Special Issue
Constitutional Identity in the Age of Global Migration

Crafting Constitutional Identity in the Era of Migration and Financial Crises–The Case of Greece

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Abstract

The debate on the exact meaning and content of their constitutional identity has a long history in many European countries, with national courts playing the leading role. Ten years ago, this debate was given a new boost by the Treaty on European Union (TEU), article 4 paragraph 2 of which urges the European Union to respect the constitutional identities of the Member States. The national courts in a number of Member States saw in this provision the recognition of their zealous efforts to control the ongoing expansion of EU competences and to overcome the absolute primacy of EU law over domestic constitutional law. In Greece, however, no debate on the possible use of constitutional identity as a limit to the European Union and its law had taken place—at least not until recently. Our main objective in this article is to try to explain why Greek courts, and especially the Symvoulion Epikrateias, the supreme administrative court, failed to develop and make recourse to a notion of constitutional identity, even in cases they had good reasons to do so, and to find out if—and, if yes, to what extent—the situation has changed after the outbreak of the financial and, soon after, the migration crises. The analysis of the relevant case-law will permit us to conclude that the Greek constitutional identity is currently still under construction and that it is constructed using elements from both the liberal and the exclusionist models.

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A. Introduction

National—mainly constitutional—courts have developed and used quite different notions of constitutional identity in an attempt to control the ongoing expansion of EU competences and to overcome the absolute primacy of EU law over domestic constitutional law.[1] Article 4 paragraph 2 TEU was merely the official recognition of this practice by the European Union. Indeed, the need to preserve constitutional identity was an issue in the so-called "dialogue between judges" already at the time the Maastricht Treaty was signed.[2] Following the example of other jurisdictions, Greek courts could have developed and rely on a notion of constitutional identity long ago. But they did not; even in cases they had good reasons to do so. Only recently, after the outbreak of the financial and the migration crises, did the Symvoulion Epikrateias, the Greek supreme administrative court, make a few explicit or implicit references to a notion of constitutional identity. Unlike what one might expect, however, the Symvoulion Epikrateias used constitutional identity not so as a shield against the European Union and its law,[3] but mainly as a shield against choices made by the national legislator. This paradoxical approach of constitutional identity is explored in Part B. In Part C, the Article offers some possible explanations for this approach. Finally, in Part D, the Article concludes with some thoughts about the model on which Greek constitutional identity should be constructed.

B. Constitutional Identity and the Greek Courts: A Paradoxical Approach

I. Reluctant Attempts to Break the Silence in the Era of Financial and Migration Crises

To date, Greek courts have not made recourse to the notion of constitutional identity in order to shape the relationship of the national constitution with EU law, despite the fact that in a number of occasions the tension between the two legal orders was high. They have done so, however, in the context of the constitutionality review of the national legislation on the award of the Greek citizenship to second-generation immigrants living in the country and on the lessening of the existing restraints on Sunday shopping, on the ability, that is to say, of retailers to operate stores on Sundays.

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[1] *See* Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011). For an overview see Monica Polzin, *Constitutional Identity as a Constructed and Restless Soul*, and Pietro Faraguna, Constitutional Identity – A Shield or a Sword? The Dilemma of Constitutional Identities in the EU, both published in the present issue of the GERMAN L. J.

[2] *See, e.g.*, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 12, 1993, Case No. 2159/92, paras. 109, 161–62; *see also* ELKE CLOOTS, *NATIONAL IDENTITY IN EU LAW* 1–3 (2015).

[3] *See* Theodore Konstadinides, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, 13 CAMBRIDGE Y.B. EUR. LEGAL STUD. 195 (2010–2011) (providing Konstadinides's expression).

1. The Citizenship to Second-Generation Immigrants Case

Greek nationality law was always dominated by the *jus sanguinis* principle.[4] This is because Greece has been traditionally a country with high emigration rates. In the early 20th century, thousands of Greeks migrated to the United States of America and Australia; fifty years later, many more migrated to western European countries, especially the Federal Republic of Germany. Application of the *jus sanguinis* principle allowed emigrants and their descendants to maintain ties with their country of origin. As a consequence, Greek citizenship is normally acquired by birth to a Greek father in wedlock or to a Greek mother, irrespective of the citizenship of the other parent or of the place of birth. By contrast, the *jus soli* principle is recognized and applied only in order to avoid statelessness. Thus, Greek citizenship is acquired by birth on Greek territory in case the child does not acquire upon birth the citizenship of another state. However, from the beginning of the 1990's, following the collapse of the communist regimes, Greece started receiving large inflows of immigrants from Eastern Europe and the Balkans; the number of irregular migrants and asylum seekers from Asia and Africa also increased significantly.[5] For some of these people Greece is just the gateway to the European Union, but for others it is their new home.

In March 2010, Greek nationality law underwent a major reform in an ambitious effort to meet the challenges of the new reality. One of the most significant novelties introduced—and the one that gave rise to months of heated public debate—was the *ipso jure* acquisition of the Greek citizenship by second-generation immigrants. More specifically, article 14 paragraph 1 of the Greek Citizenship Code was amended to provide that Greek citizenship is granted to immigrants' children born in Greece, under the condition that both their parents have lawfully lived in Greece for a period of at least five consecutive years. Three years later, at the beginning of the global migration crisis, the Symvoulion Epikrateias found against the constitutionality of this provision and in doing so it referred at some point to both the notion of national constitutional identity and the clause of article 4 paragraph 2 TEU.[6] The reference to the national constitutional identity was made in an attempt to establish that the Greek nation, based on a common historical and cultural background, is a normative fact different from the Greek people[7]. This was important in order to justify, first, the proclamation of *jus sanguinis* as a constitutional principle and, second, the assessment that the applicant may acquire Greek citizenship only after a personalized judgment of his/her national conscience—provided, of course, he or she meets all the other necessary

[4] For a detailed analysis, see Zoe Papassiopi-Passia, *Nationality and the Law of Aliens*, *in* INTRODUCTION TO GREEK LAW 409–30 (Konstantinos Kerameus & Phaedon Kozyris eds., 2008).

