judiciary's (read: the government's) assessment as long as it is not arbitrary. Such an approach disregards the very idea of a proportionality assessment and unnecessarily encourages national governments to use the argument as they please. To avoid a further erosion of the ECHR human rights system, the ECtHR will have to seriously reconsider its oversensitive attitude towards the argument of constitutional identity.

Conclusion

64. In the context of the European Union, national constitutional courts have mainly developed their concepts of constitutional identity to demand identical fundamental rights protection on the EU level as a reaction to the case-law of the CJEU, in which it rarely applied the national identity clause of Article 4.2 TEU and even prohibited the Member States from applying their fundamental rights catalogues where this would compromise the primacy, uniformity and effectiveness of EU law. Despite this legitimate use, considerations of constitutional identity have also led to clashes with the CJEU in questionable cases and even in ways that seriously undermine the rule of law. However, concerning the latter type of cases, it should be pointed out that the courts that clashed with the CJEU were no longer independent and that their inspiration by other courts has not been decisive. In this context, the CJEU should stop avoiding any type of constitutional identity argument by relying on the primacy of EU law and start focusing more on judicial dialogue instead. It can do this by allowing domestic courts to apply their own fundamental rights catalogues anytime and by taking the national identity clause on the EU level more seriously.

65. *Prima facie*, the context of the European Convention on Human Rights is radically different, as rather than facilitating political objectives of European integration, the ECtHR seeks to safeguard a minimum level of human rights protection. However, when looking closer at this context, it is revealed that this is exactly the reason why the ECtHR is in a weaker position compared to the CJEU to enforce its judgments in the internal legal orders of the High Contracting Parties. Moreover, despite its more deferential attitude compared to the CJEU, several national constitutional courts have expressed reservations of sovereignty in which the language of constitutional identity is implicitly present. In the light of this context, it was inevitable for the ECtHR to radically shift from an indifferent to a more sensitive attitude towards national constitutional law, shifting the focus towards fruitful judicial dialogue.

However, in Savickis and Others v. Latvia and subsequent Latvian cases, it has turned out that the Court's attitude has become oversensitive instead. It now recognises the concept of constitutional identity as a legitimate aim within the ECHR each time the government in question has raised such arguments, and it has found that the margin

appreciation was not exceeded if the argument was not used ‘arbitrarily’. This oversensitive attitude is seriously problematic in the light of the rule of law. As judges O’Leary, Grozev and Lemmens put it in their joint dissenting opinion in Savickis: *“Europe knows only too well by now how some States may misuse or instrumentalise arguments relating to their constitutional identity for a variety of purposes.”*[211] Therefore, future research should pay attention to how the case-law of the ECtHR will evolve in future cases. It remains to be seen whether the proportionality test will be taken more seriously in the future or will be further eroded.

[211] Joint dissenting opinion of judges O’Leary, Grozev and Lemmens in ECtHR 9 June 2022, no. 49270/11, Savickis and Others v. Latvia, §24.

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