Since 2009, when the Lisbon Treaty came into force, Article 4.2 of the Treaty on European Union (TEU) has been the subject of vigorous scholarly debate. This intellectual furore has not been matched by the volume of case law from the Court of Justice of the EU (CJEU). Indeed, it is the national constitutional courts that have made more use of the concept of national identity (understood as constitutional identity) than the CJEU.¹

This phenomenon has resulted in two parallel sets of case law, because, as the German Constitutional Court stated, ‘the identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art 4 TEU sec. 2 sentence 1 by the Court of Justice of the European Union’.²

Could this have been expected when Article 4.2 TUE was drafted? It provides:

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

Admittedly, Article 4.2 TEU is a very ambiguous provision, as scholars had pointed out from the outset. On the one hand, it is a provision belonging to the supranational Treaties and thus should be interpreted by the CJEU. On the other hand, however, it refers to concepts that are the bread and butter of national constitutional courts. Moreover, it does not expressly say anything about who should interpret the concept. The Italian Constitutional Court has derived a dualist approach, wherein the Constitutional Court has the authority to say what is national identity under domestic constitutional law and it is left to the CJEU to adjudicate on the consequences from the perspective of EU law.³

Over the years, it has been evident how Article 4.2 TEU has been perceived as troublesome. The Court of Justice has avoided using it where possible, preferring to resolve sensitive questions raised on other grounds.⁴ More recently the CJEU

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² 2 BvR 2728/13, para 29.
³ See e.g. Corte costituzionale, order, 24/2017.
⁴ Case C-493/17 Weiss and Others, ECLI:EU:C:2018:1000; Case C-42/17 M.A.S. e M.B, ECLI:EU:C:2017:936, para 53.

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has delivered some decisions, however, in which it has used Article 4.2 TEU, with not always positive results. Against this background, the constitutional courts of the European Union’s illiberal countries have abused the concept of national identity, attempting to reread Article 4.2 TEU in light of the identity politics approach common to populism. To what extent is this illiberal use of Article 4.2 TEU sustainable from a legal point of view? And what are the consequences of this interpretative abuse? Should we renounce Article 4.2 TEU and the concept of national identity? These questions are answered by Julian Scholtes’ terrific book, which has the merit of tackling all issues head-on, offering a clear reading of the phenomenon and an even clearer answer to these questions. This book is structured into seven chapters. The first is an introduction and the seventh is conclusory, while the heart of the author’s reasoning is contained in chapters two to six.

In the first chapter, the author immediately clarifies the research perspective, its relevance, and structure. These pages are truly valuable because they assist the readers by guiding them from the very beginning of this research itinerary. These pages also recall the theoretical assumptions underpinning the work and refer to valuable studies on the subject of identity in comparative law. The book is ambitious, as it aims ‘to conceptually develop the idea of constitutional identity abuse: how can we delimit legitimate invocations of constitutional identity from abuses of the latter? This book argues that the illiberal appropriations of constitutional identity should be taken seriously as what they are: the abuse of a constitutional concept as a means of window-dressing the repudiation of constitutionalism and justifying bad-faith constitutional engagement’ (p. 13).

Chapter 2 provides a historical overview of the concept of constitutional identity in European law. Although there is a general tendency to think that the reference to national identity was introduced by the Lisbon Treaty, in reality national identity has appeared in court judgments since much earlier. The author sees in the Solange and counter-limits doctrines the first emanations of the constitutional identity argument. An important turning point was the Maastricht Treaty and some decisions of constitutional courts before the Lisbon Treaty. The author rightly mentions the Michaniki case, but another important case that could be mentioned is Rottman, concerning possible statelessness due to loss of Union citizenship status. Also on that occasion, as had been the case in Michaniki, Advocate General Poiares Maduro had referred to ‘the duty, imposed on the Union by Article 6(3) EU, to respect the national identities of the Member States, of which the composition of the national body politic is clearly an essential element’.10

7. BVerfGE 37, 271.
8. Corte costituzionale, 183/73.

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The author then analyses national case law on constitutional identity after the entry of the Lisbon Treaty, which led to the explosion of the case law on constitutional identity and made this concept ‘one of the principal frames for the contestation of authority between different constitutional sites’ (p. 50). From this overview, it emerges that:

Behind the assertion of constitutional identity vis-à-vis EU law stands a metaconstitutional argument about the allocation of authority – it tries to enhance national constitutional authority through an argument pertaining to constitutionalism itself. This metaconstitutional argument, I have argued, rests on two pillars: one pillar seeks to protect a constitutional community’s commitment to the normative core of the constitution and/or its ability to retain control over that core, while another invokes the value of constitutional culture and community itself. (p. 50).