[5] For data published by the International Organization for Migration, see *Greece*, INT'L ORG. FOR MIGRATION, https://www.iom.int/countries/greece (last visited Sept. 17, 2017).

[6] *See* Symvoulion Epikrateias [Supreme administrative court] 460/2013, para. 6.

[7] *See* DIMITRIOS CHRISTOPOULOS, COUNTRY REPORT: GREECE, EUDO CITIZENSHIP OBSERVATORY 15 (2013).

requirements. But the reference was rather vague; the Symvoulion Epikrateias spoke of the national constitutional identity as a self-evident consequence of the existence of the Greek state, without further analyzing its content or quoting specific constitutional provisions that crystallize it.[8] The reference to article 4 paragraph 2 TEU, on the other hand, had no actual legal value. It could not have been otherwise, since the provision is addressed to the EU institutions, therefore, it can never serve as legal basis for the review of national legislation,[9] and, in any event, the case fell outside the scope of application of EU law. The Symvoulion Epikrateias referred to it merely to confirm that national constitutional identity not only exists, but it is also being respected by a supranational legal order, like the European Union, even in the post-modern era, when national borders are relativized and the role of the Nation State as a political actor is limited.[10]

The idea that that the nation and the people are two different normative facts has a long history in Greek constitutional theory.[11] In the Greek Constitution, the term "nation" is used much more often than in any other European constitution. Furthermore, article 1 paragraph 3 of the Greek Constitution reads as follows: "All powers derive from the People and exist for the People and the Nation . . . " The Greek people consist of those who possess the Greek citizenship. The Greek nation is a much wider and somewhat vague notion. The distinction between the people and the nation is also reflected in Greek nationality law. Indeed, Greek nationality law recognizes two categories of aliens: homogeneis (aliens of Greek descent, co-ethnics) and allogeneis (aliens of non-Greek descent). Aliens of Greek descent are those who usually speak the Greek language and share the same traditions, the same ancestry and, most important of all, the same national consciousness with Greek citizens. Although they are not part of the Greek people, they are part of the Greek nation, and this is why they can be naturalized much easier than aliens of non-Greek descent, following a special procedure. Had the *ipso jure* acquisition of citizenship by second-generation immigrants been upheld, the distinction between aliens of Greek descent and aliens of non-Greek descent would have lost much of its meaning.

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[8] *See* Symvoulion Epikrateias [Supreme administrative court] 460/2013, para 6.

[9] *See* Adelheid Putler, *Art. 4 EUV*, *in* EUV, AEUV KOMMENTAR ¶ 22 (Christian Calliess & Matthias Ruffert eds., 2011).

[10] Around the same time, Symvoylion Epikrateias was faced with a similar problem in another case. The case had to do with the ethnic origin of the students in military schools. There was a minority opinion which stated that Greek citizens who were not Greek by birth but by naturalization could not be accepted in military schools because the domain of national security and defense is a sensitive one and citizens who were not Greek by birth could constitute a possible threat to the territorial integrity and sovereignty of the state. There was, however, no reference to the national identity of Greece. *See* Symvoylion Epikrateias [Supreme administrative court] 3317/2014.

[11] For the debate in the Greek legal literature, see I. Koutnatzis, *Grundlage und Grundzüge staatlichen Verfassungsrechts (Griechenland)*, *in* HANDBOOK IUS PUBLICUM EUROPAEUM *I* 208 (Armin von Bogdany, Pedro Cruz Vilalon & Peter Huber eds., 2007).

It is worth noting that a minority of judges expressed a different opinion, in which, instead of an explicit reference to article 4 paragraph 2 TEU, there is an implicit invocation of the common European values of article 2 TEU. In their view, the *jus sanguinis* principle and the assessment that it is only by naturalization that foreigners may acquire Greek citizenship are not parts of the Greek national constitutional identity and do not need to be protected as such. On the contrary, Greece is a liberal, democratic, and tolerant Nation State and these features—liberty, democracy and tolerance—are common to the Member States and figure as founding values of the European Union.[12] A comparative study of the citizenship regimes in Europe shows that in a number of liberal, democratic, and tolerant Member States procedures for the *ipso jure* acquisition of citizenship by second-generation immigrants—similar to the one introduced in Greece—have been established long ago, without there being any question of violation of these values.

2. The Sunday Shopping Case

The Greek sovereign debt crisis started in late 2009, in the aftermath of the global financial crisis of 2007-2008. It was the result of long-term structural weaknesses of the Greek economy, which became apparent a few years after the introduction of the euro in 2001. In order to avoid sovereign default and to cover its current financial needs, the country was granted bailout loans in 2010, 2012, and 2015 by the Member States of the Euro zone, the European Financial Stability Facility, and the European Stability Mechanism, respectively. These loans were subject to the implementation of austerity measures—for example, public sector pay cuts, pension reductions, increase of the value added tax and new taxes on company profits—structural reforms—primarily aimed at fighting tax evasion and tax avoidance—and privatization of state-owned assets, agreed between the Greek government and the European Commission, the European Central Bank and the International Monetary Fund and contained in detail in a number of documents known as "memoranda of understanding." The implementation of some of the austerity measures lead to social unrest and triggered nationwide, and often violent, protests. Labor unions brought the question of the constitutionality of the public sector pay cuts and the pension reductions to the Symvoulion Epikrateias, but with no success.

In July 2014, the Greek government decided to allow the opening of the stores every Sunday of the year in three popular tourist destinations of the country. This pilot measure was part of the overall policy for tackling the economic crisis; its adoption was justified on public interest objectives, namely the increase of business turnover, the reduction of unemployment, and the offering of better services to tourists.[13] Although it was not contained in a memorandum of understanding and so, strictly speaking, it was of a purely national origin, it had been included in the OECD toolbox for achieving economic growth and

[12] *See* Symvoulion Epikrateias [Supreme administrative court] 460/2013, para. 10.

[13] It is well known that shipping and tourism are the two main pillars of the Greek economy.

it had been endorsed by the country's partners—European Commission, ECB and IMF. Actually, it is doubtful whether the measure would have been adopted by the Greek government, had not the country's partners insisted on the extensive use of the OECD toolbox. This is because, In Greece, the Sunday holiday, although not protected by the constitution, constitutes a social *acquis* since 1909, when the military government of the time introduced it in an attempt to reconcile itself with the working class. In fact, the Sunday holiday was the first social right granted by the Greek state.[14] Therefore, it was not surprising that the Greek society was deeply divided on the issue, not only at the level of public opinion, but also at the level of social and economic actors.

The question of constitutionality of the government's decision, which had taken the form of a ministerial decision, was brought to the Symvoulion Epikrateias. Once again, the applicants were labor unions, joined by small shop owners. On the contrary, the Greek federation of enterprises intervened in support of the government. In early 2017, the plenary session of the Symvoulion Epikrateias, where the case was submitted because of its special importance, ruled against the constitutionality of the measure.[15] In its ruling, the supreme administrative court made no explicit reference to the national constitutional identity. In fact, the ministerial decision was declared unconstitutional just for typical reasons—the subrogation of legislative authorization, to be more precise. Nevertheless, the emphasis on the historical significance of the Sunday holiday and its link with the Christian religion, as well as the invocation of a plethora of constitutional provisions on the protection of fundamental individual and social rights—like the right to develop freely a personality and the right to family life—makes us believe that we are dealing here with another timid attempt by the Greek judge to develop a notion of national constitutional identity.[16] This conclusion is backed by two additional considerations. First, the judgment was unanimous, without any dissenting or concurring opinions. Unanimous judgments are extremely rare in the case-law of the Symvoulion Epikrateias, especially in the era of the economic crisis. Second, the judgment was expected much earlier. Indeed, it is rather strange that an extremely brief judgment of only eight pages was delivered twoandahalf years after the day of the hearing. It is also worth noting that this was one of the few cases where comparative law remarks were made.[17]

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[14] *See* Panos Lazaratos, *Comment on Symvoulion Epikrateias* [Supreme administrative court] 307/2014, 7 THEORIA & PRAXIS DIOIKITIKOU DIKAIOU 859 (2014).

[15] *See* Symvoulion Epikrateias [Supreme administrative court], 100/2017.

[16] *See* Panos Lazaratos, *Comment on Symvoulion Epikrateias* [Supreme administrative court] 100/2017, 10 THEORIA & PRAXIS DIOIKITIKOU DIKAIOU 307 (2017).

[17] The Symvoulion Epikrateias referred to the well-known ruling of the BVerfG on the constitutional protection of the Sunday holiday. *See* Spyridon Vlaxopoulos, Comment on Symvoylion Epikrateias [Supreme administrative court] 100/2017, 10 THEORIA & PRAXIS DIOIKITIKOU DIKAIOU 313 (2017).

In Greek legal theory, this judgment was treated as a limit imposed by the Council of the State on the complete economization of politics, a limit prescribed by the need to protect a fundamental social *acquis* deriving from both the Greek and the European legal order. Indeed, the Sunday holiday is generally seen as a collective asset, guaranteeing the individual's need to be, apart from an economic actor, an active family member and his/her ability to participate in the social and political life of the country.[18] We believe that, despite its weaknesses, this was a landmark ruling, as for the first time since the outbreak of the economic crisis, not to say for the first time ever, there are clear indications that a notion of national constitutional identity could be developed and used to block a measure which was adopted by the Greek government mainly because the country's lenders had pointed to that direction.

One final remark about the Sunday shopping case should be made: In upholding a motion for temporary legal protection filed by the applicants in 2014, the Symvoulion Epikrateias insisted on the importance of the Sunday holiday for the freedom of religion of the Christians.[19] Religion in Greece is dominated by the Greek Orthodox Church, which has been accorded the status of "prevailing religion"[20] and still has very strong ties with the Greek State.[21] Furthermore, the vast majority of the population describe themselves as being Christian Orthodox. Even so, this part of the judgment was alarming, as it implied that the national constitutional identity could contain elements of a specific religion. Fortunately, the plenary session's judgment omitted this argument and merely referenced the link between the Sunday holiday and the Christian religion.

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[18] *See* Symvoulion Epikrateias [Supreme administrative court] 100/2017, para. 10.

[19] *See* Symvoulion Epikrateias [Supreme administrative court] 307/2014.

[20] Article 3 paragraph 1 of the Greek Constitution which reads as follows:

> The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928.

[21] For the special relationship between the Greek State and the Greek Orthodox Church, see CONSTANTINE PAPAGEORGIOU, RELIGION AND LAW IN GREECE (2015).

II. After a Long Silence before EU Law Challenges

The process of ratifying the Maastricht Treaty was fraught with difficulties due, *inter alia*, to constitutional restraints. In fact, in many Member States the Maastricht Treaty was ratified only after the constitution was amended. Questions of constitutionality were also raised in Greece.[22] The most important one was if the right of every Union citizen residing in a Member State of which he or she is not a national to vote and to stand as a candidate at municipal elections in that Member State was compatible with article 102 paragraph 2 of the Greek Constitution, which stipulates that the local government authorities shall be elected by all the citizens who have the right to vote. This question was answered in the affirmative via a broad—and still contested by a part of the theory—interpretation of the Greek Constitution. No request for a preliminary ruling was submitted to the European Court of Justice and no reference to constitutional identity was made. In the early and mid-1990s, Greek courts, aligned with the government and the legislature, were unconditionally embracing European integration and wanted to facilitate the country's participation to the then newly established "Union"[23].

A decade later, two high-profile cases marked a change in attitude towards EU law on the part of the Symvoulion Epikrateias. These cases concerned the ownership status of information media enterprises—the so-called "major shareholder" clause—and the prohibition of the establishment of university level institutions by private persons. This time, the Symvoulion Epikrateias—aligned again with the government and the legislature—was determined to defend the constitutional provisions at risk and, for this purpose, it did not hesitate to walk down the path of constitutional patriotism calling into question the fundamental principles of EU law and dragging itself in a power game against the European Court of Justice which was ultimately involved, and had the final call, in both cases. Surprisingly enough, even under those circumstances, the Symvoulion Epikrateias made no reference to a notion of constitutional identity.[24] It should be made clear from the outset that we do not submit that in these cases recourse to the constitutional identity clause

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[22] *See* JOULIA ILIOPOULOS-STRAGGAS, *SYNTAGMATIKO DIKAIO KAI EUROPAIKI ENOPOIISI* [*CONSTITUTIONAL LAW AND EUROPEAN INTERGRATION*] 62 (1996); PHAEDON VEGLERIS, *H SYMVASI DIKAIOMATON TOU ANTHROPOU KAI TO SYNTAGMA* [*EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE GREEK CONSTITUTION*] 132 (1977).