In Chapter 3, Scholtes addresses the ‘critiques of constitutional identity’ (p. 51). In the aftermath of the Lisbon Treaty concepts such as constitutional identity or judicial dialogue were concepts in vogue. Today, however, there is no shortage of calls to abandon the argument of constitutional identity. The crisis of constitutional identity seems to be linked to that of constitutional pluralism, the most important constitutional theory of European integration up until 10 years ago. Indeed, constitutional pluralism has been accused of horrible things, including offering arguments to autocrats.11

These are ungenerous criticisms, partly because the Polish government itself has instrumentally invoked MacCormick’s theory to justify illiberal reforms concerning the judiciary. Scholtes manages to dismantle these critiques convincingly in Chapter 3, which is the richest in the volume. These pages of the book are very useful.12 Scholtes defends constitutional identity against the criticisms of its detractors, in particular dealing with those based on the indeterminate and vulnerable nature of constitutional identity, which would make it particularly exposed to the risk of ‘populist and nativist appropriations’ (p. 66). Other scholarly views are also addressed later on; for instance, the one consisting of the proposal to respond to claims based on constitutional identity with ‘uncontested EU law primacy’ (p. 71). According to the author, however, this would end up altering that relationship between unity and diversity established by the Treaties (p. 71).

Finally, Scholtes also deals with other objections, including the one aimed at replacing the frame of constitutional identity with that of common constitutional traditions. In his view, this is not always possible since constitutional identity ‘captures something fundamental that escapes a simple reference to its alternatives: it encapsulates the value of constitutional agency within a bounded political community. Reducing constitutional contestation to questions of how to best realize shared values obscures and suppresses precisely those questions of constitutional contingency, agency, and culture that constitutional identity highlights’ (pp. 74–75). Scholtes includes the present author of this book review within the group of scholars advocating a conceptual move away from constitutional identity. But I actually think I agree with him. Indeed, elsewhere I have tried to explain why abandoning the concept of national identity

would not be a wise choice and tried to give some guidelines to tame the subversive potential of Article 4.2 TEU.\(^\text{13}\)

Scholtes then enters the meatiest part of his analysis, dealing with the ‘three dimensions of constitutional identity abuse’ (p. 78). These are the generative, substantive and relational dimensions:

The generative dimension asks how a constitutional identity claim has come about; the substantive dimension asks what a constitutional identity claim entails; and the relational dimension asks how a constitutional identity claim is being advanced (p. 78).

It should be emphasized that these three dimensions are not mutually exclusive, but strongly connected. Chapter 4 deals with the generative abuse of constitutional identity and leads the author to an interesting constitutional theory digression, in which he deals with the connection between constitutional identity and constituent power in the work of Carl Schmitt, emphasizing the risks of a static reading of the concept of identity. At this point, Scholtes dwells on the Hungarian experience which is particularly useful because it allows him to demonstrate that the abuse of constitutional identity does not begin and end with the courts, but also involves political actors:

There is much about political processes of constitution making and constitutional change that similarly needs to be considered in the politics of constitutional identity on the European level. As a form of external constitutional politics, it is deeply tied to, and often mobilized by, internal constitutional politics – accordingly, their legitimacy is also interdependent (p. 119).

Furthermore, generative abuse comes in various forms: from the manipulation of the historical argument\(^\text{14}\) to the constitutional amendments used to codify the constitutional image of the enemy,\(^\text{15}\) up to the court-packing dynamics that allowed the political power to capture the courts.

Chapter 5 explores the substantive abuse of constitutional identity. Scholtes here delves into the relationship between constitutional identity and constitutionalism:

The argument driving this chapter is simple: invoking ‘constitutional identity’ as a normative argument means invoking a normative concept of the constitution as subject to constitutionalism. Underlying a normative concept of constitutional identity is necessarily a prior idea of the constitution. Without a prior normative concept of the constitution, constitutional identity is boundless and bars any possibility of intersubjective appraisal. Severing constitutional identity from the normative expectations connected to it means invoking constitutional identity ironically and insincerely, and thus constitutes an abuse of the concept. (p. 121).