[23] *See* Julia Iliopoulos-Strangas, *Oi sxeseis tis ellinikis me tin europaiki ennomi taksi* [*The Relationship Between the Greek and the European Legal Order*], 26 TO SYNTAGMA 1093 (2000); Ioannis Bakopoulos, *Oi epiptoseis tis synthikis tou Maastricht se themata ethnikis kyriarhias* [*The Impact of the Maastricht Treaty on National Sovereignty Matters*], 23 TO SYNTAGMA 55 (1997); Evangelos Venizelos, *I europaiki ithageneia kai to Elliniko Syntagma* [*European Citizenship and the Greek Constitution*], 13 ELLINIKI EPITHEORISI EUROPAIKOU DIKAIOU 271 (1993).

[24] *See* Konstantinos Giannakopoulos, *Metaksi syntagmatikon skopon kai syntagmatikon orion: I dialektiki ekseliksi tis syntagmatikis pragmatikoititas sthn ethnikI kai sthn koinotiki ennomI taks*i [*Between Constitutional Objectives and Constitutional Limits: The Dialectic Evolution of Constitutional Reality in National and European Legal Order*], 3 EFIMERIDA DIOIKITIKOU DIKAIOU 733 (2008).

would, or should, have been approved by the European Court of Justice; we only submit that there was room for the argument to be invoked.

1. The Major Shareholder Case

Corruption is widely acknowledged as a significant problem in Greece. For many decades, corruption in the public procurement sector, in particular, was reportedly pervasive. Favoritism among government, even local government, officials towards well-connected companies and individuals was taking the form of tailored-made specifications, unclear selection or evaluation criteria, and abuse of negotiated procedures. This phenomenon took alarming dimensions in the early 1990's, when public work contractors started taking control of information media enterprises—newspapers, radio stations, and television channels. It was a common feeling that they did so in order to more effectively influence politicians in favor of their own interests. The anti-corruption legislation in force at the time proved to be inadequate to address the problem and, after a series of scandals that sparked widespread public outcry, the government sought to find a solution by introducing a new provision to the constitution on the occasion of the 2001 amendment[25]. It was a move with a strong symbolism: The political establishment wanted to demonstrate its commitment to fight against corruption.

Article 14 paragraph 9 of the Greek Constitution provides that the capacity of owner, partner, major shareholder, or managing director of an information media enterprise is incompatible with the capacity of owner, partner, major shareholder, or managing director of an enterprise which undertakes towards the public administration or towards a legal entity of the wider public sector to perform works or to supply goods or services. The aforementioned prohibition extends also over all types of intermediary persons, such as spouses, relatives, and financially dependent persons or companies. This provision, especially in the rigid way it was interpreted by the Symvoulion Epikrateias—as containing an irrefutable presumption that the presence amongst the tenderers of a contractor who is also involved in the media sector is necessarily such as to impair competition to the detriment of the other tenderers—soon became suspect for being in conflict with secondary EU law on public procurement, more specifically, with Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts[26]**.** Article 24 of that directive lists the grounds for excluding participation in a public works contract. In numerous judgments on the matter, where it openly questioned the primacy of EU law, as well as in the preliminary question it finally referred to the European Court of Justice—after having repeatedly refused to do so—the Symvoulion Epikrateias used a number of arguments based

[25] The 2001 constitutional amendment was very extensive, almost doubling its size, and of questionable quality. For more details and a fierce critique, see Prodromos Dagtoglou, *Constitutional and Administrative Law*, *in* INTRODUCTION TO GREEK LAW 24 (Konstantinos Kerameus & Phaedon Kozyris eds., 2008).

[26] OJ L 199/54. For more details, see VASILIS TZEMOS, O VASIKOS METOHOS [THE MAJOR SHAREHOLDER] 17 (2006).

on EU law in defense of the disputed constitutional provision. But it made no reference to the constitutional identity as a possible legal basis allowing for exemption from obligations under EU law. Nor did the Greek government make a similar reference during the proceeding before the European Court of Justice. The silence of the Symvoulion Epikrateias and the Greek government is even more striking if one considers that Advocate General Poiares Maduro, in his opinion on the case, offered a detailed analysis of how the constitutional identity clause should operate in the EU legal order, an analysis which has become a classic[27].

The European Court of Justice was careful in its assessment. It concluded that, whilst pursuing a legitimate objective— the equal treatment of undertakings and transparency in procedures for the award of public contracts—the major shareholder clause went beyond what was necessary to achieve that objective and thus to prevent or punish fraud and corruption, as it established a system of general incompatibility between the sector of public works and that of the information media.[28] In other words, the provision of article 14 paragraph 9 of the Greek Constitution was found to be in breach of the proportionality principle, because it did not afford public work contractors who are active in the information media sector any possibility of showing that, in their case, there is no real risk of jeopardizing transparency and distorting competition.[29] Following the ruling of the European Court of Justice, the Symvoulion Epikrateias abandoned its rigid interpretation of the disputed provision and opted for a much more flexible one which has rendered it inactive in practice.[30]

As some scholars have pointed out, declaring that the major shareholder clause is a part of the Greek constitutional identity would mean admitting that corruption is an inherent characteristic of the Greek political system.[31] However, no matter how embarrassing it may be, this assumption has already been made in the most formal way. The provision of article 14 paragraph 9 of the Greek Constitution demonstrates a particular sensitivity on behalf of

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[27] See Opinion of Advocate General Poiares Maduro at paras. 31–33, Case C-213/07, Michaniki AE v. Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias (Oct, 8, 2008), http://curia.europa.eu/juris/document/document.jsf?text=&docid=68940&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=329930.

[28] *See* Case C-213/07, *Michaniki AE v. Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, 2008 E.C.R. I-9999 (2007).

[29] See Dimitris Nikiforos**,** *To telos tou vasikou metohou . . . meso mias koinis arxchis: I analogikotita os diamesos tis ethnikis kai tis enosiakis ennomis taksis* [*The End of the Major Shareholder . . . Through a Common Principle: Proportionality as an Intermediate Between the National and the European Legal Order*], 37 TO SYNTAGMA 315 (2011).

[30] The last three rulings on the matter were the Symvoulion Epikrateias [Supreme administrative court] 3470/2011, 3471/2011 and 3472/2011. For an analysis of these rulings, see Panos Kapotas, *Greek Symvoulion Epikrateias: Judgment 3470/2011*, 10 EUR. CONST. L. REV. 162 (2014).

[31] Konstantinos Giannakopoulos, *I Epidrasi Tou Dikaiou Tis Evropaikis Enosis Ston Dikastiko Elegho Tis Syntagmatikotitas Ton Nomon* [*The Influence of EU Law on the Constitutionality Review*] 376 (2013).

the Greek political elites and the Greek public opinion for the phenomenon of political corruption from which the country is suffering since the era of the Ottoman Empire.[32] After all, it is not political corruption that could be part of the Greek constitutional identity; it is the fight against it—especially against those aspects of it that may have significant implications on the quality of a modern democracy because they involve the influence exercised by the information media.[33]

2. The Recognition of Foreign Diplomas Case

The second case concerned the systematic refusal by the Greek administrative authorities to recognize the diplomas awarded by foreign universities to students who had attended courses in Greek private for-profit institutions for post-secondary education—colloquially known as colleges—operating on the basis of franchise or validation agreements with those universities. As a result, college graduates could not exercise regulated professions in Greece, nor become members of Greek professional associations. It should be noted that the vast majority of colleges were founded in the early 1990's and are cooperating with universities established in other EU Member States, primarily in the United Kingdom. They are usually attended by students who have failed in the very demanding national university entrance examination and can afford to pay the tuition fees. The Greek authorities were relying on article 16 of the Greek Constitution, which states that, in Greece, education at university level is provided exclusively by fully self-governed public law bodies (paragraph 5) and that the establishment of university level institutions by private persons is prohibited (paragraph 8). College owners and graduates, on the other hand, were invoking the provisions of primary EU law on the right of establishment, as well as those of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas

[32] Nikos Alivizatos, *Syntagma kai diaploki: symvoli stin ermineia tis neas paragraphou 9 tou arthrou 14 Synt.* [*Constitution and Corruption: Contribution to the Interpretation of the New Paragraph 9 of Article 14 of the Greek Constitution]*, DIKAIO MESON ENIMEROSIS KAI EPIKOINONIAS 23 (2004); Xenophon Kontiadis, *I oriothethsI tis sxesis politikis eksousias kai MME: Plouralismos kai diafaneia sto epikoinoniako systima kata to arthro 14 kai 15 tou neou syntagmatos* [*The Limitation of the Relationship Between Political Power and Mass Media: Pluralism and Transparency in the Communication System of Articles 14 and 15 of the New Constitution*], *in TO NEO SYNTAGMA* [*THE NEW CONSTITUTION*] 265 (Dimitris Tsatsos - Evangelos Venizelos - Xenophon Kontiadis (eds., 2001); Antonis Manitakis, *Oi thesmikes parenergeies tis ypothesis vasikos metohos: I eknomeusi tou syntagmatos kai I paragnorisi ton adilon tropopoiiseon tou syntagmatos meso ton europaikon synthikon* [*The Institutional Side Effects of the "Major Shareholder" Case: The Constitution as a Law and the Avoidance of Constitution's Implicit Amendments Through the European Treaties*], http://www.constitutionalism.gr.

[33] It has been rightly pointed out that in reality this is a problem not only in Greece, but world-wide. *See* Evangelos Venizelos, *Oi eggyiseis polyfonias kai diafaneias sta MME kata to arthro 14 par. 9, oi kanones ermineias tou Syntagmatos kai oi sxeseis Syntagmatos koinotikou dikaiou* [*The Guarantees of Polyphony and Transparency in Information Media According to Article 14 par. 9, the Interpretation Rules of the Constitution and the Relationship Between Constitution and European Law*], 53 NOMIKO VIMA 425 (2005).

awarded on completion of professional education and training of at least three years' duration.[34] It was a long-standing dispute.

In many occasions, the Symvoulion Epikrateias came to the conclusion that the refusal did not violate EU law, since the content of teaching and the organization of education system are responsibilities of the Member States, and the disputed diplomas were awarded to students who had attended courses in institutions established in the Greek territory. In other words, the obligation to recognize education received on Greek territory as university, whilst, according to national law, it is not, would infringe the distribution of powers resulting from articles 165 and 166 TFEU, which are former articles 149 and 150 TEC.[35] Once again, however, the Symvoulion Epikrateias made no reference to the notion of constitutional identity. In the end, the European Commission brought the matter before the European Court of Justice[36] which ruled that the refusal constituted an infringement of Directive 89/48/EEC. The European Court of Justice explained that colleges, although established in Greece, are part of the educational system of the Member State with the university of which they have concluded the franchise or validation agreement, because it is that Member State that awards the diplomas solely in the light of the applicable rules in the framework of its own educational system.[37] Thus, the European Court of Justice avoided the tension that would arise from the finding of a direct conflict between the Greek constitution and EU law and, at the same time, gave the green light for the recognition of the disputed diplomas. The Greek government did not raise the issue of constitutional identity at any point in the proceedings.

Nevertheless, the conflict between article 16 of the Greek Constitution and EU law, especially the right of establishment, was evident and we submit that the invocation of constitutional identity should have been a basic line of defense for the Greek side. Article 16 of the Greek Constitution is somehow special, in the sense that it is really unusual for a constitutional provision to provide detailed regulation of the organization of higher education[38]. Indeed, most European constitutions only contain rules on the organization of the state and the protection of fundamental rights and liberties. But, in article 16, the Greek Constitution contains rules on the legal form and the financing of universities, on the

[34] OJ L 19/16.

[35] *See* Julia Iliopoulos-Strangas, *supra* note 23, at 89–90.