In this Chapter the author draws out the variety of constitutionalisms present in constitutional law to show that ‘the substance of what can be plausibly defended as “constitutional identity” is not boundless’ (p. 135). He then demonstrates how the constitutional identity argument has been used in the battle against the paradigm of


\(^{14}\) A very telling example of this trend is decision 22/2016 of the Hungarian Constitutional Court, available at: <https://hunconcourt.hu/datasheet/?id=1361AFA3CEA26B84C1257F10005DD958> (accessed 2 June 2023).

liberal constitutionalism. This leads the author to focus on the relationship between constitutional identity and illiberal democracy.

Two case studies are proposed to explore this aspect further: the issue of Hungary’s non-compliance with EU law with reference to the refugee and asylum seeker crisis and the illiberal reforms relating to the judiciary in Poland.

In both cases it is evident how the use of the argument of constitutional identity is linked to the rejection of constitutionalism (and of its pillars, namely pluralism and human dignity above all) and of the rule of law. The conclusion is that illiberal democracy:

inverts the relationship between constitutionalism and constitutional identity, rendering the former a corollary of the latter, rather than seeing the normative matrix of constitutionalism as the space within which constitutional identity develops. Claiming that what ‘constitutionalism’ entails is exclusively a matter of particularity and identity renders ‘constitutional identity’ self-legitimating – it is legitimate simply because it is there. This goes against the core of constitutionalism (pp. 166–167).

Chapter 6 deals with the relational abuse of constitutional identity and focuses, in particular, on how constitutional identity claims ‘are advanced and how they stand in relation to other legal orders’ (p. 169). In this chapter, the author analyses various judicial cases and places them in the context of the interesting distinction between ‘constitutional ironism’ and ‘constitutional solipsism’.

Obviously, some of the cases presented also lend themselves to different readings. Consider, for instance, the PSPP decision of the German Constitutional Court treated as one of the ‘intimations of relational abuse’ (p. 187) – which other authors have tried to read as examples of ‘constructive misunderstanding’, which has produced a development in European constitutional law.

Scholtes claims that ‘a sense of “constitutional ironism” – enabling constitutional actors to treat their own institutional setting with a sense of pragmatic detachment and prioritize the need to engage with other constitutional sites – can help translate claims to “sovereignty” or “ultimate authority” carried by constitutional identity into more pragmatic claims’ (p. 173). Constitutional ironism, with its emphasis on pluralism and openness, should guide courts and is in line with constitutional democracy. However, make no mistake, it cannot exclude forms of disagreement, but it helps to avoid the actors falling into constitutional solipsism. Constitutional solipsism represents ‘a retreat into a monadic view of one’s own constitution as the only meaningful normative order. Constitutional identity becomes a reason for retreat, not engagement’ (p. 199). The Hungarian and Polish Constitutional Courts are champions of this solipsistic approach.

Finally, Chapter 7 wraps up and offers an overview of the findings of the research. By combining comparative law and constitutional theory, Scholtes convincingly demonstrates that constitutional identity is not a concept to be abandoned or left in the hands of the champions of illiberalism. He offers interesting arguments that allow the concept to be rehabilitated and to guide the actors in the European context

to engage responsibly with supranational interlocutors. At the same time, as the author correctly points out, courts can play a partial role in the fight against constitutional identity abuses, since: ‘Rather than casting abusive constitutional identity claims in the light of legality or illegality, we should dare to bring them back into the realm of politics that they seek to avoid’ (p. 209).

I think this book is very important in reviving an important legal and theoretical concept. It does so by developing a clear and well-constructed research itinerary. The research questions presented at the beginning of the work are consistently developed and answered. As discussed, some of the cases analysed by the author in the book also lend themselves to different readings, but this is a very minor point that does not detract from the book’s overall value.

As an avid reader of the literature on European and comparative constitutional law, I can only recommend this book. It absolutely should not be missing from your library, both for its scholarly importance and for the crucial civic function it fulfils. Key concepts of constitutional theory must be defended with ideas, rather than handed over to the advocates of illiberal constitutional counter-narratives. Indeed, this book defends concepts while still analysing them critically, which is what scholars are supposed to do. This approach is sorely needed within such a polarized political and academic debate.