[36] *Via* an action under article 258 TFEU (former article 226 TEC) for failure to fulfill obligations.

[37] *See* Case C-274/05, *Commission v. Greece*, 2008 E.C.R I-07969, para 40; *see also* Case C-151/07, *Chatzithanasis v. Ypourgos Ygeias kai Koinonikis Allilengyis*, 2008 E.C.R I-09013, para 30.

[38] For a detailed analysis of article 16 of the Greek Constitution in light of EU law, see NIKOS ALIVIZATOS, *PERA APO TO 16: TA PRIN KAI TA META* [*BEYOND ARTICLE 16: PAST AND FUTURE*] (2007); Eleni Trova, *Neoellinikos logos kai nomimotita: I organosi tis anotatis ekpaideusis stis xores meli tis EOK kai ta idiotika panepisthmia* [*Modern Greek Discourse and Legitimacy: The Organization of Higher Education in the EEC Member States and Private Universities*], 16 TO SYNTAGMA 419 (1990).

merging or splitting of universities, on the professional status of university professors, the reasons they can be dismissed and their retirement age, on student associations, etc. It is in this context that the ban on the establishment of private universities is inscribed. The aim of the ban is to exclude education at university level from the realm of the free market economy and instead treat it as a social good. This is because, in Greece, due to the particular historical and socioeconomic circumstances of the 20th century, higher education was and still is the main route towards upward social mobility and a means of achieving social cohesion.[39] For the same reasons, higher education is made available to all citizens at no cost up through the undergraduate level.

C. Explaining the Paradox: A Weak Sense of Constitutional Identity

The cases analyzed in the previous part lead us to the question why the Greek courts, and especially the Symvoulion Epikrateias,[40] did not develop and use a notion of constitutional identity even when the tension between the Greek constitution and the EU legal order was high and why they only began to do so lately in cases which have little or nothing to do with EU law.

With regard to the major problem imposed by the Maastricht Treaty—the, at least *prima facie*, incompatibility of the Union citizens' rights to vote and to stand as candidates at municipal elections with specific provisions of the Greek constitution—the absence of any reference to a notion of constitutional identity or to any other kind of constitutional level restraint is easily explained. The aforementioned rights had a very low influence on the social and political reality of the country. Indeed, granting limited privileges to a few thousands of Union citizens living in Greece was not considered to be a sufficient reason to start a conflict with the then newly-established Union from which the political and economic life of the country would benefit so much. At the same time, a large number of Greek citizens living in other Member States would be granted the same rights. We should not forget that, at the time, the Union consisted of only twelve Member States, almost all economically stronger than Greece, and that Greece was rather a country of origin of Union citizens moving to another Member State than a host country for those citizens. Therefore, the expected

[39] The peculiarity of higher education in the Greek social context is also evident in a more recent case of Symvoylion Epikrateias concerning the cuts in university professors' salaries. In that case, the court ruled that the quality of services provided by university professors and their role in the education of the new generation deprives the government from the possibility of cutting their salaries over a certain amount due to the financial crisis and the need to reduce public spending. *See* Symvoulion Epikratias [Supreme administrative court] 4741/2014.

[40] We are saying "especially" because, despite the defuse nature of the constitutionality review in Greece, the Symvoulion Epikrateias gradually became the main judicial body reviewing the constitutionality of domestic laws and interpreting the EU law. *See* VASILIOS SKOURIS & EVANGELOS VENIZELOS, *O DIKASTIKOS ELEGHOS THS SYNTAGMATIKOTHTAS TON NOMON* [*THE JUDICIAL REVIEW OF CONSTITUTIONALITY*] 66–68 (1985); Akritas Kaidatzis, *Greece's Third Way in Prof. Tushnet's Distinction Between Strong-Form and Weak-Form Judicial Review, and What We May Learn from It*, JUS POLITICUM (2014), http://juspoliticum.com/uploads/pdf/jp13_kaidatzis.pdf, at 14.

political and economic benefits for Greece were much higher than any constitutional cost.[41] After all, the Maastricht Treaty enjoyed tremendous political support and it was almost unanimously ratified by the Greek parliament. A judicial challenge was therefore practically impossible.[42]

In the high-profile cases of the major shareholder and of the ban on the establishment of university level institutions by private persons, things were completely different. This time, the political cost to be paid and the economic interests at stake, especially in the major shareholder case, were enormous. Applying the provision of article 14 paragraph 9 of the Greek Constitution was a basic political commitment of the right wing Nea Dimokratia party under Konstantinos Karamanlis, who had declared war against corruption and was openly questioning the role some dominant information media were playing.[43] It is therefore easy to understand why the actual cancelling of this provision by the EU and its law on public procurement was an undesirable development. As for the ban on the establishment of private universities contained in article 16 paragraph 8 of the Greek constitution, it crystallizes a particular sensitivity of the Greek public sphere. It is worth noting that, in 2006, when the revisionary legislator attempted to abolish the ban, there were numerous reactions, with mass students' demonstrations and occupations in schools and universities that led the socialist party PA.SO.K. under Giorgos Papandreou to the decision to withdraw its support from (and in practice cancel) the revision effort.[44] Therefore, a constitutional provision capable of activating the social reflexes of so many people and generate a huge public debate would be not easily abandoned by the Symvoulion Epikrateias. In both cases, therefore, the consequences from a political point of view were so severe that national courts had no choice but to defend the constitutional text through a form of constitutional patriotism. Although, as we have seen above, in the end, EU law prevailed. The question, however, remains: Why wasn't constitutional identity—the only tool to allow an exemption

[41]According to the more recent statistics; In Greece reside 151.200 EU and around 800.000 third country nationals. On the contrary, around 1.000.000 Greek citizens are residing in other EU Member States. *See Foreign and Foreign-Born Population by Group of Citizenship and Country of Birth*, EUROSTAT, (last visited Sept. 17, 2017), http://ec.europa.eu/eurostat/statistics-explained/images/d/d8/Foreign_and_foreign-born_population_by_group_of_citizenship_and_country_of_birth_2012.png;

[42] Only the Greek Communist Party (KKE) voted against the ratification of the treaty. All the other parties of the parliament, the center-right Nea Dimokratia (ND), the socialist PA.SO.K., and the left-wing Synaspismos (today called SYRIZA), gave 286 positive votes collectively. *See* Georgios Papadimitriou, *I evropaiki enopiisi kai to ethniko syntagma* [*The European Integration and the National Constitution*], *in* I OLOKLIROSI TIS EYROPAIKHS ENOSIS [THE CONCLUSION OF EUROPEAN UNION] 133 (1995); Julia Iliopoulos-Strangas, *supra* note 23, at 77–81.

[43] The following statement of the former Prime Minister Konstantinos Karamanlis are indicative: "*I will not let five pimps and five other centers of power to handle the political life of the country, because there are easy to deal with as long as we do our job as legislators and the judges do their own job*". Newspaper «I KATHIMERINI» 07.10.2004, http://www.kathimerini.gr/196712/article/epikairothta/politikh/den-8a-kanoyn-koymanto-pente-ntavatzhdes.

[44] NIKOS ALIVIZATOS, *supra* note 38, at 117.

from EU imperatives—invoked? More generally, why was the issue of constitutional identity absent from the Greek legal discourse?

There is no single answer to these questions.[45]

A first answer is that there was simply no need to develop a notion of constitutional identity, as the Greek Constitution is particularly open towards international and EU law. Article 28 of the Greek Constitution, which is the foundation for the participation of the country in the European integration process, allows, under certain formal and substantive conditions: a) to vest powers belonging to the State to institutions of international organizations and b) to limit the exercise of national sovereignty. These conditions include respect for fundamental rights and for the foundations of democratic governance. However, we think that the existence of this provision cannot be the main—and certainly not the only—reason for the silence of the Greek courts on the matter. Indeed, many other Member States have similar or even more detailed constitutional provisions regulating the relations of the State with the European Union, without this having prevented their judiciary from developing and relying on a notion of constitutional identity. For the same reason and contrary to what part of the Greek legal scholarship has suggested, article 28 of the Greek constitution cannot serve as the legal basis for solving every possible conflict between EU law and the constitution, through a supposed *a priori* acceptance of all the fundamental characteristics of EU law, including primacy, as being automatically constitutional.[46]

A second answer brings into light the special characteristics of the review of constitutionality in the Greek legal order, which is incidental, diffuse and *ad hoc*. What is important for the present analysis is the second of these characteristics. The review of constitutionality is diffuse because, contrary to what is usually the case in the European constitutional area, it is not concentrated around a constitutional court.[47] It is easy to see how this diffusion makes it harder for national courts, even the apex ones, to shape a national constitutional identity in a consistent and systematic manner and how, at the same time, it can act, at least in theory, as a "restraint" in the integration process and as a limit to the primacy of EU law. The dissipation of powers in the field of constitutionality review also reduces the intensity of the

[45] KONSTANTINOS GIANNAKOPOULOS, *supra* note 31, at 374–78.

[46] More specifically, part of the Greek legal scholarship has suggested that the conflicts between national constitutional and EU law could be resolved on the grounds of article 28 of the Greek Constitution, which has the function of a special amendment clause, rendering the constitution capable of accepting the integration process as a whole without being formally amended. *See* Julia Iliopoulos-Strangas, *supra* note 28, at 92–93; Lina Papadopoulou, *I dimiourgiki autokatastrophi tou Syntagmatos I pos to Syntagma ypodehetai to koinotiko fainomeno* [*The Creative Self-distraction of the Constitution or How the Constitution Welcomes the Integration Process*], *in* ENEES, EIKOSI CHRONIA APO TIN ENTAKSI TIS ELLADAS STIN EYROPAIKI ENOSI: APOLOGISMOS KAI PROOPTIKES [TWENTY YEARS SINCE THE ACCESION OF GREECE TO THE EUROPEAN UNION: AFTERMATH AND PROSPECTS] 23 (2002).

[47] VASILIOS SKOURIS & EVANGELOS VENIZELOS, *supra* note 40; Akritas Kaidatzis, *supra* note 40.

control. Besides, it has been rightly pointed out that, in more and more cases before national courts, the constitutionality review takes a back seat, as it is often been substituted by the EU law conformity review.[48] The decline of the constitutionality review inevitably affects the constitutional identity review which already stands as the very last bulwark of national courts.

A third answer–and perhaps the most persuasive one–is that some of the objectives of the national constitution have been gradually, and up to a certain degree, substituted by the objectives of the European integration process. Admittedly, the intensity with which the European Union pursues its objectives, especially the completion and smooth functioning of the internal market and the securing of free competition and monetary stability,[49] defines the content and function of certain national constitutional provisions to such an extent that their original objectives are easily put aside. Of course, this is more or less the case in all Member States, but in Greece the political and economic expectations—and the actual benefits—from the participation in the European Union were particularly high. Since the fall of the dictatorship and the restoration of democracy in 1974, being member of the European Communities and later of the European Union was considered to be a guarantee not only for economic prosperity, but also for political stability. As a consequence, no one–and certainly not the courts–was interested in developing a notion of constitutional identity as an *ultimum refugium* against the slow erosion of certain constitutional provisions. The primacy of EU law could be contested, but up to a certain degree.[50]

Finally, a fourth answer focuses on the Greek constitutional identity from a sociological point of view. According to this approach, Greek constitutional identity must be understood as part of the wider Modern Greek national identity. Modern Greek national identity emerged in the beginning of the 19th century, along with the efforts to build an independent Greek state, and took its final form more than a century later. Its formation was not easy at all, as it required bringing together—sometimes with the use of harsh measures—peoples with different ethnic and cultural backgrounds in a country with ineffective institutions, where tutelage by "foreign powers" was for a long period of time the norm rather than the exception.[51] In this context, national identity is a taboo concept and the constitution is seen

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[48] Konstantinos Giannakopoulos, *I protaai idrysis syntagmatikou dikastiriou ypo to prisma tis ekseliksis ton sxeseon metaksy ethnikou kai enosiakou dikaiou* [*The Suggested Establishment of a Constitutional Court Under the Light of the Evolution of Relations Between National and European Law*], CONSTITUTIONALISM (last visited Sept. 17, 2017), www.constitutionalism.gr

[49] According to article 3 paragraph 3 TEU, *"[t]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance".*

[50] Julia Iliopoulos-Strangas, supra note 23, p. 71.

[51] For more details, see Paschalis Kitromilidis, "*Noeres koinotites" kai oi aparhes toy ethnikou zitimatos sta Valkania ["Imaginary communities" and the beginning of the national issue in Balkans*], *in* ETHNIKI TAUTOTITA KAI ETHNIKISMOS

merely as the result of the will to make Greece look like a "normal" European country, a "normal" member of the western block. As a consequence, Greek national identity is in reality rather weak, something it would not be safe to touch upon, and this is why Greek courts were unwilling to rely on it in cases involving the European Union.

Turning now to the question why the Symvoulion Epikrateias did invoke a notion of national constitutional identity in two recent judgments, we must observe that this happened when the Greek supreme administrative court wanted to rule against a decision taken by the Greek government, not by the European Union, although in the *Sunday shopping* case a clear message was also sent to the EU institutions. Both the Greek government's decisions—the award of Greek citizenship to second-generation immigrants living in the country and the lessening of the existing restrictions on Sunday shopping—concerned sensitive areas of policy-making closely linked with the migration and the financial crises and had triggered heated public debates. Under those circumstances, it seems like the Symvoulion Epikrateias wanted to present an additional argument in support of its opinion, especially since in none of these cases was it able to point to a specific provision of the Greek constitution that had actually been violated. As we have seen, the argument was not elaborated upon, but this was not a real problem. There was no European Court of Justice to rule that the clause on the protection of national constitutional identity should not have been invoked in the context of these cases. In other words, in the power game with the European Court of Justice, the Symvoulion Epikrateias refrained from using an argument that it was not familiar with, it was not feeling at ease with; in the power game with the Greek government, the Symvoullion Epikrateias did not, because it knew there would be nobody to judge the way the argument was used.

D. Conclusion: A Constitutional Identity Based on What Model?

At the present stage, we cannot speak of a Greek constitutional identity. Indeed, in the case-law of the Greek supreme administrative court there are only two references to constitutional identity –and the one of them is not even explicit. Greek constitutional identity is still under construction and its construction is still far from being completed. The question is on the basis of which model it is being constructed. One could argue that it is too early to try to answer this question, since there is not enough evidence to reach a safe conclusion. However, we think that the existing case-law of the supreme administrative court is telling on how this court understands the notion—at least for the time being. So far, the only explicit reference to national constitutional identity, and to the clause of article 4 paragraph 2 TEU, is to be found in the case concerning the acquisition of the Greek citizenship by second-generation immigrants living in the country. The court declared the law unconstitutional and, as a result, the law was never applied. In this judgment, the

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STI NEOTERI ELLADA [NATIONAL IDENTITY AND NATIONALISM IN MODERN GREECE] 53 (THANOS VEREMIS ed., 1999); MARK MAZOWER, DARK CONTINENT: EUROPE'S TWENTIETH CENTURY 56 (1998).

reference to national constitutional identity was not made in an attempt to defend a constitutional value—like human dignity, fundamental rights, the rule of law, etc.—or a fundamental structure of the Greek state, but to enrich the constitutional discourse with non-legal concepts, such as the maintenance of the nation as an imaginary and coherent community, in order to give constitutional status to the *jus sanguinis* principle and to prevent the *ipso jure* acquisition of the Greek citizenship by foreigners meeting certain conditions. This is a rather exclusionist reading of the notion of constitutional identity. In the Sunday shopping case, constitutional identity was connected to fundamental social rights. This was basically a liberal reading of the notion, especially since the unfortunate reference to the importance of the Sunday holiday for the Orthodox religion was repealed from the final ruling. We have the feeling that the circumstances under which the construction of the Greek constitutional identity is taking place— the financial and the migration crises—play a key role when it comes to decide what the exact content of the notion should be. The migration crisis has provoked widespread fear that the Greek nation is under threat and it must be protected from its external enemies. In this context, the constitutional identity clause was interpreted as if it was a true national identity clause. The financial crisis provoked fear that the social acquis of a whole century will be sacrificed in the name of economic recovery and free market economy. And in this context, constitutional identity was called into play in an attempt to defend a minimum of social achievements. The Greek constitutional identity is therefore constructed using elements from both existing models—liberal and exclusionist.

It is apparent that the theoretical discussion which is in favor of the construction of a constitutional identity by national courts as a means to control EU competences and to overcome the absolute primacy of EU law should not overlook the specific characteristics of the national legal orders in question, nor take their commitment in the values of liberalism, constitutionalism, and the rule of law for granted. Constitutional identity is part of the wider social and political environment and thus the notion of it that will finally prevail will also be the one to define the dynamics of the clause at national and at EU level. In order to contribute in a positive sense to the redefinition of the objectives and limits of the European constitutional space, the still far from being completed Greek constitutional identity, instead of being at least partly dominated by the almost metaphysic anxiety to safeguard and protect the Greek nation, should put forward the fundamental constitutional principles of the Greek state. For this to happen, it is necessary that the Greek courts clearly distinguish the constitutional values from their own nationalistic views.

As a general conclusion the Article submits that, at the present juncture, in which the EU is facing unprecedented challenges due to the economic and the migration crises, the recourse to the constitutional identities of the Member States could help in the shaping of the future EU policies in these fields. But for this to happen, two conditions should be met. First, the identity clause of article 4 paragraph 2 TEU must be exclusively read as a constitutional identity clause, not as a national identity clause. If a number of EU Member States continues to understand the clause as national identity with all the significations that the concept of

the nation can have—especially at a time of conservatism and rise of the radical right wing parties—then it will become a buffer against freedoms and rights protected by EU law, particularly the rights deriving from the European citizenship, as well as the rights related to cultural diversity and those of third country nationals. Second, article 4 paragraph 2 TEU must be invoked in wholly exceptional cases, only when the European Union seems to forget the so-called European values *acquis* of the liberal constitutionalism. If relying on the clause of article 4 paragraph 2 TEU becomes an everyday routine for national apex courts, the negative consequences for the uniform application of EU law will be dramatic.